

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

July 31, 2025

Christopher M. Wolpert
Clerk of Court

GREGORY D. CROSBY, a/k/a Gregory
D. Cosby,

Petitioner - Appellant,

v.

A. CILLIO, Warden; FEDERAL
BUREAU OF PRISONS,

Respondents - Appellees.

No. 25-1095
(D.C. No. 1:24-CV-01128-GPG)
(D. Colo.)

ORDER AND JUDGMENT*

Before **HARTZ, EID**, and **CARSON**, Circuit Judges.

Gregory D. Crosby is a prisoner at the United States Penitentiary, Administrative Maximum, in Florence, Colorado. On April 22, 2024, he filed a pro se application for writ of habeas corpus under 28 U.S.C. § 2241. Such an application is proper if the prisoner is seeking to reduce his time in custody. *See Palma-Salazar v. Davis*, 677 F.3d 1031, 1037 n.2 (10th Cir. 2012). Because Crosby has proceeded pro

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

se throughout this litigation, both the district court and this court must liberally construe his pleadings. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). Doing its best to understand Crosby's incoherent claims, the district court interpreted them as seeking additional credits toward his sentence based on educational programs he has completed while incarcerated. The court discerned three possible claims. It rejected two of them under 28 U.S.C. § 2244(a) as successive because they had already been presented to and rejected by the district court in a prior case. As for the third claim, the court understood Crosby to be complaining that he had not been granted credit for some of his coursework. It rejected this claim because the record indicated that Crosby had already received the maximum credit to which he could be entitled. Accordingly, the district court denied the § 2241 application. Crosby appeals. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm the district court.

Crosby is no stranger to this court. Although we count this as his nineteenth appeal, *see Crosby v. Admax*, No. 21-1437, 2022 WL 971872, at *1 (10th Cir. Mar. 31, 2022) (noting that Mr. Crosby "has previously filed 17 appeals before us"), his opening brief asserts that he "has over 47 previous cases in this Circuit." *Aplt. Br.* at 3. (The government's brief catalogues five previous appeals related to this one.) Nevertheless, he has not learned much from the experience. Interpreting his brief as liberally as reasonably possible, we can unearth no rebuttal to the district court's analysis or conclusions other than Crosby's bare assertion that the court erred. He has therefore waived any such claim on appeal. *See Garrett*, 425 F.3d at 841. Crosby's

appellate brief does repeatedly assert that he has been denied due process; but even if that issue has been preserved, he does not provide any factual allegations that might support the claim. We therefore have no choice but to uphold the rulings below.

We **AFFIRM** the judgment of the district court, **DENY** Mr. Crosby's motion to proceed *in forma pauperis*, and **GRANT** the government's motion to supplement the record.

Entered for the Court

Harris L Hartz
Circuit Judge

Appeal Documents

1:24-cv-01128-GPG Crosby v.
Ciolli et al **CASE CLOSED** on
02/27/2025

2241Fed,APPEAL,FBOP
Colo,JD4,PS6X,TERMED

U.S. District Court - District of Colorado

District of Colorado

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SUPPLEMENTAL RECORD ON APPEAL re: [29] filed by Tenth Circuit - Volume I - Pleadings;
(USCA Case No. 25-1095). Text Only Entry. (amona,)

1:24-cv-01128-GPG Notice has been electronically mailed to:

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Attachment A-Z

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 24-cv-01128-GPG

GREGORY D. CROSBY, aka Gregory D. Cosby,

Applicant,

v.

A. CILLIO, Warden, and
FEDERAL BUREAU OF PRISONS,

Respondents.

ORDER DENYING AMENDED APPLICATION FOR WRIT OF HABEAS CORPUS

This matter is before the Court on the Amended Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 ("Amended Application") (D. 18 & D. 19) filed *pro se* by Applicant Gregory D. Crosby on July 12, 2024. On August 16, 2024, Respondents filed a Response to the Amended Application (D. 22). On August 30, 2024, Mr. Crosby filed a Reply (D. 23). On December 23, 2024, Mr. Crosby filed a Motion to Correct/Amend/Modify (D. 25). Respondents filed a Response to Mr. Crosby's Motion to Correct/Amend/Modify (D. 26), arguing that the motion should be denied. After reviewing the pertinent portions of the record in this action, the Court has determined that the Motion to Correct/Amend/Modify and the Amended Application will be denied.

I. Standards of Review

The Court must construe Mr. Crosby's filings liberally because he is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per curiam); *Hall v. Bellmon*, 935

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F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not be an advocate for a *pro se* litigant. *See Hall*, 935 F.2d at 1110.

An application for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 “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.” *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973); *see also McIntosh v. U.S. Parole Comm’n*, 115 F.3d 809, 811 (10th Cir. 1997). Habeas corpus relief is warranted only if Mr. Crosby “is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2241(c)(3). “[T]he types of claims cognizable under § 2241 are those in which an individual seeks either immediate release from, or a shortened period of, physical imprisonment, *i.e.*, placement on parole or in a parole-like custodial setting, or immediate release from, or a shortened period of, custody altogether,” *Palma-Salazar v. Davis*, 677 F.3d 1031, 1037 n.2 (10th Cir. 2012) (citations omitted). Applicant bears the burden to demonstrate he is entitled to relief. *See Gayton v. Romero*, 503 F. App’x 562, 564 (10th Cir. 2012) (denying certificate of appealability because petitioner failed to meet his “burden of proof of clearly showing or stating how his sentence has been calculated by prison authorities, what particular calculations he asserts are erroneous, and the reasons and or authority for his assertions”) (internal quotation marks and citation omitted). *Espinoza v. Sabol*, 558 F.3d 83, 89 (1st Cir. 2009) (“[T]he burden of proof under § 2241 is on the prisoner.”).

II. Discussion

Mr. Crosby is a prisoner in the custody of the Federal Bureau of Prisons (“BOP”), currently incarcerated at Florence ADMAX Penitentiary in Florence, Colorado. He initiated this action on April 22, 2024, by filing *pro se* an Application for Writ of Habeas Corpus Pursuant to 28 U.S.C.

§ 2241. (D. 1). On June 10, 2024, Magistrate Judge Scott T. Varholak ordered Respondents to file a Preliminary Response limited to addressing the affirmative defense of exhaustion of administrative remedies. (D. 9). On July 1, 2024, Respondents filed a Preliminary Response indicating that they did not wish to raise the affirmative defense of exhaustion of administrative remedies as to Applicant's claims. (D. 13). On July 3, 2024, the Court ordered Respondents to show cause why the Application should not be granted. (D. 14). On July 12, 2024, without receiving leave from the Court, Mr. Crosby filed an Amended Application (D. 18 & D. 19). Respondents filed a Response (D. 22), and Mr. Crosby filed a Reply (D. 23).

A. Amended Application

The Amended Application is difficult to understand. Liberally construing his Amended Application, Mr. Crosby alleges that he is concerned that the BOP is not correctly and accurately calculating time credits for education programs he has taken. (D. 19 at 4). Specifically, he states: "Petitioner will also alleged [sic] he doesn't dispute time credit has been given. His concerns deal with are they all being calculate [sic] correctly and accurate [sic]." (*Id.*). He also argues that he has not received the "appropriate assessment classification" under the Act in violation of "due process." (*Id.* at 5). Mr. Crosby maintains that because his classification is not correct, he is not receiving proper credit. (*Id.* at 3). He also argues that he has completed programs, although not EBRR programs under the First Step Act ("FSA"), that were not properly recorded in his program review conducted by his case manager. (*Id.*). Finally, Mr. Crosby makes various statements regarding his place of confinement. (*Id.* at 4-6). While he states that he is "not saying he [is] entitled to a transfer," he argues that "the FSA Act [sic] doesn't do what it [sic] suppose [sic] to do on the transfer issue." (*Id.* at 4).

B. Respondents' Response

In their Response, Respondents construe the Amended Application as asserting the following three claims: (1) The BOP has denied him federal time credits under the First Step Act; (2) the BOP has denied him the incentive of transferring to an institution that is closer to his release residence; and (3) the BOP has denied him due process because it has continued to "assess him as high recidivism" under the First Step Act he has not received a proper classification hearing. (D. 22 at 2); (*see also* D. 26 at 1-2). According to Respondents, the Amended Application is successive and abusive because in a previous habeas action Mr. Crosby brought nearly identical claims as the first and second claims in this action, and he could and should have brought his third claim in the previous habeas action. (D. 22 at 4 & 6-7). Specifically, Respondents argue that Mr. Crosby's previous habeas action, *Crosby v. Cillio*, No. 22-cv-03119-GPG (D. Colo.) ("the previous action"), which was initiated on December 1, 2022, brought the same claims regarding programming credits under the First Step Act and his place of confinement, as the claims he is asserting in the instant action. (*See* D. 22 at 4). As to the first claim, Respondents note that in the Amended Application in the instant action, Mr. Crosby alleges that the BOP did not accurately provide him credit for the following programs: logistics, food services, recreation, Anger Management, Criminal Thinking, and Mindfulness. (D. 22 at 7 (citing D. 19 at 2-3)). Respondents argue that in his prior action, Mr. Crosby alleged that he was denied credit for courses, including Anger Management, Mindfulness, and Criminal Thinking. (*Id.* (citing *Crosby v. Cillio*, No. 22-cv-03119-GPG, D. 10 at 5)). Respondents also note that the administrative remedy used to exhaust administrative remedies for the claims in the instant action is the same administrative remedy used to exhaust administrative remedies in the previous action. (D. 22 at 7).

As to the second claim in the Amended Application in the instant action, which alleges that the BOP has not taken the proper steps to transfer him to a federal prison closer to his home, Respondents argue that he raised a nearly identical claim in his previous action. (*Id.* at 8).

Finally, as to Mr. Crosby's third claim, regarding proper classification, Respondents argue that Mr. Crosby could and should have brought such a claim in the previous action, and therefore, it is an abuse of the writ. (*Id.* at 8-9).

C. Mr. Crosby's Reply

In his Reply, Mr. Crosby states that "[t]he matter before this Court deal [sic] with the Respondents not logging proper classification document on the petitioner program review or not putting the correct/accurate information." (D. 23 at 12). Mr. Crosby states that his Amended Application asserts the following claims:

1. That he take [sic] FSA class [sic] and they are not credit [sic] properly;
 2. His Unit Case Mgr. D. English doesn't have the correct information;
 3. The Unit Team continue [sic] to keep his recidivism at a high level;
 4. That the FSA is vaguing [sic] ambiguous and doesn't do what it [sic] suppose [sic] to do; [and]
 5. He also took EBBR programming and not getting [sic] the proper credit whether if they FSA or not. It [sic] part of the Unit Team and Inmate Program Review[.]
- See P.S. 5321.09 Unit Mgt/ Inmate Program Review date 4-8-24.

(D. 23 at 3). Mr. Crosby argues that his claims in this action are not the same as were raised in the previous action. (*Id.*). He alleges that in the current habeas action he is arguing that the Unit Team is not considering the correct information at his program review. (*Id.*). According to Mr. Crosby, such a claim was not raised in his previous action. (*Id.*). As to whether the current claim is an abuse of the writ because it could and should have been raised in his previous habeas action, Mr. Crosby

makes non-sensical arguments. (*Id.*). He states that in the previous action, the Court alleged that Mr. Crosby did not make a timely appeal. (*Id.* at 5-6). Mr. Crosby then states that “[r]egardless [of] how many times [he has] filed habeas [actions] its [sic] because of the government on [sic] malicious and egregious acts or not doing their jobs.” (*Id.* at 6).

III. Analysis

The first challenge for the Court is to decipher the exact claims Mr. Crosby is asserting. To the extent that Mr. Crosby is challenging that the BOP is not properly applying federal time credits under the FSA and that the BOP is denying him the incentive to transfer him to an institution closer to his residence, the Court agrees with the Respondents that such claims are successive. In the previous action, Mr. Crosby alleged that he was being denied time credits, which he was entitled to under the First Step Act. *See Crosby*, No. 22-cv-03119 at D. 10 at 4. He also discussed that the BOP should transfer him to a different BOP facility that is closer to his primary residence; however, he also stated that he understood such transfer request could not be reviewed by any court, so he was not asserting a claim seeking such a transfer. *Id.* at D. 10 at 13-15. On December 5, 2023, this Court denied Mr. Crosby’s previous habeas application. *See id.* at D. 36 (Order Denying Application for Writ of Habeas Corpus). The Court determined that Mr. Crosby was not eligible to have time credits he earned under the Act applied to his sentence. *See id.* Further, to the extent Mr. Crosby was asserting a habeas claim that he should be transferred to a different facility, the Court denied the claim, noting that the First Step Act specifically precludes judicial review of an inmate’s place of confinement and, further, a claim requesting transfer to a different federal facility is not a cognizable habeas claim. *See id.*

Pursuant to 28 U.S.C. § 2244(a), the Court need not entertain an application for a writ of habeas corpus pursuant to § 2241 “if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.” Thus, to the extent that Mr. Crosby is asserting claims arguing that the BOP is not properly applying federal time credits under the FSA and that the BOP is denying him the incentive to transfer him to an institution closer to his residence, the claims are denied as successive.

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Respondents construe Mr. Crosby's third claim as arguing that the BOP has denied him due process because he has not received a proper classification hearing under the FSA and, therefore, he has continued to be assessed as high recidivism. (D. 22 at 8-9). Respondents argue that this claim is abusive because Mr. Crosby could and should have raised the claim in his previous action. (*Id.*). The Court disagrees. In his Amended Application in this action, Mr. Crosby references a program review date of April 19, 2024 (*see* D. 19 at 3), and in his Reply he references a program review date of April 8, 2024 (*see* D. 23 at 3). It is unclear whether the April 2024 program review occurred on April 8th or April 19th of 2024; however, in either case, these program review dates occurred after the previous action was decided on December 5, 2023. Therefore, if there is a cognizable habeas claim relating to a program review that occurred in April 2024, Mr. Crosby could not have raised such a claim in his previous habeas action.

Although his claims are not entirely clear, the Court liberally construes Mr. Crosby to be arguing that because his Unit Team is not considering all of his completed classes in his program review, he has not received a proper classification. And, if his classification was proper, Mr. Crosby could be assessed at a lower recidivism level, which would allow him to have his FSA

time credits applied. However, to the extent Mr. Crosby is arguing that if his completed classes/ programs were considered during his program review, the duration of his sentence might be less, the Court is not persuaded.

Under the FSA, an eligible inmate may *earn* time credits irrespective of his recidivism risk. *See* 18 U.S.C. § 3624(g) and 28 C.F.R. § 523.42. However, only inmates with low and minimum recidivism risk scores may have these earned credits *applied* to their prerelease custody or early transfer to supervised release. *Id.*; *also see* 18 U.S.C. § 3624(g); 28 C.F.R. § 523.44(c)(1) and (d)(1). An inmate's recidivism risk score is calculated by using the "Prisoner Assessment Tool Targeting Estimated Risk and Needs" ("PATTERN") based on considerations such as the inmate's age, severity of current offense, history of violence, programs completed, and other factors. *See generally* 2023 Review and Revalidation of the First Step Act Risk Assessment Tool, DOJ, Office of Justice Programs, National Institute of Justice (August 2024), available at <https://www.ojp.gov/pdffiles1/nij/309264.pdf> (last visited Feb. 26, 2025); *see also* https://www.bop.gov/inmates/fsa/docs/male_pattern_form.pdf (last visited Feb. 26, 2025) ("Male PATTERN Risk Scoring"). The BOP calculates a prisoner's PATTERN score as two separate scores: the inmate's risk of re-offending in general and the inmate's risk of re-offending with an act of violence. *See* Male PATTERN Risk Scoring. These scores determine whether an inmate is in a minimum-, low-, medium-, or high-risk category for re-offending. *See* https://www.bop.gov/inmates/fsa/docs/fsa_cut_points.pdf (last visited Feb. 26, 2025). Inmates with high or medium PATTERN scores do not qualify to automatically have Federal Time Credits ("FTCs") applied toward early transfer to prerelease custody and/or supervised release. *See* 18 U.S.C. § 3624(g) and 28 C.F.R. § 523.44(d).

In Mr. Crosby's previous action, the BOP attached Mr. Crosby's PATTERN worksheet summary, as of April 27, 2023, showing that he was assigned a high-risk category for reoffending. *See Cosby*, 22-cv-03119-GPG, at D. 32-2 at 34. In the PATTERN worksheet summary, Mr. Crosby received a deduction of twelve points to his general score and a deduction of four points to his violent score based on the number of programs he completed, which was reported as fifty-four. *See id.* Based on the most recent Male PATTERN Risk Scoring, this is the maximum deduction of points allowed based on programs completed. *See Male PATTERN Risk Scoring; see also Cosby*, 22-cv-03119-GPG at D. 32-2 at 38. In the Male PATTERN Risk Scoring, if an inmate has completed ten (10) or more programs, he receives a deduction of twelve points to his general score

and a deduction of four points to his violent score. *See Male PATTERN Risk Scoring.* The Male PATTERN Risk Scoring does not allow any additional deductions based on programs completed. Thus, whether Mr. Crosby completed ten programs or fifty-four programs, he would only receive a deduction of twelve points to his general score and a deduction of four points to his violent score.

Therefore, even if Mr. Crosby is correct that some of the programs he completed were "not considered" in his most recent program review, it would not have affected his PATTERN risk score because he is already receiving the maximum deduction to his score for programs completed. As such, Mr. Crosby has not met his burden to demonstrate that the execution of his sentence was affected by the fact that some of the programs he completed were not accurately considered in his program review. Therefore, to the extent Mr. Crosby is asserting a habeas claim based on his program review not properly considering classes he has completed, his habeas claim is denied.

Additionally, to the extent Mr. Crosby is attempting to assert a different claim that the Court and the Respondents have not specifically discussed, such as that his program reviews were

deficient for some other reason, the Court concludes that his Amended Application is vague and conclusory. Pursuant to Habeas Rules 2(c)(1) and 2(c)(2), a habeas applicant must identify the specific federal claim he is asserting, and he must provide specific factual allegations in support of the claim. These habeas corpus rules are more demanding than the rules applicable to ordinary civil actions, which require only notice pleading. *See Mayle v. Felix*, 545 U.S. 644, 655 (2005). Naked allegations of constitutional and/ or federal violations are not cognizable in a habeas corpus action. *See Ruark v. Gunter*, 958 F.2d 318, 319 (10th Cir. 1992) (per curiam). The Amended Application is difficult to understand, and Applicant has not met his burden of adequately asserting that he is entitled to relief for any habeas claim.

Finally, the Court will consider Mr. Crosby's Motion to Correct/Amend/Modify (D. 26) and the Respondents' Response (D. 37). In his Motion to Correct/Amend/Modify, which was filed on December 23, 2024 -- more than 3 ½ months after his Reply was filed on August 30, 2024 -- Mr. Crosby argues that Respondents have misconstrued his claims. (D. 25 at 4). Specifically, Mr. Crosby argues that when Respondents argue that his claim regarding having FSA time credits applied to his sentence is successive, they failed to consider that Mr. Crosby filed a new administrative remedy (Remedy No. 1210547-A1). (*Id.* at 4-5). According to Mr. Crosby, the new administrative remedy relates to the "Exemption Clause for high recidivism inmate [sic]," which outlines a procedure for high-recidivism inmates to petition the Warden for approval to have FSA time credits applied to his sentence. (*Id.*). Mr. Crosby states that he is awaiting a response for his new administrative remedy, which is currently at the Central Office. (*Id.* at 5). Mr. Crosby requests that the Court consider the new administrative remedy as "supplemental" to his Reply or, in the alternative, that the Court grant an evidentiary hearing. (*Id.* at 6).

Respondents argue that Mr. Crosby's Motion to Correct/Amend/Modify should be denied. (D. 26). According to Respondents, Mr. Crosby is "effectively attempting to reassert his now fully briefed claims in this action on an entirely new basis, the 'Exemption Clause.'" (*Id.* at 3). Respondents argue that in the Motion to Correct/Amend/Modify, Mr. Crosby apparently concedes that the instant habeas action is successive to the extent it was based on the legal arguments presented to the BOP in the same administrative remedy as relied on in the prior habeas case; therefore, he points to a new administrative remedy (which is currently pending at the Central Office for the BOP) and a new legal argument. (*Id.*).

The Court agrees with Respondents that Mr. Crosby's Motion to Correct/Amend/Modify is not a "supplemental" argument to support the claims asserted in his Amended Application. Instead, Mr. Crosby asserts a new argument based on the "Exemption Clause" and points to a new administrative remedy. Notably, the administrative remedy Mr. Crosby relies on his Motion to Correct/Amend/Modify was received by the Central Office on December 9, 2024 (*see* D. 25 at 8), which is well after this action was initiated on April 22, 2024 (*see* D. 1).

Any claims raised for the first time in an Applicant's reply brief are not properly before the Court, and courts generally decline to address claims raised for the first time in a responsive brief, even if the applicant is proceeding *pro se*. *See, e.g., United States v. Carpenter*, 24 F. App'x 899, 905 n.5 (10th Cir. 2001) (collecting cases); *Speed v. Allbaugh*, No. CIV-18-962-R, 2019 WL 1805021, at *16 n.5 (W.D. Okla. Mar. 26, 2019) (citing cases), *report and recommendation adopted*, 2019 WL 1852513 (W.D. Okla. Apr. 24, 2019); *Jones v. Suthers*, No. 07-cv-00523-PAB-BNB, 2009 WL 1537882, at *8 n.3 (D. Colo. May 29, 2009). Here, Mr. Crosby did not even raise the claim based on the Exemption Clause in his Reply brief (*see* D. 23) but instead waited to assert

the claim for the first time in his untimely Motion to Correct/Amend/Modify (D. 25). Thus, the new claim based on the Exemption Clause and the new administrative remedy will not be considered by the Court in this action. Respondents have already fully briefed the merits of the Amended Application. Further, it appears that the new claim, which is apparently still pending in the Central Office, is not exhausted. As such, Applicant's Motion to Correct/Amend/Modify (D. 25) will be denied. For the same reasons, Mr. Crosby's alternative request for an evidentiary hearing is denied as well.

Thus, for the reasons discussed in this order, Mr. Crosby is not entitled to habeas relief and the Amended Application will be denied.

Accordingly, it is

ORDERED that Mr. Crosby's Motion to Correct/Amend/Modify (D. 25) is DENIED. It is

FURTHER ORDERED that the Amended Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (D. 18 & D. 19), filed by Applicant Gregory D. Cosby on July 12, 2024, is DENIED and this case is dismissed. It is

FURTHER ORDERED that leave to proceed *in forma pauperis* on appeal is denied. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith. *See Coppedge v. United States*, 369 U.S. 438 (1962). If Applicant files a notice of appeal he must also pay the full appellate filing fee or file a motion to proceed *in forma pauperis* in the United States Court of Appeals for the Tenth Circuit within thirty days in accordance with Fed. R. App. P. 24.

DATED February 27, 2025

BY THE COURT:


GORDON P. GALLAGHER
United States District Judge