

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Marcia S. Krieger

Civil Action No. 11-cv-01028-MSK

ANDREW MARK LAMAR,

Applicant,

v.

ARISTEDES W. ZAVARAS, and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

ORDER TO DISMISS IN PART AND FOR ANSWER
AND FOR STATE COURT RECORD

Applicant Andrew Mark Lamar is in the custody of the Colorado Department of Corrections (DOC) and currently is incarcerated at the Colorado State Penitentiary in Cañon City, Colorado. Mr. Lamar, acting *pro se*, initiated this action by submitting to the Court an Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254. Mr. Lamar is challenging the validity of his conviction and sentence in Case No. 05CR467 in the Boulder County District Court.

The Court must construe liberally the Application filed by Mr. Lamar because he is not represented by an attorney. *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 an advocate for a *pro se* litigant. *See Hall*, 935 F.2d at 1110.

Mr. Lamar was convicted by a trial jury of sexual assault-overcoming a victim's will and was sentenced to thirty-five years to life in the DOC. Mr. Lamar appealed his conviction. The Colorado Court of Appeals (CCA) affirmed the conviction on September 24, 2009, but vacated Mr. Lamar's sentence and remanded the case for resentencing. Mr. Lamar filed a petition for rehearing and claimed that the CCA violated his right to access the court when it denied his request to rescind his opening brief, forced an attorney upon him, precluded his right to present a new brief, and obstructed his right to an adequate appeal. Mr. Lamar also challenged the CCA's determination regarding two claims raised by his appointed counsel. The CCA denied the petition for rehearing.

Mr. Lamar filed a petition for certiorari review, which the Colorado Supreme Court (CSC) denied on February 8, 2010. Respondents also assert that Mr. Lamar submitted a petition for certiorari review to the United States Supreme Court (USSC) on May 4, 2010, but the USSC did not docket the petition. Mr. Lamar does not deny Respondents' assertions.

On May 5, 2010, the state trial court resentenced Mr. Lamar to an indeterminate term of twelve years to life in the DOC. Mr. Lamar filed a notice of appeal regarding the resentencing on May 7, 2010. The appeal currently is pending before the CCA. Mr. Lamar submitted an Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 to this Court on April 13, 2011.

In the April 13 Application, Mr. Lamar asserted two claims, including a denial to assert a defense by special plea and denial of his right to trial counsel.

On May 3, 2011, Magistrate Judge Boyd N. Boland entered an order directing Respondents to file a Pre-Answer Response and address the affirmative defenses of timeliness

under 28 U.S.C. § 2244(d) and exhaustion of state court remedies under 28 U.S.C. § 2254(b)(1)(A) if Respondents intend to raise either or both of those defenses. Respondents filed a Pre-Answer Response on June 21, 2011. Mr. Lamar filed a Motion to Amend on July 21, 2011. In the Motion, Mr. Lamar amended Claim Two and added Claims Three and Four. The claims set forth in the Motion to Amend are as follows:

- 1) The trial court failed to adequately ascertain that he knowingly, intelligently, and voluntarily decided to represent himself;
- 2) The trial court failed to make an on the record searching inquiry to ascertain whether he knowingly, intelligently, and voluntarily decided to represent himself;
- 3) The trial court abused its discretion when it granted his motion to proceed pro se thus violating his sixth amendment right to conflict-free counsel; and
- 4) The trial court abused its discretion when it denied his request for reassignment of counsel thus violating his sixth amendment right to counsel.

Magistrate Judge Boland directed Respondents to file a Second Pre-Answer Response that addresses all four claims, which they did on August 19, 2011. Mr. Lamar filed a Reply and a Motion for Stay and Abeyance on September 12, 2011.

Respondents concede in both Pre-Answer Responses that Mr. Lamar's Application is timely. They also concede that Claims One and Two are exhausted, but they argue that Claims Three and Four are procedurally defaulted. In his Reply, Mr. Lamar requests that the Court dispose of Claims Three and Four or in the alternative grant him a stay and abeyance pending exhaustion of his sentencing appeal. The Court will grant Mr. Lamar's request to dismiss Claims Three and Four and will proceed to review the merits of Claims One and Two. Accordingly, it is

ORDERED that the Court will dismiss Claims Three and Four as requested by Mr. Lamar. It is

FURTHER ORDERED that the Motion for Stay and Abeyance, Doc. No. 15, is denied as moot. It is

FURTHER ORDERED that within thirty days Respondents are directed to file an Answer in compliance with Rule 5 of the Rules Governing Section 2254 Cases that fully addresses the merits of Claims One and Six. It is

FURTHER ORDERED that within thirty days of the filing of the Answer Applicant may file a reply, if he desires. It is

FURTHER ORDERED that within thirty days from the date of this Order the Respondents shall file with the Clerk of the Court, in electronic format if available, a copy of the complete record of Mr. Lamar's state court proceedings in Case No. 05CR467, including all documents in the state court file and transcripts of all proceedings conducted in the state court, but excluding any physical evidence (as opposed to documentary evidence) not relevant to the asserted claims. It is

FURTHER ORDERED that the Clerk of the Court is directed to send copies of this Order to the following:

(1) Clerk of the Court
Boulder County District Court
1777 6th Street
Boulder, Colorado 80302;

(2) Assistant Solicitor General

Appellate Division
Office of the Attorney General
1525 Sherman Street
Denver, Colorado 80203; and

- (3) Court Services Manager
State Court Administrator's Office
101 W. Colfax, Ste. 500
Denver, Colorado 80202

DATED this 21st day of November, 2011.

BY THE COURT:

Marcia S. Krieger

Marcia S. Krieger

United States District Judge

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