

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 10-cv-02916-BNB

CECIL BYNUM,

Applicant,

v.

WARDEN MILYARD, and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

FEB -1 2011

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 Mr. Bynum names Colorado Department of Corrections and Catherine P. Adkisson 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 2(a) and 1(b), Rules Governing Section 2254 Cases in the United States District Courts; and *Harris v. Champion*, 51 F.3d 901, 906 (10th Cir. 1995), the caption of this Order does not list Colorado Department of Corrections or Catherine P. Adkisson. The Order only lists Mr. Bynum's custodian, Warden Milyard, and The Attorney General of the State of Colorado in the capacity of representing counsel for the State of Colorado and Mr. Bynum's custodian. Accordingly, it is

ORDERED that within twenty-one 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-one 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 January 31, 2011, 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. 10-cv-02916-BNB

Cecil Bynum
Prisoner No. 49080
Sterling Correctional Facility
PO Box 6000
Sterling, CO 80751

Kevin Milyard, Warden
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
COURTESY COPY

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 the Keith Nordell for service of process on Kevin Milyard; and to John Suthers: APPLICATION FOR WRIT OF HABEAS CORPUS FILED 1/19/11 on 2/1/11.

GREGORY C. LANGHAM, CLERK

By: 

Deputy Clerk