

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 09-cv-02789-BNB

FREDERICK D. DEBERRY,

Applicant,

v.

BLAKE R. DAVIS,

Respondent.

FILED  
UNITED STATES DISTRICT COURT  
DENVER, CO. ORADO

JAN 07 2010

GREGORY C. LANGHAM  
CLERK

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ORDER DISMISSING CASE

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Applicant, Frederick D. Deberry, is a prisoner in the custody of the United States Bureau of Prisons who currently is incarcerated at the United States Penitentiary, Administrative Maximum, in Florence, Colorado. He filed *pro se* an application for writ of habeas corpus pursuant to 28 U.S.C. § 2241.

In an order filed on December 1, 2009, Magistrate Judge Boyd N. Boland ordered Mr. Deberry to cure certain deficiencies in the case within thirty days. On December 21, 2009, instead of curing the designated deficiencies, Mr. Deberry filed motion titled "Applicants' [sic] Motion to Withdraw His Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241" informing the Court that he wanted to withdraw the instant action without prejudice so that he may assert his claims properly in a complaint pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

The Court must construe the motion liberally because Mr. Deberry 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 motion titled "Applicants' [sic] Motion to Withdraw His Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241" as a notice of voluntary dismissal pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure.

Rule 41(a)(1) provides that "the [applicant] may dismiss an action without a court order by filing (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." No response has been filed by Respondent in this action. A voluntary dismissal pursuant to Rule 41(a)(1) is effective immediately upon the filing of a written notice of dismissal, and no subsequent court order is necessary. *See* J. Moore, *Moore's Federal Practice* ¶ 41.02(2) (2d ed. 1995); *Hyde Constr. Co. v. Koehring Co.*, 388 F.2d 501, 507 (10th Cir. 1968). The notice closes the file. *See Hyde Constr. Co.*, 388 F.2d at 507. Accordingly, it is

ORDERED that the motion titled "Applicants' [sic] Motion to Withdraw His Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241" that Applicant, Frederick D. Deberry, submitted to and filed with the Court on December 21, 2009, is construed liberally as a notice of voluntary dismissal pursuant to Fed. R. Civ. P. 41(a)(1). It is

FURTHER ORDERED that the voluntary dismissal is effective as of December 21, 2009, the date the notice of dismissal was filed in this action. It is

FURTHER ORDERED that the action is dismissed without prejudice. It is

FURTHER ORDERED that the Prisoner's Motion and Affidavit for Leave to

Proceed Pursuant to 28 U.S.C. § 1915 filed on November 16, 2009, is denied as moot.

DATED at Denver, Colorado, this 6th day of January, 2010.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Philip A. Brimmer", is written over a horizontal line.

PHILIP A. BRIMMER  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

**CERTIFICATE OF MAILING**

Civil Action No. 09-cv-02789-BNB

Frederick D. Deberry  
Reg No. 09303-042  
US Penitentiary ADX  
P.O. Box 8500  
Florence, CO 81226-8500

I hereby certify that I have mailed a copy of the **ORDER** to the above-named individuals on 1/7/10

GREGORY C. LANGHAM, CLERK

By: 

Deputy Clerk