

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 09-cv-02479-BNB

ADRIAN JAMES,

Applicant,

v.

GEORGE DUNBAR and
JOHN SUTHERS, The Attorney General of the State of Colorado,

Respondents.

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

NOV 06 2009

GREGORY C. LANGHAM
CLERK

ORDER TO FILE PRE-ANSWER RESPONSE

As part of the preliminary consideration of the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 in this case, the Court has determined that a limited Pre-Answer Response is appropriate. Respondents are directed pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts and to *Denson v. Abbott*, 554 F.Supp. 2d 1206 (D. Colo. 2008), to file 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 28 U.S.C. § 2254(b)(1)(A). If Respondents do not intend to raise either of these affirmative defenses, they must notify the Court of that decision in the Pre-Answer Response. Respondents may not file a dispositive motion as their Pre-Answer Response, or an Answer, or otherwise address the merits of the claims in response to this Order.

In support of the Pre-Answer Response, Respondents should attach as exhibits all relevant portions of the state court record, including but not limited to copies of all documents demonstrating whether this action is filed in a timely manner and/or whether Applicant has exhausted state court remedies.

Applicant may reply to the Pre-Answer Response and provide any information that might be relevant to the one-year limitation period under 28 U.S.C. § 2244(d) and/or the exhaustion of state court remedies. Applicant also should include information relevant to equitable tolling, specifically as to whether he has pursued his claims diligently and whether some extraordinary circumstance prevented him from filing a timely 28 U.S.C. § 2254 action in this Court.

The Court also notes that Applicant names the Department of Corrections and Aristedes Zavaras as Respondents. Because the law is well-established that the only proper respondent to a habeas corpus action is the habeas applicant's custodian, *see* 28 U.S.C. § 2242; Rules Governing Section 2254 Cases in the United States District Courts, Rule 2(a), ; and *Harris v. Champion*, 51 F.3d 901, 906 (10th Cir. 1995), the caption of this Order does not list the Department of Corrections or Aristedes Zavaras. Although Aristedes Zavaras, who is the Executive Director of the Colorado Department of Corrections, may be considered as Applicant's custodian, naming Mr. Zavaras is redundant when naming the warden of the institution in which the applicant is incarcerated. Rules Governing Section 2254 Cases in the United States District Courts, Rule (2)(a) advisory committee's note, 1976 adoption (proper person to be served is either the warden of the institution where applicant is incarcerated or the chief officer in charge of state penal institution). John Suthers, The Attorney General of the State of Colorado, however, is listed as a Respondent in the capacity of representing counsel for the State of Colorado and Applicant's custodian. Accordingly, it is

ORDERED that for the purpose of service the only properly named Respondents are George Dunbar and John Suthers. It is

FURTHER ORDERED that **within twenty days from the date of this Order**

Respondents shall file a Pre-Answer Response that complies with this Order. It is

FURTHER ORDERED that **within twenty days of the filing of the Pre-Answer Response** Applicant may file a Reply, if he desires. It is

FURTHER ORDERED that if Respondents do not intend to raise either of the affirmative defenses of timeliness or exhaustion of state court remedies, they must notify the Court of that decision in the Pre-Answer Response.

DATED November 6, 2009, at Denver, Colorado.

BY THE COURT:

s/ Boyd N. Boland
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CERTIFICATE OF MAILING

Civil Action No. 09-cv-02479-BNB

Adrian James
Prisoner No. 132271
Buena Vista Corr. Facility
PO Box 2017
Buena Vista, CO 81211

George Dunbar,
c/o Keith Nordell
Colorado Department of Corrections
Office of Legal Affairs
DELIVERED ELECTRONICALLY

John Suthers, Attorney General
Office of the Attorney General
DELIVERED ELECTRONICALLY

Paul Sanzo, Asst. Attorney General
Office of the Attorney General
DELIVERED ELECTRONICALLY
COURTESY COPY

I hereby certify that I have mailed a copy of the ORDER to the above-named individuals, and the following forms to Keith Nordell for service of process on George Dunbar; and to John Suthers; AMENDED APPLICATION FOR WRIT OF HABEAS CORPUS FILED 11/3/09 on 11/6/09.

GREGORY C. LANGHAM, CLERK

By: 

Deputy Clerk