

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

APR 05 2011

GREGORY C. LANGHAM
CLERK

Civil Action No. 11-cv-00019-BNB

JOHN WARRENER,

Applicant,

v.

ANGEL MEDINA, and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

ORDER DRAWING CASE

This matter is before the Court on the response to order to show cause that Applicant, John Warrener, submitted to and filed with the Court on April 1, 2011. For the reasons stated below, the second part of the third claim Mr. Warrener asserts in his habeas corpus application will be dismissed voluntarily.

On March 25, 2011, Magistrate Judge Boyd N. Boland ordered Mr. Warrener to show cause within thirty days why his habeas corpus application should not be denied as a mixed petition for failure to exhaust state court remedies as to each of his seven asserted claims. Magistrate Judge Boland allowed Mr. Warrener the alternative to dismiss voluntarily his unexhausted claim, i.e., the second part of claim three only, and to proceed with the exhausted claims, and explained the consequences of voluntarily dismissing his unexhausted claim and proceeding with his exhausted claims.

Magistrate Judge Boland warned Mr. Warrener that, if he failed to provide a clear response indicating his intentions, he would have failed to show cause as directed, and

the Court would dismiss the instant action as a mixed petition.

In claim three, Mr. Warrener asserts that his Fourteenth Amendment right to due process was violated when the trial court failed to have him evaluated for competency to stand trial and at the time he committed the alleged offense. He raised the first portion of claim three regarding the trial court's failure to have him evaluated for competency to stand trial in his opening brief (**see** pre-answer response, ex. A at 26-30) on direct appeal in No. 05CA1850. Therefore, Magistrate Judge Boland found that the first portion of claim three appeared to be exhausted. However, Mr. Warrener raised the second portion of claim three regarding the trial court's failure to have him evaluated for competency at the time he committed the alleged offense as an ineffective-assistance-of-counsel claim in the opening brief for the appeal in No. 09CA1058 from the denial of his Colo. R. Crim. P. 35(c) postconviction motion. **See** pre-answer response, ex. J at 12-14). As such, Magistrate Judge Boland found that the second portion of claim three is unexhausted.

In response to the order to show cause, Mr. Warrener offered to submit an amended application "to clarify that claim 3 is only dealing with the direct appeal issue of the trial court's failure to require a competency evaluation." **See** response to order to show cause (document no. 9) at 2. An amended application is not necessary because Mr. Warrener has made clear that he is willing to dismiss voluntarily the unexhausted portion of claim three, i.e, the trial court's failure to have him evaluated for competency at the time he committed the alleged offense. Moreover, Magistrate Judge Boland did not offer Mr. Warrener the alternative of filing an amended application.

Accordingly, it is

ORDERED that the unexhausted portion of claim three alleging that the trial court's failure to have Applicant, John Warrener, evaluated for competency at the time he committed the alleged offense, is dismissed voluntarily, and Mr. Warrener is allowed to proceed only with the exhausted claims one, two, four through seven, and the first portion of claim three alleging that the trial court failed to have him evaluated for competency to stand trial. It is

FURTHER ORDERED that the order to show cause (document no. 8) is discharged. It is

FURTHER ORDERED that the remaining claims and the case are drawn to a district judge and a magistrate judge.

DATED April 5, 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. 11-cv-00019-BNB

John Warrener
Prisoner No. 109110
Limon Correctional Facility
49030 State Hwy. 71
Limon, CO 80826

I hereby certify that I have mailed a copy of the **ORDER** to the above-named individuals on April 5, 2011.

GREGORY C. LANGHAM, CLERK

By: _____



Deputy Clerk