

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 09-cv-01969-BNB

MICHAEL R. O'CONNOR,

Applicant,

v.

ANGEL MEDINA, Warden Limon Correctional Facility, and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

MAR 15 2010

GREGORY C. LANGHAM
CLERK

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

Applicant, Michael R. O'Connor, is a prisoner in the custody of the Colorado Department of Corrections who currently is incarcerated at the correctional facility in Limon, Colorado. On August 28, 2009, Mr. O'Connor filed *pro se* an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging the validity of his conviction in Adams County District Court case number 01CR2949. He has paid the \$5.00 filing fee for a habeas corpus action.

On September 2, 2009, Magistrate Judge Boyd N. Boland ordered Respondents to file within twenty days a pre-answer response limited to addressing the affirmative defenses of timeliness under 28 U.S.C. § 2244(d) and/or exhaustion of state court remedies under § 2254(b)(1)(A).

On October 21, 2009, after being granted an extension of time, Respondents filed a pre-answer response. In the pre-answer response, they noted that Mr. O'Connor

failed to make clear each claim he intended to raise in this action. Specifically, they noted that Applicant failed to make clear whether he was asserting a claim of ineffective assistance of counsel and that he failed to provide actual support for such a claim. On December 3, 2009, Magistrate Judge Boland ordered Mr. O'Connor to file an amended application. On December 29, 2009, Mr. O'Connor filed an amended application in which he asserted the following claims:

1. A deficient self-defense jury instruction deprived Applicant of due process by shifting to him the burden to prove his defense, and

2. Appellate counsel was ineffective for (a) failing to raise the jury instruction claim as a federal constitutional question, and (b) failing to raise other meritorious claims, including: (i) the admission at trial of Applicant's out-of-court statements that were incomplete and taken out of context; (ii) the trial court's refusal to admit evidence of the victim's propensity for violence, and (iii) the trial court's refusal to grant a mistrial.

On March 1, 2010, Magistrate Judge Boland ordered Mr. O'Connor to show cause within thirty days why the amended application should not be denied as a mixed petition. Alternatively, Magistrate Judge Boland informed Mr. O'Connor that he may dismiss voluntarily the unexhausted claims 1 and 2(a) and proceed with the exhausted claim 2(b). Magistrate Judge Boland warned Mr. O'Connor he must provide a clear response to the order indicating his intentions or he will have failed to show cause as directed, and the Court would dismiss the instant action as a mixed petition.

On March 10, 2010, Mr. O'Connor filed a response titled "Applicant's Combined Response to Order to Show Cause/Motion to Amend/Alter Order of March 1, 2010."

The Court must construe liberally Mr. O'Connor's filings because he 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 motion to amend or alter the March 1, 2010 order will be denied; unexhausted claims 1 and 2(a) will be dismissed; and exhausted claim 2(b) will be drawn to a district judge and to a magistrate judge.

In the response to the show-cause order, Mr. O'Connor concedes that claims 1 and 2(a) are not exhausted and asks to be allowed to proceed with exhausted claim 2(b). He also asks that the Court hold the instant action in abeyance while he exhausts the unexhausted claims. For the reasons previously stated in Magistrate Judge Boland's order to show cause, the request for stay and abeyance is denied. The Court will dismiss as unexhausted claims 1 and 2(a) and will draw to a district judge and to a magistrate judge exhausted claim 2(b). Accordingly, it is

ORDERED that the renewed request for a stay and abeyance in the response titled "Applicant's Combined Response to Order to Show Cause/Motion to Amend/Alter Order of March 1, 2010" that Applicant, Michael R. O'Connor, filed on March 10, 2010, is denied. It is

FURTHER ORDERED that exhausted claim 2(b) and the amended application are drawn to a district judge and to a magistrate judge. It is

FURTHER ORDERED that unexhausted claims 1 and 2(a) are dismissed without prejudice.

DATED at Denver, Colorado, this 15th day of March, 2010.

BY THE COURT:

s/Philip A. Brimmer
PHILIP A. BRIMMER
United States District Judge, for
ZITA LEESON 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-01969-BNB

Michael R. O'Connor
Reg No. 99450
Limon Correctional Facility
49030 State Hwy. 71
Limon, CO 80826

John J. Fuerst III
Senior Assistant Attorney General
DELIVERED ELECTRONICALLY

I hereby certify that I have mailed a copy of the **ORDER** to the above-named individuals on 3/15/10

GREGORY C. LANGHAM, CLERK

By: 

Deputy Clerk