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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

MAR 21 2000

HENRY L. RUDOLPH, Petitioner-Appellant, v. HANK GALETKA, Respondent-Appellee.	
---	--

PATRICK FISHER
Clerk

No. 99-4207

(D.C. No. 99-CV-371)

(Utah)

ORDER AND JUDGMENT^(*)

Before SEYMOUR, Chief Judge, EBEL and BRISCOE, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The cause is therefore ordered submitted without oral argument.

Petitioner Henry Rudolph appeals the dismissal of his petition for habeas corpus under 28 U.S.C. § 2254, and requests a certificate of appealability from this court. We grant the certificate and reverse and remand.

Mr. Rudolph was convicted of aggravated burglary and violation of a protective order in Utah district court. After his convictions were affirmed by the Utah Supreme Court on direct appeal, see State v. Rudolph, 970 P.2d 1221 (Utah 1998), he filed the present habeas petition alleging twelve constitutional violations. The magistrate judge concluded that five of these claims had not been presented to the state court and that under Rose v. Lundy, 455 U.S. 509, 510 (1982), the mixed petition "must be dismissed without prejudice." App., vol. I, Report and Recommendation at 2. The district court adopted the recommendation, reiterating that the petition "must" be dismissed. *Id.*, Order filed Aug. 10, 1999, at 1. The district court dismissed Mr. Rudolph's petition without prejudice, instructing him that he could refile his federal petition including only his exhausted claims, or he could seek review of the unexhausted claims in state court under Utah R. Civ. P. 65B(b). Mr. Rudolph appeals this decision, arguing that the unexhausted claims should be addressed on the merits because he only failed to bring those claims on direct appeal due to the ineffective assistance of his appellate counsel.

Both the district court and the magistrate judge relied on Rose for the proposition that petitions including exhausted and unexhausted claims for relief must be dismissed without prejudice. See Rose, 455 U.S. at 520 (holding district court should dismiss mixed habeas petitions which raise claims unexhausted in

P&B
correct

state court). *Rose* was superseded by statute, however, upon the passage of the Anti-Effective Death Penalty and Anti-terrorism Act (AEDPA), codified in relevant part at 28 U.S.C. § 2254(b)(2). Section 2254(b)(2) states that "[a]n application for a writ of habeas corpus may be denied on the merits notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." This section allows federal district courts entertaining habeas petitions which contain unexhausted claims to address those claims if they can be decided on their merits against the petitioner.⁽¹⁾ ⁽²⁾ ^{not}

This court has held that section 2254(b)(2) is a codification of the holding in *Granberry v. Greer*, 481 U.S. 129 (1987), under which a federal court that is "convinced that the petition has no merit" may deny the petition on the merits rather than apply the exhaustion rule. *Hoxsie v. Kerby*, 108 F.3d 1239, 1242-43 (10th Cir. 1997) (quoting *Granberry*, 481 U.S. at 134). Similarly, the Supreme Court has indicated that when an unexhausted claim is "easily resolvable against the habeas petitioner," the district court may apply section 2254(b)(2) and deny the claim on the merits. *See Lambrix v. Singletary*, 520 U.S. 518, 525 (1997). Thus, under section 2254(b)(2), where the district court is convinced the unexhausted claim is without merit, or that the issue is easily resolvable against the defendant, the court may reach the merits of the claim rather than dismiss the petition.

Neither the magistrate judge nor the district court indicated an awareness of the district court's discretion under section 2254(b)(2) to determine whether the unexhausted claims are easily resolvable against Mr. Rudolph and, if so, to address the exhausted claims without the necessity of dismissing the petition under *Rose v. Lundy*.

Accordingly, we GRANT Mr. Rudolph's certificate of appealability, REVERSE the order of the district court, and REMAND for further consideration.

ENTERED FOR THE COURT

Stephanie K. Seymour

Chief Judge

FOOTNOTES

Click footnote number to return to corresponding location in the text.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, or collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

1. *No valid assessment of the record. We did not even review clearly erroneous fact w/erroneous view of law.* *A. Kelley 3/29/95*

Mr. Rudolph filed this § 2254 petition in the United States District Court in Utah on May 27, 1999, after the April 24, 1996 effective date of AEDPA. Thus, we apply the provisions of § 2254 as amended by AEDPA.

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URL: <http://lawdns.wuacc.edu/ca10/cases/2000/03/99-4207.htm>.*

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

R I L E D
United States Court of Appeals
Tenth Circuit

OCT 30 2000

HENRY L. RUDOLPH,

Petitioner - Appellant,

vs.

HANK GALETKA,

Respondent - Appellee.

PATRICK FISHER
Clerk
No. 00-4099

(
D.C. No. 99-CV-371)

(D. Utah) *My 1999?*

ORDER AND JUDGMENT^(*)

Before **BRORBY, KELLY, and MURPHY**, Circuit Judges.^(**)

Mr. Rudolph, an inmate appearing pro se, seeks to appeal the district court's remand order, again dismissing his habeas petition without prejudice for failure to exhaust all of his federal claims in state court. We had remanded the case to the district court for consideration of 28 U.S.C. 2254(b)(2), which allows a federal district court to deny, but not grant, unexhausted habeas claims, as an alternative to the dismissal of a mixed petition. See Rudolph v. Galetka, No. 99-4207, 2000 WL 293706, at *2 (10th Cir. Mar. 21, 2000). On remand, the district court concluded that petitioner raised colorable federal claims that were unexhausted and were not easily resolvable, at least not without a review of trial and appellate court records. See I.R. doc. 27 at 2; doc. 25 at 6.

On appeal, Mr. Rudolph urges the merits of his claims and argues that exhaustion would be futile and that obvious structural errors suggest dispensing with the exhaustion requirement. Mr. Rudolph's conclusory and somewhat inflammatory statements do not demonstrate that exhaustion should be excused. See Duckworth v. Serrano, 454 U.S. 1, 4 (1981). We cannot say the district court abused its discretion in requiring exhaustion, having found colorable federal claims. See Lambert v. Blackwell, 134 F.3d 506, 515 (3rd Cir. 1997).

In view of the remand inviting the district court to consider 28 U.S.C. § 2254(b)(2) and the same disposition on remand, we GRANT a certificate of appealability, see Slack v. McDaniel, 120 S. Ct. 1595, 1604 (2000); Paredes v. Atherton, No. 00-1016, 2000 WL 1289022 (10th Cir. Aug. 28, 2000), and AFFIRM the district court's dismissal without prejudice. All other pending

motions are denied.

Entered for the Court

[| Keyword | Case | Docket | Date: Filed / Added |](#) [PDF \(11797 bytes\)](#) [RTF \(8055 bytes\)](#)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

F I L E D
United States Court of Appeals
Tenth Circuit

OCT 30 2000

HENRY L. RUDOLPH,

Petitioner - Appellant,

vs.

HANK GALETKA,

Respondent - Appellee.

PATRICK FISHER
Clerk

No. 00-4099

(
D.C. No. 99-CV-371)

(D. Utah)

ORDER AND JUDGMENT^(*)

Before BRORBY, KELLY, and MURPHY, Circuit Judges.^(**)

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On appeal, Mr. Rudolph urges the merits of his claims and argues that exhaustion would be futile and that obvious structural errors suggest dispensing with the exhaustion requirement. Mr. Rudolph's conclusory and somewhat inflammatory statements do not demonstrate that exhaustion should be excused. See Duckworth v. Serrano, 454 U.S. 1, 4 (1981). We cannot say the district court abused its discretion in requiring exhaustion, having found colorable federal claims. See Lambert v. Blackwell, 134 F.3d 506, 515 (3rd Cir. 1997).

In view of the remand inviting the district court to consider 28 U.S.C. § 2254(b)(2) and the same disposition on remand, we GRANT a certificate of appealability, see Slack v. McDaniel, 120 S. Ct. 1595, 1604 (2000); Paredes v. Atherton, No. 00-1016, 2000 WL 1289022 (10th Cir. Aug. 28, 2000), and AFFIRM the district court's dismissal without prejudice. All other pending

motions are denied.

Entered for the Court

Paul J. Kelly, Jr.

Circuit Judge

FOOTNOTES

Click footnote number to return to corresponding location in the text.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

** After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1 (G). The cause is therefore ordered submitted without oral argument.

 | [Keyword](#) | [Case](#) | [Docket](#) | Date: [Filed](#) / [Added](#) |  [Word](#) (11797 bytes)  [RTF](#) (8055 bytes)

Comments to: WebMaster.ca10@law.wuacc.edu.

Updated: October 31, 2000.

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URL: <http://lawdns.wuacc.edu/ca10/cases/2000/10/00-4099.htm>.

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STATEMENT OF CASE

Fraud, Public Corruption, RICO §§ 1875-§1951-§1962

Obvious Structural errors

Pattern of obfuscation that's eroding federal policy.

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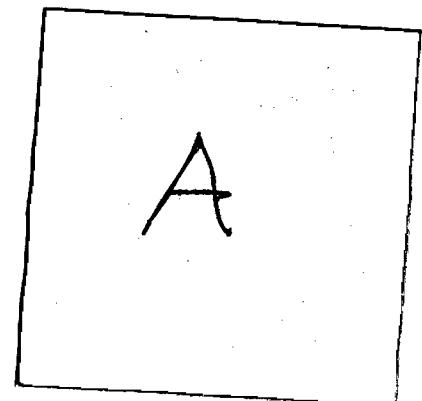
7

Gonzales v. Crosby, 366 F.3d 1253

7

Recd 9/23/95
SUPREME COURT OF UTAH
332 STATE CAPITOL
SALT LAKE CITY, UTAH 84114
OFFICE OF THE COURT

September 22, 1995



Joan C. Watt
Robert K. Heineman
SALT LAKE LEGAL DEFENDER ASSOCIATION
Attorneys at Law
424 East 500 South, Suite 300
Salt Lake City, UT 84111

The State of Utah,
Plaintiff and Appellee,
v.
Henry Lee Rudolph,
Defendant and Appellant.

No. 950057
941901206

Re: Order of Remand

Enclosed is a copy of the order issued by the court
for the above referenced case.

Susan E. Richards
Lead Deputy Clerk

Enc.

THE SUPREME COURT OF THE STATE OF UTAH

----oo0oo----

The State of Utah,
Plaintiff and Appellee,
v.
Henry Lee Rudolph,
Defendant and Appellant.

No. 950057
941901206

----oo0oo----

ORDER

Because significant portions of the transcript are missing due to technical problems experienced by the court reporters' machinery, the Court, on motion of the defendant, vacates the conviction and remands the matter for retrial.

9/21/95
Date


Michael D. Zimmerman
Chief Justice
For the Court

WAYNE A. FREESTONE
DAVID J. ANGERHOFER
CONTRACT ATTORNEYS
50 West 300 South, Suite 900
Salt Lake City, Utah 84101
(801) 322-1503
(801) 363-0844

M E M O R A N D U M

TO: HENRY RUDOLPH USP #23634

DATE: May 5, 1995

RE: REQUESTED LEGAL SERVICES

Please be advised that your Civil Rights Complaint and accompanying documents for RUDOLPH vs. HUGGARD, et. al. These have been mailed to the court.

Please be advised that your 2254 Petition For Writ of Habeas Corpus was also mailed to the Federal District Court.

Thank You.

CONTRACT ATTORNEYS



11/02/1998

Utah Supreme Court

Docket Event Listing

State v. Rudolph

Docket No: 960482 Docket Date: 11/13/1996

App. Type: Criminal Appeal

Agency: 3rd District Court, Salt Lake

Case: 941901206

Status: Dismissal Pending

Staff:

BUSINESS State of Utah - Appellee

JAN GRAHAM (OFFICE OF ATTORNEY GENERAL)

LAURA DUPAIX (ASSISTANT ATTORNEY GENERAL)

Henry Lee Rudolph - Appellant

KAREN STAM (SALT LAKE LEGAL DEFENDER ASSOCIATION)

JOAN C. WATT (SALT LAKE LEGAL DEFENDER ASSOCIATION)

KRISTINE M. ROGERS (SALT LAKE LEGAL DEFENDER ASSOCIATION)

SHARON L. PRESTON (ATTORNEY AT LAW)

01 11/08/1996 Designation of Record

02 11/08/1996 Transcript Request Received

Hearings: 10-6-95:10-20-95:11-17-95:1-5-96: 2-20-96:4-2-96:
4-19-96:5-24-96:9-27-96. Brad Young is the reporter.

03 11/08/1996 Notice of Appeal Filed

04 11/08/1996 Appearance of Counsel

Joan C. Watt, Karen Stam and Kristine M. Rogers appear
as co-counsel for appellant.

05 11/08/1996 Courtesy Copy

Affidavit of Impecuniosity Filed.

06 11/14/1996 Docketing Statement Filed

07 11/14/1996 Extension of Time for TranscriGranted 11/12/1996 DMJ
Granted 30 days to January 4, 1997 to Brad Young to file the
transcripts.

08 01/13/1997 Notice of Transcript Filed in

Brad Young indicates that the transcripts were placed on
file with the district court Jan. 6, 1997.

09 01/16/1997 Misc. Letter

From Legal Defenders to Bunny Neuenschwander requesting she
find out who reported the October 6, 1995 hearing.

10 01/28/1997 Miscellaneous Memorandum

Ex parte pro se submission of fraudulent documents

11 02/26/1997 Called for Record
Sent letter.

12 03/14/1997 Notice of Transcript Filed in

Eileen Ambrose indicates that the transcripts were placed on file with the district court March 12, 1997.

13 04/07/1997 Motion-Supplement Record Granted 04/08/1997 RCH

1 vol. transcript. This is a composite volume which replaces transcripts which were lost from the record.

14 04/08/1997 ~~Motion-Supplement Record Grant~~ RCH
It is ordered that the enclosed volume containing transcripts of hearings from Sept. 9, 1994 through Jan 13, 1995 be included in the record of this case.

15 04/08/1997 Record Sent to T.Ct. (per requ
1 vol. replacement transcript sent to DC for pagination

16 04/09/1997 Transcript Request Received
Hearing held February 9, 1996.
Request was directed to Bunny Neuenschwander.

17 04/10/1997 Misc. Letter
letter from Mr. Rudolph.

18 04/21/1997 Notice of Transcript Filed in
Indicated by the filing of the transcripts with the record.

19 04/21/1997 Record Filed
3 vols. pleadings: 16 vols. (12 transcripts bound together).

20 04/22/1997 Set Briefing Schedule
Appellant's brief is due June 2, 1997.

21 04/24/1997 Clerk's Note
*Record Checked out by LDA, Joan Watt.

22 05/12/1997 Misc. Letter
From court reporter indication that the hearing held on February 6, 1996 was continued and there's no transcript.

23 05/22/1997 Extension of Time for Appellant Stipulation
Stipulation that appellant's brief is due July 2, 1997.

24 06/20/1997 Supplement to Brief
Copies sent by Joan Watt of an argument prepared by Henry Rudolph to supplement the opening brief.

25 06/20/1997 Appellant's Brief Filed

26 06/20/1997 Clerk's Note
*Record returned by LDA this date.

27 06/26/1997 Misc. Letter
Letter from Laura Dupaix stateing that Attorney Generals Office needs Record.

28 06/30/1997 Appearance of Counsel
Laura Dupaix appears as counsel for State of Utah.

29 07/03/1997 Extension of Time for Appellee Stipulation

Stipulation that appellee may have up to and including August 19, 1997 to file their brief.

30 08/14/1997 Extension of Time for Appellee Granted 08/18/1997 PHB
Granted that appellee may have up to and including September 18, 1997 to file their brief. (30 days)

31 09/10/1997 Extension of Time for Appellee Granted 10/03/1997 LHR
Granted 15 days to October 3, 1997 to file brief.

32 09/10/1997 Attorney Called
Laura Dupaix phoned asking where the State's exhibits are, they are not with the record.

33 09/12/1997 Supplemental Record Filed
2 envelopes of exhibits.

34 09/29/1997 Misc. Letter
Letter from AG, Laura Dupaix, to check out record.

35 10/01/1997 Motion-Accept Overlength Brief Denied 10/01/1997
Appellee request permission to file a brief of no more than 60 pages.

36 10/01/1997 Motion-Accept Ovrlngth Brief D MDZ

37 10/03/1997 Appellee's Brief Filed

38 10/22/1997 Calendared
Set for 12/01/1997 at 13:30

39 10/24/1997 Extension of Time for Reply Br
Stipulation that appellant may have up to and including November 17, 1997 to file reply brief (15 days)

40 10/24/1997 Miscellaneous
Joan Watt authorizes representative to check out record on her behalf.

41 11/14/1997 Appellant's Reply Brief Filed
Pro se brief

42 12/01/1997 Submitted on Oral Argument

43 02/24/1998 Misc. Letter
From Mr. Rudolph requesting docket print outs for 970110 and 960482. Sent print outs this day.

44 07/31/1998 Opinion Filed
Howe, C.J. - Affirmed

45 08/10/1998 Extension of Time for Rehearin
Motion Stipulation and Order for Extension of time to file Petition for Rehearing

46 08/11/1998 Extension Granted PHB

It is hereby ordered that an extension of time be given to Petitioner for preparation of a petition for rehearing up to and including September 3, 1998.

47 09/03/1998 Appearance of Counsel
Appearance of Co-counsel of Sharon L. Preston, co-counsel with Joan C. Watt.

48 09/03/1998 Brief Lodged
Petition for Rehearing filed by LDA needs attorney signature on certificate of service

49 09/03/1998 Petition for Rehearing Denied 10/29/1998(RCH)
Filed by Henry Lee Rudolph, pro se.
9-4-98 Petition filed by Joan Watt and Sharon Preston on behalf of appellant.

50 10/29/1998 Petition for Rehearing Denied RCH

51 12/31/2099 Post Rehear Pet. - Remittitur Due 11/03/1998

=====

Prepared By

Phone

Date

E. NEAL GUNNARSON
District Attorney for Salt Lake County
KATHERINE BERNARDS-GOODMAN, 5446
Deputy District Attorney
231 East 400 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 363-7900

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH,)
Plaintiff,) RESPONSE TO MOTION TO DISMISS
-vs-) COUNT I
HENRY LEE RUDOLPH,) Case No. 941901206FS
Defendant.) Hon. PAT B. BRIAN

The State, by and through its attorney, Katherine Bernards-Goodman, Deputy District Attorney, hereby responds to Defendant's Motion to Dismiss Count I Aggravated Burglary.

In the information dated August 4, 1994 the defendant was charged with an aggravated burglary, under Utah Code Annotated Title 76, Chapter 6, Section 203. The intent alleged was intent to commit a sexual assault. The Defendant was charged with Aggravated Sexual Assault and Violation of a Protective Order as well. Mr. Rudolph was found not guilty on December 1, 1994 of the aggravated sexual assault and it has been conceded that this charge cannot be relitigated.

However, the Defendant was found guilty of Aggravated Burglary and Violation of a Protective Order. While the jury found that the defendant did not commit an aggravated sexual assault, this does not preclude them, nor is it inconsistent for them, to find the defendant had the

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



JAN GRAHAM
ATTORNEY GENERAL

CAROL CLAWSON
Solicitor General

REED RICHARDS
Chief Deputy Attorney General

PALMER DEPAULIS
Chief of Staff

July 3, 1996

Mr. Henry L. Rudolph
450 South 3rd East
Salt Lake City, UT 84111

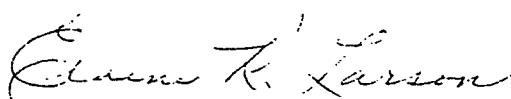
Dear Mr. Rudolph:

Your letter of June 6, 1996, regarding alleged corruption by a Judge, prosecutor and several police officers was reviewed by the Criminal Enforcement screening committee.

The Salt Lake District Attorney has jurisdiction over the criminal prosecution of matters which occur in Salt Lake County. The Attorney General's office investigates and prosecutes cases which are multi-county or if requested to do so by the county or district attorney who has jurisdiction. The elected District Attorney has broad prosecutorial discretion in determining whether or not to prosecute, or in your case refile charges, in any criminal case. Only in very rare circumstances will we intervene or overrule a decision made by a county or district attorney. Nevertheless, in a case such as yours, which has already been prosecuted and there is now pending prosecution, it would be a conflict for the Attorney General's office to have any involvement since this office represents the State in any appeal you might file.

Since you have not been successful in defending yourself against all the original charges, you should contact a private attorney or, if you can't afford an attorney, you should consider asking for a legal defender to handle your defense. A defense attorney would also know how to handle the alleged perjury by a witness for the prosecution.

Very truly yours.


Elaine R. Larson
Investigations Division

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



FILED

MAR 2 1997

CLERK SUPREME COURT
UTAH

JAN GRAHAM
ATTORNEY GENERAL

CAROL CLAWSON
Solicitor General

REED RICHARDS
Chief Deputy Attorney General

PALMER DEPAULIS
Chief of Staff

March 26, 1997

FILED

MAR 28 1997

CLERK SUPREME COURT
UTAH

Re: Henry Rudolph v. Captain Cunningham et al., 970110

Dear Mr. Butler:

The Office of the Attorney General recently learned of the pendency of the above-captioned appeal, which is from a district court order dismissing as frivolous on its face a Rule 65B petition for extraordinary relief. The State respondents were not served or ordered to respond by the trial court and, consequently, did not appear there and submit to that court's jurisdiction.

Respondents are not waiving service of the original petition and will not appear as parties on appeal. Accordingly, we will not be filing any brief or memorandum in this case.

Very truly yours,

Annina M. Mitchell

ANNINA M. MITCHELL
Deputy Solicitor General

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



JAN GRAHAM
ATTORNEY GENERAL

JAMES R SOPER
Solicitor General

REED RICHARDS
Chief Deputy Attorney General

9 November 1999

Patrick Fisher
Clerk
UNITED STATES COURT OF APPEALS, TENTH CIRCUIT
1823 Stout Street
Denver, Colorado 80257

Re: *Rudolph v. Galetka*, Case No. 99-CV-371

Dear Mr. Fisher:

This office recently received your letter, signed by Deputy Clerk L. Balzano, dated 18 November 1999. The letter states that the Court has construed documents filed by Mr. Rudolph as an opening brief and invites "appellee" to file a responsive brief within 30 days.

The State of Utah is not a party to this action. Although a State agent was named in the petition below, the district court has not served upon the Attorney General a copy of the petition and an order requiring the State to file a response as specified in rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. Nor does the State by this letter enter a general appearance in this case or waive formal service.

Accordingly, the Utah Attorney General does not intend to file a brief in this appeal.

Very truly yours,

J. FREDERIC VOROS, JR.
Chief, Criminal Appeals Division

jm

copy: Henry L. Rudolph

JOAN C. WATT, #3967
Attorney for Defendant/Appellant
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: 532-5444

IN THE SUPREME COURT OF THE STATE OF UTAH

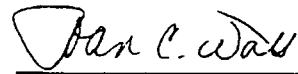
THE STATE OF UTAH,	:	MOTION, STIPULATION AND ORDER TO SUPPLEMENT THE RECORD
Plaintiff/Appellee,	:	
v.	:	
HENRY LEE RUDOLPH,	:	Case No. 960482
Defendant/Appellant.	:	Priority No. 2

COMES NOW Defendant/Appellant, HENRY LEE RUDOLPH, by and through counsel of record, JOAN C. WATT, and moves this Court pursuant to Rule 11(h), Utah Rules of Appellate Procedure to correct the record in this case by supplementing the record with the enclosed volume containing the transcripts of the following dates: September 9, 1994; September 19, 1994; October 14, 1994; October 19, 1994; October 28, 1994; November 18, 1994; November 22, 1994; November 28, 1994; November 29, 1994; November 30, 1994; December 1, 1994; and January 13, 1995.

This volume of transcripts contains the transcripts which were prepared following the first trial and were contained in the official record following that trial. The conviction obtained in the first trial was summarily reversed by this Court because the entire transcript of the trial was not prepared. The transcripts in this volume, however, were prepared and were part of the

official record. The District Court has since misplaced the transcripts and has requested that Appellant correct the record by including this copy of the official transcripts.

DATED this 7th day of April, 1997.



JOAN C. WATT

Attorney for Defendant/Appellant

STIPULATION

I, BARNARD N. MADSEN, have read the foregoing motion and stipulate to the supplementation of the record described therein.

DATED this _____ of April, 1997.

BARNARD N. MADSEN
Assistant Attorney General

ORDER

Based upon motion and stipulation of counsel,

IT IS HEREBY ORDERED that the enclosed volume containing transcripts of hearings from September 9, 1994 through January 13, 1995 be included in the record of this case.

DATED this _____ day of April, 1997.

BY THE COURT:

SUPREME COURT JUSTICE

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be delivered a copy of the foregoing to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Sixth Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 7th day of April, 1997.

Joan C. Watt

JOAN C. WATT

DELIVERED this _____ day of April, 1997.

UNITED STATES COURT OF APPEAL
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

October 16, 2018

Elisabeth A. Shumaker
Clerk of Court

HENRY LEE RUDOLPH,

Plaintiff - Appellant,

v.

No. 17-4168

TIMOTHY HANSON, et al.,

Defendants - Appellees.

ORDER

Before BRISCOE, HARTZ, and BACHARACH, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

September 12, 2018

Elisabeth A. Shumaker
Clerk of Court

HENRY LEE RUDOLPH,

Plaintiff - Appellant,

v.

TIMOTHY HANSON; KAREN STAM;
CHARLES BEHRENS; BARBARA
BYRNE; KATHERINE BERNARDS
GOODMAN; ERIN RILEY; MICHAEL
SIBBETT; KEITH HAMILTON; JESSE
GALLEGOS; CURTIS GARNER; ALEX
HUGGARD,

Defendants - Appellees.

No. 17-4168
(D.C. No. 2:14-CV-00883-CW)
(D. Utah)

ORDER AND JUDGMENT*

Before BRISCOE, HARTZ, and BACHARACH, Circuit Judges.

Plaintiff Henry Rudolph appeals from the dismissal by the United States District Court for the District of Utah of his suit under 42 U.S.C. § 1983 alleging

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G).* The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

violations of his rights under the First, Fifth, Sixth, Eighth, Thirteenth, and Fourteenth Amendments. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

Plaintiff's claims arise out of his prosecution and conviction for aggravated burglary and violation of a protective order. His first trial was in August 1994, and he was eventually convicted in 1996. He unsuccessfully pursued postconviction relief in state and federal court, with his last claim dismissed by this court in 2009. He was paroled by the Utah Board of Pardons and Parole in 2014. This suit was filed on December 2, 2014.

The district court dismissed defendant Timothy Hanson on the ground that judges are entitled to absolute judicial immunity. *See Stein v. Disciplinary Bd. of Supreme Court of NM*, 520 F.3d 1183, 1195 (10th Cir. 2008). It dismissed defendant Karen Stam on the ground that public defenders do not act under color of state law when representing clients. *See Polk County v. Dodson*, 454 U.S. 312, 325 (1981). It dismissed defendants Charles Behrens, Barbara Byrne, and Catherine Bernards Goodman on the ground that prosecutors enjoy absolute prosecutorial immunity. *See Imbler v. Pachtman*, 424 U.S. 409, 424 (1976). It dismissed the claims against witness Alex Huggard based on his testimony at Plaintiff's trials on the ground that  the claims were barred by Utah's four-year residual statute of limitations. *See Fratus v. Deland*, 49 F.3d 673, 675 (10th Cir. 1995). It dismissed the claims against Michael Sibbett, Keith Hamilton, Jesse Gallegos, and Curtis Garner, because they were entitled to absolute immunity for their actions as members of the Utah Board of 

Pardons and Parole. *See Knoll v. Webster*, 838 F.2d 450, 451 (10th Cir. 1988). And it dismissed defendant Erin Riley, who acted as the state's attorney in Plaintiff's postconviction actions, on the ground that she enjoyed absolute immunity for her actions. *See Robinson v. Volkswagenwerk AG*, 940 F.2d 1369, 1373 (10th Cir. 1991) (noting absolute immunity has been extended to government lawyers acting as advocates in civil proceedings); *Ellibee v. Fox*, 244 Fed. Appx. 839, 844 (10th Cir. 2007) (rejecting claim that government attorney "is not entitled to absolute prosecutorial immunity when he is acting as defense counsel for the state in a civil habeas action"). Although defendants Hanson, Byrne, Sibbett, and Hamilton had not yet been served, the district court exercised "its screening authority to dismiss these defendants." R., Vol. I at 438.

The district court's decision is soundly based on legal precedent and principles, and Plaintiff's brief on appeal offers no authority or argument that calls the decision into question. Therefore, we **AFFIRM** the judgment below.

Entered for the Court

Harris L Hartz
Circuit Judge

**Additional material
from this filing is
available in the
Clerk's Office.**