

APPENDIX

- APPENDIX A** JUDGMENT, April 5, 2022, USCA Eighth Circuit
- APPENDIX B** ORDER, February 2, 2022, U.S. District Court Souther Dist. Iowa
- APPENDIX C** ORDER, May 20, 2022, USCA Eighth Circuit, En Banc
- APPENDIX D** APPEAL SUPPLEMENT, ECF 117, February 27, 2022 U.S. Dist. Court
- APPENDIX E** SCOTUS Clerk's Letter, September 1, 2022 Correction order

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-1360

United States of America

Plaintiff - Appellee

v.

Dustin Nguyen

Defendant - Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Western
(1:19-cr-00061-JAJ-1)

JUDGMENT

Before LOKEN, BENTON, and ERICKSON, Circuit Judges.

The court has carefully reviewed the original file of the United States District Court and orders that this appeal be dismissed for lack of jurisdiction.

The motion to proceed on appeal in forma pauperis is denied as moot.

April 05, 2022

A

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 22-1360

United States of America

Appellee

v.

Dustin Nguyen

Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Western
(1:19-cr-00061-JAJ-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is
also denied.

May 20, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DUSTIN NGUYEN,)	Case No. 4:22-cv-00222-SMR
)	
Movant,)	
)	ORDER TO AMEND
v.)	
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

Before the Court are three motions filed by Dustin Nguyen regarding a collateral attack on his sentence imposed in *United States v. Nguyen*, 1:19-cr-00061-SMR-HCA-1. (“Crim. Case”). In that case, Nguyen was sentenced to 120 months’ imprisonment after a jury convicted him of receipt of child pornography, in violation of 18 U.S.C. § 2252. J., Crim. Case, ECF No. 106. On July 6, 2022, Nguyen filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255, a Motion for Extension of Time to File a Memorandum and Amended Petition, and a Motion to Proceed *In Forma Pauperis*. [ECF Nos. 1; 2; 3].

As an initial matter, in support of his Motion to Proceed *In Forma Pauperis*, Nguyen submitted an affidavit outlining his financial situation. [ECF No. 3]. He is currently in the custody of the Bureau of Prisons (“BOP”) and does not earn any income. *Id.* at 1. He also submitted a certification from the BOP institution affirming that he has no money in his inmate trust fund account. *Id.* at 3. Based on Nguyen’s submissions, the Court is satisfied that he is indigent. His Motion to Proceed *In Forma Pauperis* is GRANTED. [ECF No. 3].

In his Motion for Extension of Time, Nguyen seeks a 90-day extension “to properly prepare” his § 2255 motion. [ECF No. 2]. Judgment was entered against Nguyen on June 30, 2021. J., Crim. Case, ECF No. 106. Thus, his right to appeal his sentence expire on July 15, 2021. *See* Fed. R. App.

P. 4(b) (governing appeal time limits). No direct appeal of the sentence was taken by Nguyen.

Rather, on January 31, 2022, Nguyen filed a *pro se* motion to set aside the judgment. Crim. Case, ECF No. 113. United States District Court Judge John A. Jarvey, now retired, denied the motion. Judge Jarvey held that the motion was “a collateral attack on the defendant’s conviction and sentence,” and explained that Nguyen’s “exclusive remedy is a petition filed pursuant to 28 U.S.C. § 2255.” Crim. Case, ECF No. 114. Judge Jarvey cautioned that “[o]rdinarily, a defendant can only file one § 2255 petition,” and directed Nguyen to file a notice informing the court whether he wished to treat his motion to set aside judgment as a motion under § 2255. *Id.* Nguyen responded to Judge Jarvey’s order with a notice of appeal to the United States Court of Appeals for the Eighth Circuit. Crim. Case, ECF No. 116. The Eighth Circuit dismissed the appeal for lack of jurisdiction. Crim. Case, ECF No. 120. Although he had warned Nguyen his motion to set aside judgment was a collateral attack, Judge Jarvey did not ultimately construe it as a § 2255 motion. In an order denying a different motion filed by Nguyen, Judge Jarvey wrote, “[t]he court will not authorize the copying and production of records at public expense unless a § 2255 proceeding is pending. If the defendant files a petition pursuant to 28 U.S.C. § 2255, the court will conduct an initial review of that petition.” Crim. Case, ECF No. 121.

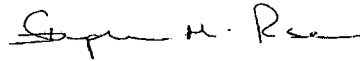
In light of this history, the Court will construe Nguyen’s filing at ECF No. 1 as his first motion filed pursuant to § 2255. Because it was filed before the one-year deadline, it is also timely. However, Nguyen is ordered to amend his motion. Currently, Nguyen asserts seven grounds for relief, many of which appear to be frivolous. Much of the relief he seeks is not available under a § 2255 motion. Additionally, the motion alternates between handwritten and typed format. Nguyen is DIRECTED to file an amended motion under § 2255 by no later than **October 29, 2022**. The amended motion should succinctly set forth the grounds for relief and a brief statement of facts in support of those grounds. It must be typed or legibly handwritten. If an amended motion is not filed by that date, the

Court will conduct an initial review of the current motion pursuant to Rule 4 of the Rules Governing § 2255 Proceedings.

Nguyen's Motion for an Extension is GRANTED. [ECF No. 2]. His Motion to Proceed *In Forma Pauperis* is GRANTED. [ECF No. 3]. Nguyen is DIRECTED to file an amended motion in the manner described above by **October 29, 2022**.

IT IS SO ORDERED.

Dated this 28th day of July, 2022.



STEPHANIE M. ROSE, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DUSTIN NGUYEN,

Defendant.

No. 1:19cr0061-JAJ

ORDER

This matter comes before the court pursuant to the defendant's January 31, 2022 pro se Motion to Set Aside Judgment. [Dkt. 113]

The motion is a collateral attack on the defendant's conviction and sentence. His exclusive remedy is a petition filed pursuant to 28 U.S.C. § 2255. Ordinarily, a defendant can only file one § 2255 petition. Second or subsequent petitions can only be filed upon certification from the Court of Appeals. 28 U.S.C. § 2255(h).

If the defendant wishes to pursue his January 31, 2022 Motion to Set Aside Judgment, the court will treat it as a petition pursuant to 28 U.S.C. § 2255. Therefore, any later § 2255 petition will be treated as a second or successive petition, requiring certification from the Court of Appeals.

Upon the foregoing,

IT IS ORDERED that the defendant shall file with the court on or before **February 18, 2022**, a notice of whether he intends to proceed with his January 31, 2022 pro se Motion to Set Aside Judgment, understanding that it will be treated as a petition pursuant to 28 U.S.C. § 2255.

DATED this 2nd day of February, 2022.

B

JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA