

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 09-cv-02698-BNB

JOSHUA D. MOORE,

Applicant,

v.

ANGEL MEDINA, Warden, L.C.F.,

Respondent.

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

JAN 21 2010

GREGORY C. LANGHAM
CLERK

ORDER OF DISMISSAL

Applicant, Joshua D. Moore, is a prisoner in the custody of the Colorado Department of Corrections who currently is incarcerated at the Limon Correctional Facility. He initiated this acting by filing a *pro se* Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241. He has paid the \$5.00 filing fee.

On November 19, 2009, Magistrate Judge Boyd N. Boland ordered Respondent to file a preliminary response to the habeas corpus application and address the affirmative defenses of timeliness and exhaustion of state court remedies. On December 4, 2009, Respondent filed a preliminary response. Mr. Moore has not filed a Reply.

The Court must construe Mr. Moore's filings liberally because he is a *pro se* litigant. *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 act as a *pro se* litigant's advocate. *See Hall*, 935 F.2d at 1110. For the reasons stated below, the Court will dismiss the action for failure to exhaust state remedies.

In the Application, Mr. Moore challenges his Colorado Code of Penal Discipline (COPD) conviction for inciting to riot. Mr. Moore asserts that he was denied the right to due process because he was not notified of a COPD rule change, and that his conviction is not supported by sufficient evidence. Application at 3.

Respondent argues that Mr. Moore has failed to exhaust state court remedies before seeking federal court intervention. Prelim. Resp. at 3. Respondent contends that Mr. Moore has presented his claims to the Lincoln County District Court and the Colorado Court of Appeals (CCA), but failed to obtain judicial review of the CCA's decision by the Colorado Supreme Court. *Id.* at 4.

Mr. Moore is required to exhaust state remedies before he may pursue his claims in a habeas corpus action in this Court. *See Wilson v. Jones*, 430 F.3d 1113, 1118 (10th Cir. 2005). Like other habeas petitioners, a § 2241 petitioner fulfills the requirement to exhaust state remedies once the issue has been “fairly presented to the state courts.” *Picard v. Connor*, 404 U.S. 270, 275 (1971); *Hawkins v. Mullin*, 291 F.3d 658, 668 (10th Cir. 2002). This requirement “is satisfied if the federal issue has been properly presented to the highest state court.” *Dever v. Kan. State Penitentiary*, 36 F.3d 1531, 1534 (10th Cir. 1994). “The 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. *See Miranda v. Cooper*, 967 F.2d 392, 398 (10th Cir. 1992).


Mr. Moore does not allege that he has fairly presented his claims to the Colorado Supreme Court. Mr. Moore's failure to challenge his COPD conviction in the Colorado Supreme Court after these claims were presented fairly to the Colorado Court of Appeals renders these claims unexhausted. The Court will dismiss this action for failure to exhaust because Mr. Moore makes no reasoned argument that demonstrates he has exhausted state remedies. Accordingly, it is

ORDERED that the habeas corpus application is denied and the action is dismissed without prejudice for failure to exhaust state remedies. It is

FURTHER ORDERED that no certificate of appealability will issue because Applicant has not made a substantial showing of the denial of a constitutional right.

DATED at Denver, Colorado, this 20 day of January, 2010.

BY THE COURT:


CHRISTINE M. ARGUELLO
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-02698-BNB

Joshua D. Moore
Prisoner No. 91246
Limon Correctional Facility
49030 State Hwy. 71
Limon, CO 80826

Jennifer S. Huss
Assistant Attorney General
DELIVERED ELECTRONICALLY

I hereby certify that I have mailed a copy of the **ORDER AND JUDGMENT** to the above-named individuals on 1/21/10

GREGORY C. LANGHAM, CLERK

By: 

Deputy Clerk