UNITED STATES COURT OF APPE

FOR THE TENTH CIRCUIT

In re: DANIEL PAUL STARR,

Petitioner.

(D.C. Nos. 4:20-CV-00665-GKF-JFJ &
4:20-CV-00226-JED-JLJ)
(N.D. Okla.)

ORDER

Before **HOLMES, PHILLIPS,** and **EID,** Circuit Judges.

Daniel Paul Starr petitions for a writ of mandamus. We deny the petition.

Mr. Starr was convicted in Oklahoma state court of rape by instrumentation, first degree rape, and unauthorized use of a motor vehicle. Since being convicted, he has pursued various forms of relief from both state and federal courts. Most recently, he has requested this court issue certificates of appealability in two pending habeas matters. *See Starr v. Crow*, No. 21-5001; *Starr v. Crow*, No. 21-5006.

The mandamus petition discusses Mr. Starr's underlying habeas claims, including claims arising out of a DNA report that the government delivered to his counsel during his trial, and alleges that prison officials have subjected him to obstacles and impediments in pursuing his claims. It is unclear, however, exactly what relief Mr. Starr is requesting from this court. A writ of mandamus is not an appropriate vehicle to raise or re-raise federal habeas claims challenging a state conviction. And to the extent that Mr. Starr asks us to order the state court to rule on certain filings, we cannot do so. We

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do not have authority to issue a writ of mandamus to a state court. *See Van Sickle v. Holloway*, 791 F.2d 1431, 1436 n.5 (10th Cir. 1986).

The petition also cites 28 U.S.C. § 2244(b)(2), which concerns authorization of second-or-successive § 2254 claims. To the extent Mr. Starr is seeking authorization to file a new § 2254 application, we deny the request. Mr. Starr cites various new laws regarding DNA testing, but he does not identify "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," as required for authorization under 28 U.S.C. § 2244(b)(2)(A). Further, the petition indicates that the state provided the DNA report to his counsel during his trial. Because the "factual predicate for the claim" was discoverable (and actually was discovered) previously, the evidence of the DNA report does not satisfy § 2244(b)(2)(B).

The petition for a writ of mandamus is denied. The motion to proceed without prepayment of costs and fees also is denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

FILED
United States Court of Appeals
Tenth Circuit

December 15, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DANIEL PAUL STARR,

Petitioner - Appellant,

v.

SCOTT CROW, Director,

Respondent - Appellee.

No. 21-5001
(D.C. No. 4:20-CV-00665-GKF-JFJ)
(N.D. Okla.)

DANIEL PAUL STARR,

Petitioner - Appellant,

v.

SCOTT CROW, Director,

Respondent - Appellee.

No. 21-5006
(D.C. No. 4:20-CV-00226-JED-JLJ)
(N.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HOLMES**, **PHILLIPS**, and **EID**, Circuit Judges.

Daniel Paul Starr, an Oklahoma inmate representing himself, requests a certificate of appealability (COA) so he can appeal from the district court's orders dismissing two

* This order 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 Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

28 U.S.C. § 2254 habeas matters. We dismiss No. 21-5001 for lack of jurisdiction, and we deny a COA in and dismiss No. 21-5006.

BACKGROUND

In 2002, Mr. Starr was convicted in Oklahoma state court of rape by instrumentation, first degree rape, and unauthorized use of a motor vehicle, all after prior convictions for two or more felonies. He was sentenced to consecutive twenty-year sentences on each count. The Oklahoma Court of Criminal Appeals affirmed. Mr. Starr then unsuccessfully sought post-conviction relief from the state courts before filing a § 2254 application for habeas relief in federal district court. The district court denied the application, and this court denied a COA, *Starr v. Ward*, 221 F. App'x 689, 691 (10th Cir. 2007). In 2019, this court further denied Mr. Starr's motion for authorization to file a second-or-successive § 2254 application. *In re Starr*, No. 19-5088 (10th Cir. Oct. 16, 2019) (unpublished).

In May 2020, Mr. Starr filed in the district court a document entitled "Motion for Enlargement of Time to File an [sic] Second Post-Conviction Appeal Out-of-Time Order Filed." The district court directed the clerk to open the matter as a § 2254 action, and it became case No. 20-CV-00226. The district court held, however, that the filing was insufficient to invoke its habeas jurisdiction. It further noted that Mr. Starr had already pursued relief under § 2254, so it would lack jurisdiction over another § 2254 application if he were to file one without this court's prior authorization. *See* 28 U.S.C. § 2244(b)(3); *In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008) (per curiam). On June 9, 2020, the district court administratively closed the matter. It directed that the case could be

reopened if, within 30 days, Mr. Starr filed a § 2254 application on the court's approved form, accompanied by either the filing fee or a motion to proceed without prepayment of costs and fees.

Mr. Starr did not file anything within the 30-day period. In December 2020, however, he filed a "Notice of Intent to Appeal" asking the district court to hear his claims and referring to claims he was pursuing in Oklahoma state court. The district court directed the clerk to open the matter as a separate § 2254 action, and it became case No. 20-CV-00665. As with case No. 20-CV-00226, the district court concluded that the "Notice of Intent to Appeal" was not sufficient to invoke its jurisdiction or to properly commence a habeas action. And it again noted that Mr. Starr would have to obtain this court's authorization before filing another § 2254 application. On December 29, 2020, it dismissed case No. 20-CV-00665, without prejudice, for lack of jurisdiction.

While the district court was considering the "Notice of Intent to Appeal," Mr. Starr had been preparing a lengthy application for a COA, which the prison mailed on December 31, 2020. The district court filed that document in case No. 20-CV-00665 on January 8, 2021, directing the clerk to docket it as both a notice of appeal and an application for a COA. This court opened the appeal as No. 21-5001 and then abated it to allow the district court to consider issuing a COA.

Upon further examination, the district court concluded that in filing the "Notice of Intent to Appeal," Mr. Starr did not intend to commence a new § 2254 action, but instead intended to appeal and seek a COA in case No. 20-CV-00226. It therefore denied a COA in case No. 20-CV-00665. But it also ordered the clerk to file Mr. Starr's papers from

case No. 20-CV-00665 in case No. 20-CV-00226. The cross-filing of the "Notice of Intent to Appeal" in case No. 20-CV-00226 triggered a second appeal, No. 21-5006. The district court also denied a COA in case No. 20-CV-00226.

Mr. Starr now requests a COA to appeal in both No. 21-5001 and No. 21-5006.

DISCUSSION

I. No. 21-5001

Appeal No. 21-5001 arises out of the December 29, 2020, order dismissing case No. 20-CV-00665 without prejudice. We first must satisfy ourselves that we have jurisdiction to consider this matter. *See United States v. Battles*, 745 F.3d 436, 447 (10th Cir. 2014). Upon consideration, we conclude that we do not.

A party seeking to appeal in a civil case, including a habeas case, must file a timely notice of appeal to confer jurisdiction on this court. *See Manco v. Werholtz*, 528 F.3d 760, 762 (10th Cir. 2008). To be effective, a notice of appeal must (A) identify the appealing party or parties, (B) "designate the judgment, order, or part thereof being appealed," and (C) "name the court to which the appeal is taken." Fed. R. App. P. 3(c)(1). These requirements are jurisdictional in nature. *See Smith v. Barry*, 502 U.S. 244, 248 (1992). We construe the requirements liberally, *see id.*, and have cautioned against "hypertechnical" rulings "that a notice of appeal does not challenge a judgment or order that the appellant clearly wished to appeal," *Sines v. Wilner*, 609 F.3d 1070, 1074 (10th Cir. 2010). A notice confers jurisdiction on this court "so long as the intent to appeal from a specific ruling can fairly be inferred by probing the notice and the other party was not misled or prejudiced." *Id.* (internal quotation marks omitted).

The first page of the application for COA refers to review of the order dated June 9, 2020. The application is lengthy and difficult to follow, but it does not appear to mention the December 29 order at all. That is likely due to the fact that Mr. Starr was preparing the application at the same time that the district court was considering what to do with the "Notice of Intent to Appeal" in case No. 20-CV-00665. Pages of the application for COA are dated December 21, 23, and 24, and the application was mailed on December 31, probably before Mr. Starr ever received a copy of the December 29 dismissal order. While preparing the application for COA on December 21, 23, and 24, Mr. Starr did not know that the district court would soon dismiss case No. 20-CV-00665, and it would have been impossible for him to designate the December 29 order for review. He "could hardly have sought our appellate review of a district court order that did not exist." *Battles*, 745 F.3d at 449.

Given the timing of the application for COA and its plain reference to the June 9 order, we are not satisfied that the application also sought review of the December 29 order. *See Sines*, 609 F.3d at 1075 (concluding that document that referred to one habeas matter could not be construed to appeal from different habeas matter). Nor did Mr. Starr file any other documents during the 30-day appeal period that would satisfy Rule 3 as to the December 29 order. *See Smith*, 502 U.S. at 248-49 ("If a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal."). Under these circumstances, we do not have jurisdiction to consider appeal No. 21-5001. *See Battles*, 745 F.3d at 450, 452. We therefore dismiss No. 21-5001 for lack of jurisdiction.

II. No. 21-5006

Appeal No. 21-5006 arises out of the June 9, 2020, order administratively closing case No. 20-CV-00226. Again, we must initially satisfy ourselves as to our jurisdiction. Unlike No. 21-5001, we conclude that we have jurisdiction. But we deny a COA.

A. Jurisdiction

Two jurisdictional requirements are relevant in this matter. In addition to the requirement of a timely notice of appeal, *see Manco*, 528 F.3d at 762, this court can review only "final decisions" of the district court under 28 U.S.C. § 1291.

The June 9 order administratively closed the case but allowed it to be reopened if, within 30 days, Mr. Starr filed a § 2254 action using the court's form. An order directing administrative closure is not necessarily an appealable final decision, *see Crystal Clear Commc'ns, Inc. v. Sw. Bell Tel. Co.*, 415 F.3d 1171, 1176 (10th Cir. 2005), although it can be, if it ends the litigation in the district court, *see Hayes Fam. Tr. v. State Farm Fire & Cas. Co.*, 845 F.3d 997, 1003-04 (10th Cir. 2017). Ultimately, however, we need not decide whether the June 9 order was an appealable final decision, because we have jurisdiction regardless.

If the June 9 order ripened into a final decision, it became final no earlier than July 9, at the end of the 30-day period the order set for filing a § 2254 action on the court's form. *See Morris v. City of Hobart*, 39 F.3d 1105, 1109-10 (10th Cir. 1994). The district court did not enter a separate judgment under Fed. R. Civ. P. 58(a), giving Mr. Starr the benefit of Rule 58(c)(2)(B), which deems the decision to be final 150 days later, on December 6, 2020. Mr. Starr had 30 days to appeal, *see* Fed. R. App. P. 4(a)(1),

making the appeal deadline January 5, 2021. Before January 5, Mr. Starr filed not only his "Notice of Intent to Appeal," but also his application for a COA, which specifically indicated that he sought review of the June 9 decision. *See Smith*, 502 U.S. at 248-49 ("If a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal."). Accordingly, if the June 9 order ripened into an appealable final decision, Mr. Starr filed a timely notice of appeal and we have jurisdiction to consider the order.

Even if the June 9 order did not ripen into an appealable final decision, however, we still have jurisdiction. Noting potential confusion over the order's appealability, in February 2021 the district court not only denied Mr. Starr's application for a COA, but also declared its order to be "a final order terminating this action" and ordered the clerk to designate the case "as finally closed rather than administratively closed" and to enter a separate Rule 58(a) judgment. No. 21-5006, R. Vol. IV at 73-74. The district court entered that judgment on February 4, 2021. Only a few days later, well within the 30-day appeal period, Mr. Starr filed both a document that this court construed as an amended notice of appeal and another document indicating an intent to appeal. Therefore, even if the June 9 order initially was not an appealable final decision, we have jurisdiction because the district court subsequently entered a final judgment, and Mr. Starr filed a timely notice of appeal from that judgment.

B. COA Analysis

Mr. Starr must obtain a COA to proceed with this matter. *See* 28 U.S.C. § 2253(c)(1)(A). Because the district court dismissed his filing on a procedural ground,

for a COA he must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Before this court, Mr. Starr focuses on arguing the merits of his habeas claims. He does not address the reasons why the district court dismissed his "Motion for Enlargement of Time"—that it was not sufficiently substantial to invoke the district court's habeas jurisdiction and that, if construed as a § 2254 habeas application, it would be barred unless Mr. Starr obtained this court's prior authorization under § 2244(b)(3). Neither does he address his failure to file a § 2254 action using the district court's form.

As the district court noted, Mr. Starr has already pursued relief under § 2254. *See Starr*, 221 F. App'x at 689-91. Thus, he must obtain this court's authorization before he can file another § 2254 application in district court. *See* 28 U.S.C. § 2244(b)(3). And as the district court recognized, it lacks jurisdiction to consider an unauthorized second-or-successive § 2254 application. *See In re Cline*, 531 F.3d at 1251. The "Motion for Enlargement of Time" appeared to seek relief in the nature of habeas, but Mr. Starr did not obtain this court's authorization before filing it. For this reason alone, the district court could not consider the merits of the filing. Given that the district court lacked jurisdiction, no reasonable jurist could debate whether it acted correctly in dismissing the filing. We therefore deny a COA in No. 21-5006.

CONCLUSION

We dismiss No. 21-5001 for lack of jurisdiction, and we deny a COA in and dismiss No. 21-5006. Because Mr. Starr has failed to show "the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues," *DeBardeleben v. Quinlan*, 937 F.2d 502, 505 (10th Cir. 1991), we deny his motion to proceed without prepayment of costs or fees. We further deny his motion for a stay and his "sworn affidavit" dated July 19, 2021, which we have construed as a second motion for the appointment of counsel.

Entered for the Court

Allison H. Eid
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DANIEL PAUL STARR,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 20-CV-0226-JED-JFJ**
	)	
SCOTT CROW, Director,	)	
	)	
Respondent.	)	

ORDER DENYING MOTIONS AND CLOSING CASE

This **administratively closed** matter is before the Court on two motions filed by Petitioner Daniel Paul Starr: a motion for certificate of appealability (Doc. 7) and a motion for leave to proceed on appeal *in forma pauperis* (Doc. 8). For the reasons stated herein, the Court denies both motions and orders this case finally closed.

I.

Starr, a state inmate appearing *pro se*, initiated this action on May 21, 2020, by filing a "motion for enlargement of time to file a second post-conviction appeal out-of-time order filed" (Doc. 1). Because the motion identified Starr as "a state prisoner in state custody" and included references to his attempts to obtain postconviction relief in state court and to "exhaust state remedies," Doc. 1, at 1-4, the Court directed the Clerk of Court to open this matter as a 28 U.S.C. § 2254 habeas corpus action.

In an order (Doc. 2) filed June 9, 2020, the Court denied Starr's motion and ordered this matter administratively closed, subject to reopening if Starr (1) filed a properly authorized third

§ 2254 petition[1] and (2) either submitted the requisite filing fee or filed a motion to proceed *in forma pauperis* within 30 days of the order. Five months later, on November 9, 2020, Starr submitted a notice of change of address (Doc. 3) and a letter (Doc. 4) requesting "one copy of a certificate of appealability." Understanding Starr's letter as requesting a form, the Clerk of Court sent Starr a response letter (Doc. 5) indicating that the Clerk's office does not maintain a form for requesting a certificate of appealability.

Before taking any of the steps necessary to support reopening this matter, Starr filed a notice of appeal (Doc. 6) on December 8, 2020.[2] The notice states, in its entirety:

> Comes now Daniel Paul Starr, appearing pro se as the Petitioner, hereby request that the U.S. District Court here [sic] my claims as I try to present them in state district court, Tulsa County.
>
> #1. Due to transfer on 8-24-2020 I am without inmate legal assistant. I am clueless functioning illiterate, and Covid-19 lockdowns plus three (3) riots on the units I live on—no one to help me.
>
> #2. Law library lockdown . . . on a deadline, January 7, 2021 (PC-2019-600).

Doc. 6, at 1 (irregular capitalization omitted).

On January 8, 2021, Starr filed a motion for certificate of appealability (Doc. 7). Seven days later, he filed a motion for leave to proceed on appeal *in forma pauperis* (Doc. 8). On January

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[1] In the order, the Court advised Starr about the steps he would need to take to properly commence a habeas action, reminded him that he had previously filed two § 2254 petitions in this court challenging the judgment entered against him in the District Court of Tulsa County, Case No. CF-2001-963, and further advised him that he must obtain authorization from the United States Court of Appeals for the Tenth Circuit before filing a third § 2254 petition challenging the same judgment. Doc. 2, at 2-3.

[2] The Clerk of Court received the notice of appeal on December 16, 2020. Doc. 6, at 1. But Starr declares, under penalty of perjury, that he delivered the notice to prison officials for mailing, with postage prepaid, on December 8, 2020. Doc. 6, at 2. The Court thus deems the notice filed on December 8, 2020. *See* Rule 3(d), *Rules Governing Section 2254 Cases in the United States District Courts*.

20, 2021, the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") docketed Starr's appeal as Case No. 21-5006. Doc. 11.

II.

Starr requests a certificate of appealability on several issues and seeks leave to proceed on appeal, in Case No. 21-5006, without prepayment of the $505 appellate docketing and filing fees. Docs. 7, 8. For the following reasons, the Court denies both motions.

A. The administrative closing order may not be a final, appealable order.

First, Starr may be attempting to appeal from an order that is not a final, appealable order. When Starr filed his notice of appeal on December 16, 2020, the only order filed in this matter was the administrative closing order (Doc. 2), filed June 9, 2020. In that order, the Court concluded that this matter should be administratively closed because Starr did not take the steps necessary to properly commence a habeas action. Doc. 2. Ordinarily, an administrative closing order merely removes a case from the district court's docket of active cases and does not constitute a final, appealable order under 28 U.S.C. § 1291. *Hayes Family Trust v. State Farm Fire & Cas. Co.*, 845 F.3d 997, 1003 & n.4 (10th Cir. 2017). Thus, to the extent Starr's notice of appeal can be read as signifying his intent to appeal from the June 9, 2020 administrative closing order, it appears he is attempting to appeal from an order that is not a final, appealable order.

However, in some circumstances, "an administrative closing order may mature into a final, appealable order." *Hayes Family Trust*, 845 F.3d at 1003 n.4. Specifically, the Tenth Circuit has held "that an administrative closing order that notifies the parties that the case will be dismissed with prejudice absent action on their part within a specified period of time is sufficient to terminate a case." *Morris v. City of Hobart*, 39 F.3d 1105, 1110 (10th Cir. 1994). But here the Court did not notify Starr in the administrative closing order that this matter would be dismissed absent

further action on his part. Instead, the Court advised Starr of the steps he would need to take to commence a habeas action and further advised him that this matter could be reopened if he completed those steps no later than 30 days after entry of the administrative closing order. Doc. 2, at 2-3. Starr did not properly commence a habeas action within the 30-day time period and did not request additional time to do so. To date, however, the Court has neither dismissed this matter nor entered a separate judgment, as required by Fed. R. Civ. P. 58(a). Because the administrative closing order included no language advising Starr that the matter might be dismissed with prejudice if he failed to take further action, *Morris*'s holding seems inapplicable, and the administrative closing order may not be a final, appealable order.

B. If the administrative closing order can be construed as a final, appealable order, the notice of appeal may not be sufficient to invoke appellate jurisdiction.

Second, even assuming *Morris*'s holding applies and the June 9, 2020 administrative closing order (Doc. 2) could be construed as a final, appealable order, the notice of appeal may not be sufficient to invoke appellate jurisdiction. In a civil action, a notice of appeal must be filed within 30 days of entry of judgment. Fed. R. App. P. 4(a)(1)(A). In addition, the notice of appeal must designate the order being appealed. Fed. R. App. P. 3(c)(1)(B). Both of these requirements are jurisdictional. *Williams v. Akers*, 837 F.3d 1075, 1078 (10th Cir. 2016). In this case, the notice of appeal appears to be timely but does not clearly designate the order being appealed.

Assuming *Morris* applies, the administrative closing order would have matured into a final, appealable order, by its terms, on July 9, 2020, when the time expired for Starr to reopen this matter by filing a properly authorized third § 2254 petition. Because the Court has not entered a separate judgment, as required by Fed. R. Civ. P. 58(a), Starr had 180 days from July 9, 2020, to file a timely notice of appeal challenging the administrative closing order. *See* Fed. R. App. P.

4(a)(1)(A) (providing notice of appeal in civil action must be filed within 30 days of entry of judgment); Fed. R. App. P. 4(a)(7)(A)(ii) (providing that if Fed. R. Civ. P. 58(a) requires a separate document, a judgment or order is entered for purposes of Rule 4(a) "when the judgment or order is entered in the civil docket and the earlier of either (1) the filing of the separate document or (2) the passage of 150 days from the entry of the judgment or order in the civil docket). Starr's December 8, 2020, notice of appeal is therefore timely as it was filed 152 days after entry of the administrative closing order.

Nevertheless, the notice of appeal, even liberally construed, may not sufficiently designate the administrative closing order as the order appealed from. Under Fed. R. App. P. 3(c)(1)(B), the notice of appeal must "designate the judgment, order, or part thereof being appealed." Courts should liberally construe the notice of appeal to determine whether it satisfies the designation requirement. *Williams*, 837 F.3d at 1078. And liberal construction is particularly appropriate when the appellant appears *pro se*. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). But Starr's notice of appeal not only fails to mention the Court's administrative closing order, it fails to acknowledge that the order was filed or that the Court directed him to take further steps to properly commence a habeas action. As set forth above, the notice of appeal (1) asks this Court to consider claims that Starr represents he is pursuing in Tulsa County District Court, (2) suggests he cannot proceed without legal assistance, (3) references prison lock downs and riots, and (4) asserts that a library lock down was impeding his ability to comply with a January 7, 2021 deadline in a state postconviction proceeding. Doc. 6. Even a generous construction of this notice of appeal does not reveal Starr's intent to appeal from the administrative closing order.

And Starr's motion for a certificate of appealability, while voluminous, sheds no further light on the matter. To be fair, the motion for a certificate of appealability does state that Starr is

seeking a certificate of appealability (COA) so that he can appeal from the order entered on June 9, 2020. Doc. 7, at 1. But the motion proceeds to characterize that order as one "denying and dismissing with prejudice the petition for writ of habeas corpus" filed in this matter. Doc. 7, at 1. As a reminder, the administrative closing order explained why the "motion for enlargement of time to file a second post-conviction appeal out-of-time order filed" (Doc. 1) that Starr filed to initiate this action was not sufficient to properly commence a habeas action. Doc. 2, at 2-3. Thereafter, Starr did not file a § 2254 petition. He therefore requests a COA on several issues that he never presented to this Court through a properly filed § 2254 petition. *See* Doc. 7, 1-28. Thus, while the motion requesting a COA mentions the administrative closing order by date, the motion mischaracterizes the substance of that order and instead suggests an intent to appeal from a nonexistent order dismissing a § 2254 petition that he never filed.

Based on the foregoing, the Court finds that even if the notice of appeal is timely, it does not sufficiently designate the order being appealed and the notice is therefore insufficient to invoke appellate jurisdiction.

C. Even if the notice of appeal can be construed as sufficient to invoke appellate jurisdiction, the Court declines to either issue a certificate of appealability or authorize Starr to proceed on appeal *in forma pauperis*.

Third, and finally, even if the notice of appeal could be construed as sufficient to invoke appellate jurisdiction, Starr has not made the showings necessary to obtain a COA or to support his request to proceed on appeal *in forma pauperis*.

At most, the administrative closing order might be construed as a procedural dismissal of an unsuccessful attempt to commence a habeas action. Even when a district court procedurally dismisses a properly filed habeas petition, the petitioner cannot obtain a COA unless the petitioner

shows, at least, that reasonable jurists would debate (1) whether the procedural dismissal was correct and (2) whether the petition states a valid constitutional claim. *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). Because Starr never filed a § 2254 petition in this matter, neither of these issues is reasonably debatable.

To support his request for leave to proceed on appeal without prepayment of the requisite fees, Starr has to show (1) that he lacks the financial ability to prepay those fees and (2) that he has "a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal." *DeBardeleben v. Quinlan*, 937 F.2d 502, 505 (10th Cir. 1991). Starr did not submit sufficient information with his motion to proceed on appeal *in forma pauperis* for this Court to determine whether he lacks the ability to prepay the appellate docketing and filing fees. Doc. 8. Regardless, even assuming he cannot prepay the fees, he cannot make the second showing. Again, because Starr never filed a properly authorized third § 2254 petition in this case, the issues for which he appears to seek appellate review, i.e., the issues he identifies in his motion for certificate of appealability, have never been presented to this Court. And the Court discerns from Starr's pleadings no nonfrivolous argument as to how those issues could be presented, for the first time, through an appeal.

In short, even if Starr's notice of appeal could be construed as sufficient to invoke appellate jurisdiction, the Court finds no basis to issue a COA or to grant Starr leave to proceed on appeal *in forma pauperis*.

III.

Based on the foregoing analysis, the Court denies Starr's motion for certificate of appealability (Doc. 7) and denies Starr's motion for leave to proceed on appeal *in forma pauperis* (Doc. 8). In addition, the Court finds it necessary to clarify this this is a final order terminating

this action. The Clerk of Court is directed to designate this case as finally closed rather than administratively closed.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Starr's motion for certificate of appealability (Doc. 7) is **denied**.
2. Starr's motion for leave to proceed on appeal *in forma pauperis* (Doc. 8) is **denied**.
3. This is a final order terminating this action.
4. The Clerk of Court is directed to designate this case as finally closed rather than administratively closed.
5. A separate judgment shall be entered in this matter.

ORDERED this 4th day of February, 2021.

JOHN E. DOWDELL, CHIEF JUDGE
UNITED STATES DISTRICT COURT

Additional material from this filing is available in the Clerk's Office.