

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

Civil Action No. 09-cv-00371-BNB

RUDY STANKO,

Applicant,

MAR -4 2009

GREGORY C. LANGHAM
CLERK

v.

HERMAN QUAY, Local Director,
MICHAEL NALLEY, Regional Director, and
HARLEY LAPPIN, National Director,

Respondents.

ORDER CONSTRUING 28 U.S.C. § 2241 APPLICATION AS **BIVENS** COMPLAINT
AND DIRECTING APPLICANT TO FILE CLAIMS ON COURT-APPROVED FORM

Applicant, Rudy Stanko, is a prisoner in the custody of the United States Bureau of Prisons who is incarcerated at the Federal Correctional Institution (FCI) in Littleton, Colorado. He initiated the instant action by filing *pro se* an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 (1994). He paid the \$5.00 filing fee for a habeas corpus action.

The Court has reviewed the application and finds that Mr. Stanko is asserting civil rights claims rather than habeas corpus claims. Mr. Stanko complains about his custody classification. He does not challenge the execution of his sentence.

“The essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody.” *See Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973). Generally, a federal prisoner’s challenge to his conditions of confinement is cognizable under

Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). ***See, e.g., Richards v. Bellmon***, 941 F.2d 1015, 1018 (10th Cir. 1991).

The Court will construe the application liberally as asserting civil rights claims pursuant to ***Bivens***. The clerk of the court will be directed to mail to Mr. Stanko the appropriate form for filing a Prisoner Complaint. Mr. Stanko will be ordered to complete the complaint form and submit his completed complaint to the Court if he wishes to pursue his claims. Mr. Stanko should name as defendants the individuals who allegedly have violated his rights.

In addition, as noted above, Mr. Stanko has paid the \$5.00 filing fee applicable to a habeas corpus action. Because the Court has determined that this action properly is construed as a ***Bivens***-type civil rights action, Mr. Stanko is required to pay the \$350.00 filing fee. ***See*** 28 U.S.C. § 1915 (2006). Therefore, Mr. Stanko also will be ordered to submit the balance of \$345.00 or, if he is unable to pay the entire balance at this time, to submit a Prisoner's Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. § 1915 together with a certified copy of his inmate trust fund account statement as required pursuant to 28 U.S.C. § 1915(a)(2). If leave to proceed pursuant to § 1915 is granted, Mr. Stanko will be allowed to pay the balance of the filing fee in installments. ***See*** 28 U.S.C. § 1915(b). Accordingly, it is

ORDERED that the habeas corpus application is construed liberally as asserting claims pursuant to ***Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics***, 403 U.S. 388 (1971). It is

FURTHER ORDERED that Mr. Stanko cure the deficiencies in this action by

submitting to the Court **within thirty (30) days from the date of this order** a Prisoner Complaint and either a payment in the amount of \$345.00 or a properly supported Prisoner's Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. § 1915. It is

FURTHER ORDERED that the clerk of the Court mail to Mr. Stanko, together with a copy of this order, two copies of the following forms: Prisoner's Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. § 1915; Prisoner Complaint. It is

FURTHER ORDERED that if Mr. Stanko fails to cure the designated deficiencies within the time allowed, the habeas corpus application will be denied and the action dismissed without prejudice and without further notice.

DATED March 4, 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-00371-BNB

Rudy Stanko
Reg. No. 18259-013
FCI - Englewood
9595 W. Quincy Ave.
Littleton, CO 80123

I hereby certify that I have mailed a copy of the **ORDER** and **two copies of the Prisoner's Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. §1915 and Prisoner Complaint forms** to the above-named individuals on 3/4/09

GREGORY C. LANGHAM, CLERK

By: 

Deputy Clerk