

APPENDIX A

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

No: 18-2698

Winston Grey Brakeall, also known as Winston G. Brakeall

Petitioner - Appellant

v.

Robert Dooley, Chief Warden, Mike Durfee State Prison

Respondent - Appellee

Appeal from U.S. District Court for the District of South Dakota - Sioux Falls
(4:17-cv-04112-LLP)

JUDGMENT

Before WOLLMAN, KELLY and ERICKSON, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

The motion for appointment of counsel is denied as moot.

December 04, 2018

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

/s/ Michael E. Gans

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Robert Dooley, Chief Warden, Mike Durfee State Prison

Appellee

Appeal from U.S. District Court for the District of South Dakota - Sioux Falls
(4:17-cv-04112-LLP)

ORDER

The petition for rehearing by the panel is denied.

January 11, 2019

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
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MANDATE

In accordance with the judgment of 12/04/2018, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

January 18, 2019

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

WINSTON GREY BRAKEALL,
a/k/a Winston G. Brakeall,

Petitioner,

vs.

* CIV 17-4112

ROBERT DOOLEY, Chief Warden,
Mike Durfee State Prison,

Respondent.

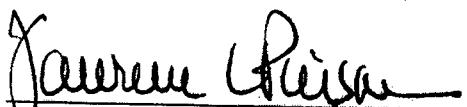
* JUDGMENT

In accordance with the Order filed on this date with the clerk,

IT IS ORDERED, ADJUDGED, and DECREED that Petitioner's application for a
writ of habeas corpus is dismissed with prejudice.

Dated this 18th day of July, 2018.

BY THE COURT:



Lawrence L. Piersol
United States District Judge

ATTEST:

MATTHEW W. THELEN, CLERK

BY:



Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

WINSTON GREY BRAKEALL, * CIV 17-4112
a/k/a Winston G. Brakeall, *

Petitioner, *
vs. * ORDER

ROBERT DOOLEY, Chief Warden, *
Mike Durfee State Prison, *

Respondent. *

Petitioner Winston Grey Brakeall, an inmate at the Mike Durfee State Prison, has applied for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Magistrate Judge issued a Report and Recommendation recommending that the Petition be dismissed with prejudice due to procedural default. Petitioner filed objections to the Report and Recommendation.

In the Report and Recommendation, Magistrate Judge Duffy also recommended Petitioner's Motion for Order, for computer access and printing, Doc. 12, be denied as moot. Petitioner then filed a Motion for Reconsideration, Doc. 19, requesting the Court to reconsider the recommendation regarding computer access and the number of pages inmates are allowed to print. That claim is moot as to this case as this case is being dismissed with prejudice. The limitation of access claimed does not in this case establish cause as a basis to avoid procedural default.

The Court has conducted a *de novo* review of Petitioner's case before this Court, including Petitioner's Objections to the Report and Recommendation, and adopts the Report and Recommendation. Petitioner did not appeal pursuant to SDCL 1-26, the only method of appeal from the decision of the South Dakota Board of Pardons and Paroles revoking his parole for failing some but passing other polygraph tests which asked incriminating questions which if answered one way

could lead to a felony conviction. Petitioner in other instances refused to answer mandatory questions on the basis of possible self-incrimination. Petitioner has a non-frivolous constitutional claim on the basis of the persuasive but non-binding decision of the Tenth Circuit Court of Appeals in *United States v. VanBehren*, 822 F.3d 1139 (10th Cir. 2016) (government's threat to seek revocation of supervised release if defendant refused to answer mandatory questions in a polygraph constituted unconstitutional compulsion under the Fifth Amendment). The Tenth Circuit and other circuits have upheld polygraph testing as a special condition of supervised release. *See, e.g. United States v. Johnson*, 446 F.3d 272, 277 (2d Cir. 2006); *United States v. Dotson*, 324 F.3d 256, 261 (4th Cir. 2003); *United States v. Zinn*, 321 F.3d 1084, 1090 (11th Cir. 2003); *United States v. Lee*, 315 F.3d 206, 217 (3rd Cir. 2003). When punishment is not the result of candor, there can be benefits to the defendant and the public in terms of effective supervision, deterrence and other treatment.

Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851 (1995) sets the standard for determining actual innocence to avoid a procedural bar to consideration of merits of constitutional claims. The requirement is that a procedurally defaulted petitioner show that a constitutional violation has probably resulted in the conviction of one who is actually innocent. The petitioner must submit new, reliable evidence to support the claim of actual innocence. *Amrine v. Bowersox*, 238 F.3d 1023 (8th Cir. 2001) applied in *Kidd v. Norman*, 651 F.3d 947 (8th Cir. 2011). *Kidd* is criticized in 50 Creighton L. Rev. 367 (2017): "Does Actual Innocence Actually Matter? Why the *Schlup* Actual Innocence Gateway Requires Newly Presented, Reliable Evidence." *Schlup* is a gateway designed to prevent a fundamental miscarriage of justice where a defendant can meet the evidentiary requirement for showing actual innocence. The present case presents a colorable claim of a constitutional violation, but the nature of the case does not provide for a showing of new credible evidence of actual innocence. If the present case were to allow an exception to procedural default, another gateway to avoid procedural bar to the consideration of constitutional claims would have to be recognized. The courts have not recognized such an additional gateway and Congress has not created one.

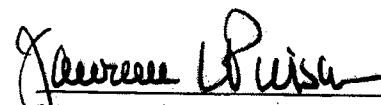
Accordingly,

IT IS ORDERED:

1. That Petitioner's Objections (Doc. 22) are denied, and the Magistrate Judge's Report and Recommendation (Doc. 13) is adopted.
2. That Respondents' Motion to Dismiss Petitioner's Application for Writ of Habeas Corpus (Doc. 8) is granted.
3. That Petitioner's Motion for Order, for computer access and printing (Doc. 12) is denied as moot.
4. That the Petitioner's Motion for Reconsideration (Doc. 19) is denied.
5. That Petitioner's Motion to Amend/Correct Petition for Writ of Habeas Corpus (Doc. 16) is denied.
6. That Petitioner's Application for Writ of Habeas Corpus (Doc. 1) is dismissed with prejudice.
7. That a Certificate of Appealability shall not issue.

Dated this 10th day of July, 2018.

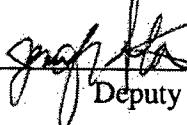
BY THE COURT:



Lawrence L. Piersol
United States District Judge

ATTEST:

MATTHEW W. THELEN, CLERK

BY: 

Deputy

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