

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 14-cv-00217-BNB

(The above civil action number must appear on all future papers sent to the court in this action. Failure to include this number may result in a delay in the consideration of your claims.)

ROBERT J. ZWIERZYCKI,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER DIRECTING PLAINTIFF TO CURE DEFICIENCIES

Plaintiff, Robert J. Zwierzycki, is a prisoner in the custody of the Federal Bureau of Prisons who currently is incarcerated at the Federal Correctional Institution in Littleton, Colorado. He initiated this action by submitting *pro se* a pleading titled “Complaint for a Constitutional Challenge” (ECF No. 1) and a document titled “Declaration in Support of Request to Proceed In Forma Pauperis” (ECF No. 3). After review pursuant to D.C.COLO.LCivR 8.1(b), the Court has determined that the submitted documents are deficient as described in this order.

Mr. Zwierzycki seeks to have 18 U.S.C. § 2252A declared unconstitutional and have his sentence vacated. Mr. Zwierzycki pleaded guilty in the United States District Court for the District of Nevada (Las Vegas) in No. 09-cr-00449-RLH-GWF-1 on charges of receipt of child pornography pursuant to 18 U.S.C. § 2254A(a)(2). He was sentenced to ninety-seven months of incarceration and to supervised release for life.

An amended judgment was entered on the docket on February 2, 2011. The Court may take judicial notice of its own records and files that are part of the Court's public records. See, e.g., *Wolf v. Suthers*, No. 13-cv-00234-BNB (D. Colo. filed Jan. 30, 2013); see also *St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979).

The Court finds that Mr. Zwierzycki is asserting habeas corpus claims rather than civil rights claims. "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*, 403 U.S. 388 (1971), and 28 U.S.C. § 1331. See *Standifer v. Ledezma*, 653 F.3d 1276, 1280 (10th Cir. 2011). Mr. Zwierzycki is challenging the basis for his conviction and sentence on criminal charges, not the conditions of his confinement.

Mr. Zwierzycki will be directed to cure the following if he wishes to pursue his claims. Any papers that Mr. Zwierzycki files in response to this order must include the civil action number on this order.

28 U.S.C. § 1915 Motion and Affidavit:

- (1) is not submitted
- (2) is missing affidavit
- (3) is missing certified copy of prisoner's trust fund statement for the 6-month period immediately preceding this filing
- (4) is missing certified statement showing current balance in prison account
- (5) is missing required financial information
- (6) is missing an original signature by the prisoner
- (7) is not on proper form
- (8) names in caption do not match names in caption of complaint, petition or habeas application

- (9) An original and a copy have not been received by the court. Only an original has been received.
- (10) other: The § 1915 motion and affidavit and certificate showing prison account balance are necessary only if the \$5.00 filing fee is not paid in full in advance.

Complaint, Petition or Application:

- (11) is not submitted
- (12) is not on proper form (must use the court's Prisoner Complaint form)
- (13) is missing an original signature by the prisoner
- (14) is missing page nos.
- (15) uses et al. instead of listing all parties in caption
- (16) An original and a copy have not been received by the court. Only an original has been received.
- (17) Sufficient copies to serve each defendant/respondent have not been received by the court.
- (18) names in caption do not match names in text
- (19) other: The only proper Respondent in a habeas corpus action is Applicant's current warden, superintendent, jailer or other custodian. The United States of America is not a proper party to this action.

Accordingly, it is

ORDERED that the action is construed as a habeas corpus action pursuant to 28 U.S.C. § 2241 rather than as a civil rights action filed pursuant to *Bivens*. It is

FURTHER ORDERED that Plaintiff, Robert J. Zwierzycki, cure the deficiencies designated above **within thirty days from the date of this order**. Any papers that Mr. Zwierzycki files in response to this order must include the civil action number on this order. It is

FURTHER ORDERED that Mr. Zwierzycki shall obtain the court-approved forms for filing a Prisoner's Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. § 1915 in a Habeas Corpus Action and Application for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (with the assistance of his case manager or the facility's legal assistant), along with the applicable instructions, at www.cod.uscourts.gov. It is

FURTHER ORDERED that, if Mr. Zwierzycki fails to cure the designated deficiencies **within thirty days from the date of this order**, the action will be dismissed without further notice.

DATED January 27, 2014, at Denver, Colorado.

BY THE COURT:

s/Boyd N. Boland
United States Magistrate Judge