

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 09-cv-00758-BNB

CLAIR LLOYD BEAZER,

Applicant,

v.

WARDEN SUSAN JONES, Colorado State Penitentiary, and
JOHN SUTHERS, Attorney General of the State of Colorado,

Respondents.

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

JUL 02 2009

GREGORY C. LANGHAM
CLERK

ORDER TO DISMISS IN PART AND TO DRAW CASE
TO A DISTRICT JUDGE AND TO A MAGISTRATE JUDGE

Applicant Clair Lloyd Beazer is a prisoner in the custody of the Colorado Department of Corrections at the Colorado State Penitentiary in Cañon City, Colorado. Mr. Beazer initiated this action by filing *pro se* an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Mr. Beazer is challenging the validity of his conviction in Park County District Court case number 03CR25.

In an order filed on April 8, 2009, Magistrate Judge Boyd N. Boland directed Respondents to file a Pre-Answer Response limited to addressing the affirmative defenses of timeliness under 28 U.S.C. § 2244(d) and exhaustion of state court remedies under 28 U.S.C. § 2254(b)(1)(A) if Respondents intend to raise either or both of those affirmative defenses in this action. On May 11, 2009, Respondents filed their Pre-Answer Response. Mr. Beazer was provided an opportunity to file a reply to the Pre-Answer Response but he has not done so.

The Court must construe the application liberally because Mr. Beazer is not represented by an attorney. **See *Haines v. Kerner***, 404 U.S. 519, 520-21 (1972); ***Hall v. Bellmon***, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not be an advocate for a *pro se* litigant. **See *Hall***, 935 F.2d at 1110. For the reasons stated below, the Court will dismiss the application in part.

Mr. Beazer was convicted of second degree assault following a jury trial and he was sentenced to ten years in prison. The judgment of conviction was affirmed on direct appeal. **See *People v. Beazer***, No. 04CA2117 (Colo. Ct. App. Feb. 15, 2007). On October 29, 2007, the Colorado Supreme Court denied Mr. Beazer's petition for writ of certiorari on direct appeal. On February 22, 2008, Mr. Beazer filed in the trial court a postconviction motion for sentence reconsideration. On May 5, 2008, the trial court granted the motion and reduced Mr. Beazer's sentence to nine years in prison.

Mr. Beazer filed the instant action on April 3, 2009, asserting four claims for relief. Those four claims are the following:

- (1) The trial court violated his right to due process by failing to impose an effective sanction for the prosecution's violation of the rules of discovery and its failure to provide potentially exculpatory evidence.
- (2) The prosecution's loss of potentially exculpatory evidence violated his right to due process.
- (3) The trial court violated his right to due process by refusing to instruct the jury on provocation.
- (4) The trial court erred in admitting improper expert opinion testimony.

Respondents do not argue that this action is barred by the one-year limitation period in 28 U.S.C. § 2244(d). Respondents also concede that Mr. Beazer's first and

second claims for relief are exhausted. However, Respondents contend that Mr. Beazer's third and fourth claims for relief should be dismissed because those claims are unexhausted and procedurally barred.

Pursuant to 28 U.S.C. § 2254(b)(1), an application for a writ of habeas corpus may not be granted unless it appears that the applicant has exhausted state remedies or that no adequate state remedies are available or effective to protect the applicant's rights. **See *O'Sullivan v. Boerckel***, 526 U.S. 838 (1999); ***Dever v. Kansas State Penitentiary***, 36 F.3d 1531, 1534 (10th Cir. 1994). The exhaustion requirement is satisfied once the federal claim has been presented fairly to the state courts. **See *Castille v. Peoples***, 489 U.S. 346, 351 (1989). Fair presentation requires that the federal issue be presented properly "to the highest state court, either by direct review of the conviction or in a postconviction attack." ***Dever***, 36 F.3d at 1534.

Furthermore, "the substance of a federal habeas corpus claim" must have been presented to the state courts in order to satisfy the fair presentation requirement. ***Picard v. Connor***, 404 U.S. 270, 278 (1971); **see also *Nichols v. Sullivan***, 867 F.2d 1250, 1252 (10th Cir. 1989). Fair presentation does not require a habeas corpus petitioner to cite "book and verse on the federal constitution." ***Picard***, 404 U.S. at 278 (internal quotation marks omitted). However, "[i]t is not enough that all the facts necessary to support the federal claim were before the state courts." ***Anderson v. Harless***, 459 U.S. 4, 6 (1982) (per curiam). A claim must be presented as a federal constitutional claim in the state court proceedings in order to be exhausted. **See *Duncan v. Henry***, 513 U.S. 364, 365-66 (1995) (per curiam).

Finally, “[t]he exhaustion requirement is not one to be overlooked lightly.” ***Hernandez v. Starbuck***, 69 F.3d 1089, 1092 (10th Cir. 1995). A state prisoner bringing a federal habeas corpus action bears the burden of showing that he has exhausted all available state remedies before seeking federal relief. ***See Miranda v. Cooper***, 967 F.2d 392, 398 (10th Cir. 1992).

As noted above, Respondents assert only that Mr. Beazer failed to exhaust state remedies for claims three and four. Respondents specifically argue that Mr. Beazer failed to exhaust state remedies for claims three and four because neither claim was raised on direct appeal as a federal constitutional claim. Although Respondents concede that Mr. Beazer asserted claim three on direct appeal as a violation of due process, Respondents contend that Mr. Beazer’s references to a denial of due process were insufficient to apprise the state courts that he was raising a federal constitutional claim because he relied on state law decisions in support of his claim. With respect to Mr. Beazer’s claim four, Respondents assert that the claim is not presented to this Court as a federal constitutional claim and, in any event, Mr. Beazer did not present it to the state courts on direct appeal as a federal constitutional claim. Construing the application liberally, the Court will assume that Mr. Beazer is raising claim four as a federal constitutional claim in this action.

The Court has reviewed Mr. Beazer’s opening brief on direct appeal and finds that Mr. Beazer failed to raise either claim three or claim four as a federal constitutional claim. Mr. Beazer did not make any argument in his opening brief on direct appeal that could be construed as a federal constitutional argument with respect to claim four. With

respect to claim three, the Court finds that Mr. Beazer's references to due process in his opening brief on direct appeal did not satisfy the fair presentation requirement for the simple reason that he did not explicitly connect those references to a claim under federal law. He did not cite the federal Constitution, he did not cite any federal case law, and he did not label the claim a "federal" claim. **See *Baldwin v. Reese***, 541 U.S. 27, 32-33 (2004). The fact that Mr. Beazer specifically referred to the Due Process Clause of the Fourteenth Amendment and federal case law in connection with another claim in the same opening brief also undercuts any argument that a brief reference to due process satisfies the fair presentation requirement. **See *id.*** at 33. Therefore, the Court finds that Mr. Beazer failed to exhaust state remedies for either claim three or claim four.

Although Mr. Beazer failed to exhaust claims three and four, the Court may not dismiss those claims for failure to exhaust if Mr. Beazer no longer has an adequate and effective state remedy available to him. **See *Castille***, 489 U.S. at 351. The Colorado Rules of Criminal Procedure prohibit successive postconviction Rule 35 motions with limited exceptions that are not applicable to the claims Mr. Beazer failed to exhaust. **See Colo. R. Crim. P. 35(c)(3)(VII)**; **see also *People v. Bastardo***, 646 P.2d 382, 383 (Colo. 1982) (stating that postconviction review is not available to address under a recently contrived constitutional theory issues that were raised previously). Therefore, the Court finds that claims three and four are procedurally defaulted.

As a general rule, federal courts "do not review issues that have been defaulted in state court on an independent and adequate state procedural ground, unless the

default is excused through a showing of cause and actual prejudice or a fundamental miscarriage of justice.” **Jackson v. Shanks**, 143 F.3d 1313, 1317 (10th Cir. 1998). Application of this procedural default rule in the habeas corpus context is based on comity and federalism concerns. **See Coleman v. Thompson**, 501 U.S. 722, 730 (1991). Mr. Beazer’s **pro se** status does not exempt him from the requirement of demonstrating either cause and prejudice or a fundamental miscarriage of justice. **See Lepiscopo v. Tansy**, 38 F.3d 1128, 1130 (10th Cir. 1994).

Mr. Beazer fails to demonstrate either cause and prejudice for his procedural default or that a failure to consider claims three and four will result in a fundamental miscarriage of justice. Therefore, the Court finds that claims three and four are procedurally barred and must be dismissed.

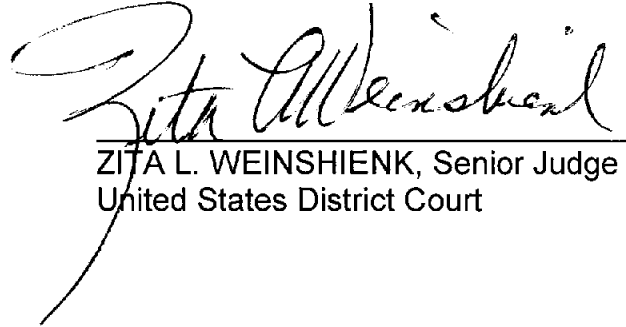
In summary, Respondents do not argue that this action is untimely or that claims one and two are unexhausted. Claims three and four will be dismissed as procedurally barred. Therefore, upon completion of the Court’s review pursuant to D.C.COLO.LCivR 8.2C, the case will be drawn to a district judge and to a magistrate judge. **See** D.C.COLO.LCivR 8.2D. Accordingly, it is

ORDERED that claims three and four in the application filed on April 3, 2009, are dismissed as procedurally barred. It is

FURTHER ORDERED that this case shall be drawn to a district judge and to a magistrate judge.

DATED at Denver, Colorado, this 1 day of July, 2009.

BY THE COURT:



ZITA L. WEINSHIENK, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CERTIFICATE OF MAILING

Civil Action No. 09-cv-00758-BNB

Clair Lloyd Beazer
Prisoner No. 49801
Colorado State Penitentiary
P.O. Box 777
Cañon City, CO 81215-0777

Christopher Y. Bosch
Assistant Attorney General
DELIVERED ELECTRONICALLY

I hereby certify that I have mailed a copy of the **ORDER** to the above-named individuals on 7/21/09

GREGORY C. LANGHAM, CLERK

By: 

Deputy Clerk