

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

DAVID LAWRENCE SMITH,

Petitioner,

v.

**DAN SCHNURR, *Hutchinson
Correctional Facility Warden,***

Respondent.

Case No. 18-3298-DDC

MEMORANDUM AND ORDER

This matter comes before the court on prisoner David Lawrence Smith’s pro se¹ Motion for Extension of Time (Doc. 31). He asks the court to grant “him an extension of time of thirty days beyond the first thirty day time limit, to file his motions for Appointment of counsel and to appeal in [forma pauperis].” Doc. 31 at 1. Mr. Smith directed his request to the Tenth Circuit but mailed it to the district court. *Id.* (caption of motion reads: “In the United States Court of Appeals for the Tenth Circuit”). Mr. Smith requested identical relief from the Tenth Circuit. Motion for Extension of Time, *Smith v. Schnurr*, No. 21-3074 (10th Cir. May 10, 2021), Doc. 10829323. To the extent Mr. Smith seeks relief from this court, the court denies Mr. Smith’s motion in part and dismisses it in part.

On April 15, 2021, the court denied Mr. Smith’s Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 (Doc. 1) and decided not to issue a certificate of appealability. Doc. 22

¹ Because Mr. Smith proceeds pro se, the court construes his filings liberally. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (holding that courts must construe pro se litigant’s pleadings liberally and hold them to a less stringent standard than formal pleadings drafted by lawyers). But, under this standard, the court does not assume the role as Mr. Smith’s advocate. *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). The court does not construct arguments for Mr. Smith or search the record. *Id.*

at 33. Mr. Smith since has filed a Notice of Appeal. Doc. 27 at 1. Mr. Smith asks this court for an extension of time to file a motion to appoint counsel and an extension of time to file an application to proceed in forma pauperis in his appeal to the Tenth Circuit. Doc. 31 at 1.

Early in his action before this court, the court found Mr. Smith financially eligible to proceed in forma pauperis. *See* Doc. 5 at 2. “A party who was permitted to proceed in forma pauperis in the district-court action . . . may proceed on appeal in forma pauperis without further authorization[.]” Fed. R. App. P. 24(a)(3).² *See* Order at 1, *Smith v. Schnurr*, No. 21-3074 (10th Cir. May 12, 2021), Doc. 10829337 (“Appellant’s *ifp* status continues on appeal pursuant to Fed. R. App. P. 24(a)(3).”). So, to the extent Mr. Smith seeks an extension of time to file a motion to appeal in forma pauperis, his request is moot. Mr. Smith may proceed on appeal without prepayment of fees. The court thus denies as moot Mr. Smith’s request for extension of time to file a motion to appeal in forma pauperis. The Clerk of the Court is directed to forward a copy of this Order to the Clerk of the Tenth Circuit.

Mr. Smith’s motion also requests additional time to file a motion for appointment of counsel in his appeal to the Tenth Circuit. Doc. 31 at 1. The Circuit controls the decision whether to appoint counsel on appeal. *See* 10th Cir. R. Add. I § II.1. The Tenth Circuit denied Mr. Smith’s request without prejudice and provided that Mr. Smith “may file a motion for appointment of counsel with the combined opening brief and certificate of appealability.” Order at 2, *Smith v. Schnurr*, No. 21-3074 (10th Cir. May 12, 2021), Doc. 10829337. Thus, to the

² Federal Rule of Appellate Procedure 24(a)(3)(A) permits a petitioner to “proceed in forma pauperis without further authorization, unless” the district court “certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis[.]” This court has not found that Mr. Smith appeals the court’s Order denying his Petition for Writ of Habeas Corpus in bad faith.

extent Mr. Smith intended to ask this court for an extension of time to file a motion to appoint counsel to represent him in his appeal, this court lacks jurisdiction and thus dismisses his request.

IT IS THEREFORE ORDERED that Mr. Smith's request for an extension of time to file a motion to appeal in forma pauperis is moot, and the court thus denies it.

IT IS FURTHER ORDERED that Mr. Smith's request for an extension to file a motion for appointment of counsel is dismissed because this court lacks jurisdiction.

IT IS FURTHER ORDERED that Mr. Smith's Motion for Extension of Time (Doc. 31) is denied in part and dismissed in part, as set forth in this Order. The court directs the Clerk of the Court to forward a copy of this Order to the Clerk of the Tenth Circuit.

IT IS SO ORDERED.

Dated this 18th day of May, 2021, at Kansas City, Kansas.

s/ Daniel D. Crabtree
Daniel D. Crabtree
United States District Judge