

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

MAY 02 2011

GREGORY C. LANGHAM
CLERK

Civil Action No. 11-cv-00657-BNB

EDWARD ALLEN,

Applicant,

v.

TOM CLEMENTS, and
JOHN SUTHERS, Attorney General of the State of Colorado,

Respondents.

ORDER OVERRULING OBJECTION

This matter is before the Court on Applicant's "Objection to Denial of Appointment of Counsel" (Doc. #11) filed *pro se* on April 28, 2011. Applicant specifically objects to Magistrate Judge Boyd N. Boland's April 22, 2011 minute order denying as premature Applicant's motion for appointment of counsel in this habeas corpus action.

Applicant is a prisoner in the custody of the Colorado Department of Corrections and he is incarcerated at the Sterling Correctional Facility in Sterling, Colorado. Applicant has filed an Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 challenging the validity of his state court criminal conviction. On March 30, 2011, Magistrate Judge Boland ordered Applicant to file an amended habeas corpus application that clarifies the specific claims he is asserting in this action. On April 18, 2011, Applicant filed an amended habeas corpus application. On April 19, 2011, Magistrate Judge Boland ordered Respondents to file within twenty-one days a Pre-

Answer Response limited to addressing the affirmative defenses of timeliness and exhaustion of state court remedies. Respondents have not yet filed their Pre-Answer Response. On April 21, 2011, Applicant filed a motion for appointment of counsel. On April 22, 2011, Magistrate Judge Boland entered a minute order denying the motion for appointment of counsel as premature. Applicant objects to the denial of his motion for appointment of counsel, apparently because he believes that he is unable to comply with Magistrate Judge Boland's order to file an amended application that clarifies the specific claims he is asserting in this action.

Pursuant to 28 U.S.C. § 636(b)(1)(A) a judge may reconsider any pretrial matter designated to a magistrate judge to hear and determine where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law. The Court has reviewed the file and finds that Magistrate Judge Boland's minute order denying Applicant's motion for appointment of counsel is not clearly erroneous or contrary to law. "In most federal courts, it is the practice to appoint counsel in post-conviction proceedings only after a petition for post-conviction relief passes initial judicial evaluation and the court has determined that issues are presented calling for an evidentiary hearing." *Johnson v. Avery*, 393 U.S. 483, 487 (1969). Applicant's claims in this habeas corpus action have not passed initial judicial evaluation yet and no determination has been made as to whether an evidentiary hearing is necessary. Furthermore, the Court notes that Applicant already has filed an amended application in response to Magistrate Judge Boland's order to file an amended application. Accordingly, it is

ORDERED that Applicant's "Objection to Denial of Appointment of Counsel"
(Doc. #11) filed on April 28, 2011, is overruled.

DATED at Denver, Colorado, this 2nd day of May, 2011.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CERTIFICATE OF MAILING

Civil Action No. 11-cv-00657-BNB

Edward Allen
Prisoner No. 122690
Sterling Correctional Facility
PO Box 6000
Sterling, CO 80751

I hereby certify that I have mailed a copy of the **ORDER** to the above-named individuals on May 2, 2011

GREGORY C. LANGHAM, CLERK

By: _____



Deputy Clerk