

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-cv-00701-BNB

DARRYL MARTIN,

Applicant,

v.

MR. SMELSER, Warden Crowley Correctional Facility, and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

APR 20 2007

GREGORY C. LANGHAM
CLERK

ORDER FOR APPLICANT TO FILE AMENDED APPLICATION

On March 29, 2007, Applicant Darryl Martin initiated the instant action by filing with the Court a *pro se* Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254. I entered an order on April 6, 2007, instructing Mr. Martin to file his claims on a current Court-approved form, which Applicant did on April 13, 2007.

The Court must construe the Application dated April 13, 2007, liberally because Mr. Martin is a *pro se* litigant. *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 a *pro se* litigant's advocate. *See Hall*, 935 F.2d at 1110. For the reasons stated below, the Court will construe the action as filed pursuant to 28 U.S.C. § 2241 and order Mr. Martin to submit an Amended Application on a Court-approved form used in asserting claims pursuant to § 2241.

Mr. Martin has submitted his claims on a Court-approved form used for filing 28 U.S.C. § 2254 actions. Upon review of the form, the Court finds that Mr. Martin's claims are that (1) he is being punished twice for the same crime, (2) the DOC continues to

deny him parole because of his sex offender classification, and (3) his sex offender classification disallows his placement in either minimum custody or community facilities.

Mr. Martin's denial of parole claim challenges the execution of his sentence. A challenge of the execution of a sentence is more properly considered in a 28 U.S.C. § 2241 action as opposed to a § 2254 action. **See *Montez v. McKinna***, 208 F.3d 862, 865 (10th Cir. 2000). Therefore, the Court will direct Mr. Martin to file his denial of parole claim on a Court-approved form used in filing § 2241 applications.

As for Mr. Martin's claim that he is being punished twice for his 1981 sex assault crime, the claim was addressed previously in ***Martin v. Chief of Mental Health Servs.***, No. 02-cv-01947-REB-BNB (D. Colo. Aug. 22, 2003) (Not selected for publication). In Case No. 02-cv-01947-REB-BNB, a 42 U.S.C. § 1983 lawsuit, the court dismissed the action for failure to state a claim. The court found that the DOC's classification of Applicant as a sex offender did not arise out of a criminal proceeding and was not a violation of the double jeopardy clause. ***Id.*** at 6-7. This Court finds that Mr. Martin's double jeopardy claim both is inappropriately raised in a habeas action and is repetitious litigation.

As for Plaintiff's claim regarding the DOC restrictions on the type of facility where he may be held, the claim addresses the conditions of his confinement and more properly is raised in a 42 U.S.C. § 1983 action.

Mr. Martin, therefore, will be directed to amend the Application and file the denial of parole claim on a Court-approved form used for filing § 2241 actions.

Accordingly, it is

ORDERED that Mr. Martin file **within thirty days from the date of this Order** an Amended Application that complies with the directives in the Order. It is

FURTHER ORDERED that the Clerk of the Court mail to Mr. Martin, together with a copy of this Order, one copy of the following form for use in filing the Amended Application: Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241. It is

FURTHER ORDERED that the Amended Application shall be titled "Amended Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241" and shall be filed with the Clerk of the Court, United States District Court for the District of Colorado, Alfred A. Arraj United States Courthouse, 901 Nineteenth Street, Room A105, Denver, Colorado 80294-3589, within thirty days from the date of this Order. It is

FURTHER ORDERED that if Mr. Martin fails to file an Amended Application as directed, **within thirty days from the date of this Order**, the Application will be denied and the action dismissed without further notice.

DATED April 20, 2007, 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

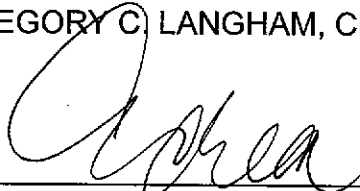
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Darryl Martin
Prisoner No. 61336
Crowley County Corr. Facility
6564 State Hwy. 96
Olney Springs, CO 81062-8700

I hereby certify that I have mailed a copy of the **ORDER and two copies of Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241** the above-named individuals on 4/20/07

GREGORY C. LANGHAM, CLERK

By: _____


Deputy Clerk