

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 13-cv-02624-BNB

ALEXANDER ROSES,

Applicant,

v.

MR. FAULK, SCF Warden, and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

ORDER

This matter is before the Court on Respondents' Motion for Leave to Move to Dismiss § 2254 Action (Doc. No. 11) filed on November 22, 2013. On October 8, 2013, the Court ordered Respondents 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). Respondents were directed not to file a dispositive motion as their Pre-Answer Response, or an Answer, or otherwise address the merits of the claims in response to the Court's October 8 Order. On October 28, 2013, Respondents filed a Motion for Extension of Time to File Pre-Answer Response, which the Court granted (Doc. No. 10).

In the Motion for Leave to Move to Dismiss, Respondents seek leave to file a motion to dismiss limited to addressing the affirmative defense of timeliness. Respondents allege that this action clearly is time-barred. In support, Respondents attached a copy of the state court docket sheet for Applicant's criminal case that

indicates no state court postconviction motions were pending in Applicant's criminal case between September 2000 and August 2005 and October 2005 and May 2011. Respondents further assert that the Attorney General's files from Applicant's direct and postconviction appeals have been destroyed as part of routine file management, and that obtaining copies of the documents necessary to address exhaustion of state remedies would be an expensive endeavor.

Under these circumstances, the Court agrees that Respondents should be allowed to file a motion to dismiss limited to addressing the affirmative defense of timeliness. Applicant may respond to Respondents' Motion to Dismiss. See *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998). Accordingly, it is

ORDERED that Respondents' Motion for Leave to Move to Dismiss § 2254 Action (Doc. No. 11) filed on November 22, 2013, is granted. It is

FURTHER ORDERED that Respondents file a Motion to Dismiss **within twenty-one days** from the date of this Order. It is

FURTHER ORDERED that Applicant may file a Response to the Motion to Dismiss **within twenty-one days** from the date Respondents' Motion to Dismiss is filed.

DATED December 2, 2013, at Denver, Colorado.

BY THE COURT:

s/ Boyd N. Boland
United States Magistrate Judge