

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 09-cv-00348-BNB

DARREL GUICE,

Applicant,

v.

THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondent.

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

MAR 31 2009

GREGORY C. LANGHAM
CLERK

ORDER TO FILE PRELIMINARY RESPONSE

Applicant, Darrel Guice, currently is confined in the Denver County Jail. He has filed *pro se* an amended Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241. He has paid the \$5.00 filing fee for a habeas corpus action.

As part of the preliminary consideration of the amended Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 filed in this case and pursuant to *Keck v. Hartley*, 550 F. Supp. 2d 1272 (D. Colo. 2008), the Court has determined that a limited Preliminary Response is appropriate. Respondent is directed pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts to file a Preliminary Response limited to addressing the affirmative defenses of timeliness under 28 U.S.C. § 2244(d) and/or exhaustion of state court remedies. If Respondent does not intend to raise either of these affirmative defenses, Respondent must notify the Court of that decision in the Preliminary Response. Respondent may not file a dispositive motion as a Preliminary Response, or an Answer, or otherwise address the merits of the claims in response to this Order.

In support of the Preliminary Response, Respondent should attach as exhibits all relevant portions of the state court record, including but not limited to copies of all documents demonstrating whether this action is filed in a timely manner and/or whether Applicant has exhausted state court remedies.

Applicant may reply to the Preliminary Response and provide any information that might be relevant to the one-year limitation period under 28 U.S.C. § 2244(d) and/or the exhaustion of state court remedies. Applicant also should include information relevant to equitable tolling, specifically as to whether he has pursued his claims diligently and whether some extraordinary circumstance prevented him from filing a timely 28 U.S.C. § 2241 action in this Court.

Finally, the Court notes that Applicant lists the Denver County Jail as Respondent in the caption of the amended habeas corpus application. The law is well-established that the only proper respondent to a habeas corpus action is the applicant's custodian. **See** 28 U.S.C. § 2242; Rules 2(a) and 1(b), Rules Governing Section 2254 Cases in the United States District Courts; *Harris v. Champion*, 51 F.3d 901, 906 (10th Cir. 1995). It is unclear whether Chief Foffs, who is listed in the text of the amended application, is Applicant's custodian. Applicant is challenging his incarceration pursuant to a parole hold apparently placed on him in connection with his violating the conditions of his parole. Therefore, the only Respondent listed in the caption of this order is the Attorney General of the State of Colorado. If the state attorney general is not the appropriate Respondent, the state attorney general should advise the Court who the proper Respondent is and move for a substitution of party. Accordingly, it is

ORDERED that **within twenty (20) days from the date of this Order** Respondent shall file a Preliminary Response that complies with this Order. It is

FURTHER ORDERED that **within twenty (20) days of the filing of the Preliminary Response** Applicant may file a Reply, if he desires. It is

FURTHER ORDERED that if Respondent does not intend to raise either of the affirmative defenses of timeliness or exhaustion of state court remedies, Respondent must notify the Court of that decision in the Preliminary Response. It is

FURTHER ORDERED that the only proper Respondent for the purpose of service is the Attorney General of the State of Colorado.

DATED March 26, 2009, 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. 09-cv-00348-BNB

Darrel Guice
Prisoner No.1593947
Denver County Jail
PO Box 1108
Denver, CO 80201

John Suthers, Attorney General
Office of the Attorney General
DELIVERED ELECTRONICALLY

Paul Sanzo, Asst. Attorney General
Office of the Attorney General
DELIVERED ELECTRONICALLY
COURTESY COPY

I hereby certify that I have mailed a copy of the ORDER to the above-named individuals, and the following forms to John Suthers: AMENDED APPLICATION FOR WRIT OF HABEAS CORPUS FILED 3/20/09 on 3/31/09.

GREGORY C. LANGHAM, CLERK

By: 

Deputy Clerk