

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JUSTIN GARDNER,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

8:17CV390

MEMORANDUM AND ORDER

This matter is before the court on the Notice of Appeal (filing 41) filed by Petitioner on February 22, 2022, and a memorandum from the Clerk of the Court requesting a ruling as to Petitioner's authorization to proceed in forma pauperis on appeal (filing 42). Petitioner seeks to appeal the court's Memorandum and Order (filing 4) and Judgment (filing 5) entered on December 5, 2017, dismissing Petitioner's habeas petition without prejudice for failing to pay the filing fee or submit a motion to proceed in forma pauperis; the November 28, 2018 orders (filings 32 & 33) entered by the Eighth Circuit Court of Appeals directing Petitioner to pay the appellate filing fee or file a motion to proceed in forma pauperis and specifying the materials that would be reviewed in Petitioner's previous appeal; the Eighth Circuit's February 1, 2019 Judgment (filing 35) and March 28, 2019 Mandate (37) dismissing Petitioner's prior appeal for lack of jurisdiction; and the Judgment (filing 38) and Mandate (filing 39) issued by the Eighth Circuit Court of Appeals on January 28, 2022, denying Petitioner's motion for authorization to file a successive habeas application.

This is the third appeal Petitioner has filed in this case. Petitioner filed his first appeal of the court's December 5, 2017 judgment on May 7, 2018, and the Eighth Circuit Court of Appeals denied a certificate of appealability and dismissed the appeal on July 31, 2018. (Filings 12 & 20; *see also* Filing 21.) Petitioner then filed a second frivolous appeal on November 20, 2018, in which he again sought to

challenge the December 5, 2017 dismissal of his habeas petition. (Filings 22 & 23.) That appeal was likewise unsuccessful. (*See* Filings 35 & 37.) Now, Petitioner is back and trying to challenge this court's judgment again as well as the Eighth Circuit's denial of his second appeal and his motion for authorization to file a successive habeas application.

Petitioner's appeal is clearly frivolous and not taken in good faith because (1) he has already prosecuted two appeals of this court's judgment dismissing his habeas petition, (2) this matter has been closed for over four years and his appeal is grossly untimely, (3) he is improperly attempting to have the Eighth Circuit reconsider orders and judgments that essentially have already been reviewed on appeal, and (4) the Eighth Circuit Court of Appeals' denial of his motion for authorization to file a successive habeas application is not appealable. *See* 28 U.S.C. § 2244(3)(E). Thus, Petitioner may not proceed in forma pauperis on appeal. *See* Fed. R. App. P. 24(a)(3) and 28 U.S.C. § 1915(a)(3).

IT IS THEREFORE ORDERED that: Petitioner may not proceed on appeal in forma pauperis. This matter is closed, and Petitioner should refrain from filing any further frivolous appeals.

Dated this 25th day of February, 2022.

BY THE COURT:



Richard G. Kopf
Senior United States District Judge