UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

HAIDER SALAH ABDULRAZZAK, Plaintiff, vs. DENNIS KAEMINGK, AARON MILLER, SD. BD OF PARDONS AND PAROLES, DOUG CLARK, ROBERT DOOLEY, SUSAN JACOBS, KIM LIPINCOTT, J.C. SMITH, DUSTI WERNER, DAKOTA PSYCHOLOGICAL SERVICES LLC., JUSHUA J. KAUFMAN, Defendants.	4:17-CV-04058-KES ORDER GRANTING MOTION TO PROCEED IN FORMA PAUPERIS

Plaintiff, Haider Salah Abdulrazzak, is an inmate at the Mike Durfee State Prison in Springfield, South Dakota. Plaintiff filed a pro se civil rights lawsuit under 42 U.S.C. § 1983 and requested leave to proceed in forma pauperis under 28 U.S.C. § 1915. Docket 1; Docket 2.

Under the Prison Litigation Reform Act (PLRA), a prisoner who "brings a civil action or files an appeal in forma pauperis . . . shall be required to pay the full amount of a filing fee." 28 U.S.C. § 1915(b)(1). The court may, however, accept partial payment of the initial filing fee where appropriate. Therefore, " '[w]hen an inmate seeks pauper status, the only issue is whether the inmate pays the entire fee at the initiation of the proceedings or over a period of time

APPENDIX A

under an installment plan.' " *Henderson v. Norris*, 129 F.3d 481, 483 (8th Cir. 1997) (quoting *McGore v. Wrigglesworth*, 114 F.3d 601, 604 (6th Cir. 1997)).

The initial partial filing fee that accompanies an installment plan is calculated according to 28 U.S.C. § 1915(b)(1), which requires a payment of 20 percent of the greater of:

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

Plaintiff has reported average monthly deposits to his prisoner trust account of $91.67 and an average monthly balance of $46.62. Docket 3. Based on this information, the court grants plaintiff leave to proceed in forma pauperis provided he pays an initial partial filing fee of $18.33, which is 20 percent of $91.67. Plaintiff must pay this initial partial filing fee by May 25, 2017. If the court does not receive payment by this deadline, this matter will be dismissed. Plaintiff may request an extension of time if needed.

In addition to the initial partial filing fee, plaintiff must "make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account." 28 U.S.C. § 1915(b)(2). The statute places the burden on the prisoner's institution to collect the additional monthly payments and forward them to the court as follows:

> After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.

28 U.S.C. § 1915(b)(2). Therefore, after payment in full of the initial partial filing fee, the remaining installments will be collected under this procedure.

The clerk of the court will send a copy of this order to the appropriate financial official at plaintiff's institution. Plaintiff will remain responsible for the entire filing fee, as long as he is a prisoner, even if the case is dismissed at some later time. *See In re Tyler*, 110 F.3d 528, 529-30 (8th Cir. 1997).

Accordingly, it is ORDERED

1. Plaintiff's motion for leave to proceed in forma pauperis (Docket 2) is granted. **Plaintiff will make an initial partial payment of $18.33 by May 25, 2017**, made payable to the Clerk, U.S. District Court. If the initial partial filing fee is not received by the specified deadline, the case **will be dismissed**.
2. After payment of the initial partial filing fee, plaintiff's institution will collect the additional monthly payments in the manner set forth in 28 U.S.C. § 1915(b)(2), quoted above, and will forward those installments to the court until the $350 filing fee is paid in full.
3. The clerk of the court is directed to send a copy of this order to the appropriate official at plaintiff's institution.
4. The clerk of the court is directed to set a pro se case management deadline in this case using the following text: May 25, 2017: initial partial filing fee payment due.

5. Plaintiff will keep the court informed of his current address at all times. All parties are bound by the Federal Rules of Civil Procedure and by the court's Local Rules while this case is pending.

Dated April 25, 2017.

BY THE COURT:

/s/ *Karen E. Schreier*
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

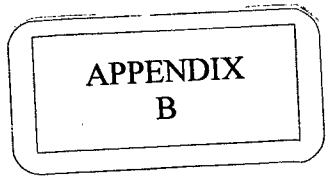
DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

HAIDER SALAH ABDULRAZZAK, Plaintiff, vs. DENNIS KAEMINGK, AARON MILLER, SD. BD OF PARDONS AND PAROLES, DOUG CLARK, ROBERT DOOLEY, SUSAN JACOBS, KIM LIPINCOTT, J.C. SMITH, DUSTI WERNER, DAKOTA PSYCHOLOGICAL SERVICES LLC., JUSHUA J. KAUFMAN, JOHN DOE 1, JOHN DOE 2, JANE DOE, Defendants.	4:17-CV-04058-KES ORDER GRANTING MOTION TO AMEND, DENYING MOTION TO APPOINT COUNSEL, DISMISSING AMENDED COMPLAINT IN PART, AND DIRECTING SERVICE

INTRODUCTION

Plaintiff, Haider Salah Abdulrazzak, is an inmate at the Mike Durfee State Prison in Springfield, South Dakota. He filed a pro se civil rights lawsuit under 42 U.S.C. § 1983, Docket 1, and now moves to amend his complaint and moves the court to appoint him counsel. Docket 10; Docket 11. The court grants Abdulrazzak's motion and screens his amended complaint under 28 U.S.C. § 1915A. For the reasons stated below, the court dismisses Abdulrazzak's amended complaint in part and directs service in part.



FACTUAL BACKGROUND

Abdulrazzak was paroled on June 25, 2014. Docket 10-1 at 7. While on parole, Abdulrazzak temporarily settled his civil case concerning immigration. *Id.* After this settlement, on April 20, 2016, Dusti Werner, Abdulrazzak's parole agent, told him she was adding more restrictions to his original parole agreement, even though he had not committed a new offense or violated his parole. *Id.*

Under the new restrictions, Abdulrazzak was required to go through sex offender treatment and admit guilt (it appears through a polygraph test) to his original convictions. *Id.* at 4, 7. Abdulrazzak alleges that these restrictions are not applied to U.S. citizens. *Id.* at 4. Abdulrazzak alleges that defendants did not discuss these requirements with him before he was paroled, even though they discussed them with other parolees who were U.S. citizens. *Id.* at 6.

Abdulrazzak told his parole agent he would not admit guilt because his admission could be used against him to support his conviction or bring new charges, including perjury. *Id.* at 7. Werner told Abdulrazzak that his parole would be revoked if he did not admit his guilt. *Id.* at 4. Abdulrazzak alleges that defendants tried to coerce him into admitting his guilt by denying him entry into a treatment program for Post-Traumatic Stress Disorder (PTSD), refusing to let him do laundry in the summer, keeping his GPS monitor on after he passed two polygraph tests, charging him for services on parole, and sending that bill to a collection agency. *Id.* at 7, 13.

During this time, Abdulrazzak also alleges that defendants kept him from accessing the courts. *Id.* at 15. He alleges that defendants denied him access to the prison law library, paper, the internet, and email, so he could not work on his immigration case or his habeas case. *Id.* They also would not let him access his documents, though he states that Werner offered to let him print them on her printer, and he refused. *Id.* at 18. Abdulrazzak missed the deadline for filing an appeal because of these denials. *Id.* at 15.

Eventually, Abdulrazzak alleges that correctional officers took the flash drive on which he stored his legal documents. *Id.* at 18. Unknown correctional officers routinely inspected the lockers where Abdulrazzak's flash drive was stored, and they were the only people with access to the lockers. *Id.* at 19. Abdulrazzak alleges that there were more valuable items in his locker that were not taken. *Id.* at 20.

On November 2, 2016, Werner filed an allegation of a parole violation against Abdulrazzak. *Id.* at 19. Because of this alleged violation, Abdulrazzak was incarcerated in the Jameson Annex for 30 days. *Id.* On November 15, 2016, a hearing was held concerning this allegation, and Abdulrazzak was told that he had no rights under the Fifth Amendment because he was a parolee. *Id.* at 4. On March 13, 2017, the parole board upheld the decision, which appears to be the revocation of Abdulrazzak's parole. *Id.*

On April 24, 2017, Abdulrazzak filed a complaint under § 1983. In his complaint and in a letter he later sent to the court, Abdulrazzak stated that he wished to file an amended complaint. Docket 1 at 9; Docket 7. The court

instructed Abdulrazzak that he had the right to amend his complaint and ordered Abdulrazzak to file his amended complaint by June 8, 2017. Docket 9. On May 24, 2017, Abdulrazzak moved to amend his complaint and attached a proposed amended complaint to his motion. Docket 10; Docket 10-1. In his amended complaint, Abdulrazzak raises seven claims, seeking declaratory and injunctive relief as well as damages. Docket 10-1 at 9. The motion to amend is granted.

LEGAL STANDARD

The court must accept the well-pleaded allegations in the complaint as true and draw all reasonable inferences in favor of the non-moving party. *Schriener v. Quicken Loans, Inc.*, 774 F.3d 442, 444 (8th Cir. 2014). Civil rights and pro se complaints must be liberally construed. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citation omitted); *Bediako v. Stein Mart, Inc.*, 354 F.3d 835, 839 (8th Cir. 2004). Even with this construction, "a pro se complaint must contain specific facts supporting its conclusions." *Martin v. Sargent*, 780 F.2d 1334, 1337 (8th Cir. 1985); *Ellis v. City of Minneapolis*, 518 F. App'x 502, 504 (8th Cir. 2013). Civil rights complaints cannot be merely conclusory. *Davis v. Hall*, 992 F.2d 151, 152 (8th Cir. 1993); *Parker v. Porter*, 221 F. App'x 481, 482 (8th Cir. 2007).

A complaint "does not need detailed factual allegations . . . [but] requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "If a plaintiff cannot make the requisite showing, dismissal is

appropriate." *Abdullah v. Minnesota*, 261 F. App'x 926, 927 (8th Cir. 2008); *Beavers v. Lockhart*, 755 F.2d 657, 663 (8th Cir. 1985). Under 28 U.S.C. § 1915A, the court must screen prisoner complaints and dismiss them if they are "(1) frivolous, malicious, or fail[] to state a claim upon which relief may be granted; or (2) seek[] monetary relief from a defendant who is immune from such relief." 1915A(b).

DISCUSSION

Abdulrazzak's amended complaint raises seven claims under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments. Docket 10-1. A number of his allegations are conclusory and repetitive, and his claims are often reiterated in multiple counts. The court has attempted to discuss each claim within separate counts, even though Abdulrazzak makes similar allegations throughout his amended complaint.

I. Count I

In Count I, Abdulrazzak raises claims under the First, Fifth, Eighth, and Fourteenth Amendments against South Dakota Secretary of Corrections (SD DOC) Dennis Kaemingk, SD DOC Policy Maker Aaron Miller, the SD Board of Pardons and Paroles (the Board), and the Director of the Board Doug Clark. Docket 10-1 at 4. Abdulrazzak states that he brings these claims against defendants "as municipalities" and alleges that there is a policy to discriminate against him as a non-citizen of the United States. *Id.* He alleges that the policy required him to admit his guilt and participate in sex offender treatment, requirements that were not in his original parole agreement. *Id.*

The defendants are not "municipalities." Even if they were, a municipality may only be liable for a violation of constitutional rights if the violation was caused by its customs or policies. *Crawford v. Van Buren Cty., Ark.*, 678 F.3d 666, 669 (8th Cir. 2012) (quoting *Rynders v. Williams*, 650 F.3d 1188, 1195 (8th Cir. 2011)). Abdulrazzak does not point to a custom or policy that violated his rights. He argues that he was discriminated against as a non-citizen and an Iraqi, but he alleges that the discrimination started two years into his parole. He does not explain how his citizenship status or nationality changed and caused defendants to begin discriminating against him. He also alleges elsewhere that the parole requirements were added after and because his immigration case was settled. Docket 10-1 at 6. Therefore, Abdulrazzak fails to state a claim upon which relief may be granted, and his claim is dismissed under 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b)(1).

II. Count II

In Count II, Abdulrazzak raises claims under the First, Fifth, Eighth, and Fourteenth Amendments against Warden Robert Dooley, Deputy Warden Susan Jacobs, and Unit Staff Member Kim Lippincott. Docket 10-1 at 6. Abdulrazzak claims that Dooley, Jacobs, and Lippincott violated his rights by failing to discuss the requirements of parole that were subsequently added. *Id.* He alleges that they discussed the parole requirements with United States citizens. *Id.* He also alleges that if defendants had discussed these parole requirements with him, he would have invoked his Fifth Amendment rights. *Id.*

In *McKune v. Lile*, 536 U.S. 24 (2002), a plurality of the Supreme Court held that prison officials did not violate a prisoner's Fifth Amendment rights when they changed the prisoner's privilege status level and moved him to a maximum-security facility after he refused to participate in a sexual abuse treatment program, which required him to admit all prior improper sexual activities without guaranteed immunity. The Court found that these consequences were not severe enough to constitute "compulsion" for purposes of the Fifth Amendment right against self-incrimination. *Id.* There, the plaintiff complained he would be transferred and lose privileges, but the Court observed that his decision would "not extend his term of incarceration" or affect his parole eligibility. *Id.* at 38.

The Eighth Circuit Court of Appeals discussed *McKune* in *Entzi v. Redmann*, 485 F.3d 998 (8th Cir. 2007). There, Entzi claimed that his probation officer compelled him to be a witness against himself by filing a petition to revoke his probation when it was discovered that Entzi had not finished the sex offender treatment. *Id.* at 1001. The state did not revoke Entzi's probation, but Entzi did have to pay an attorney to defend him in the revocation process. *Id.* at 1002. The Eighth Circuit found that this did not constitute compulsion.

The Eighth Circuit found that, even assuming the probation officer's actions constituted compulsion, Entzi did not have a cause of action for damages under § 1983. "[T]he general rule is that a person has no claim for civil liability based on the Fifth Amendment's guarantee against compelled

self-incrimination unless compelled statements are admitted against him in a criminal case." *Id.* (citing *Chavez v. Martinez*, 538 U.S. 760, 767 (2003)). The "core guarantee" of the self-incrimination clause is evidentiary. *Id.* (citing *Chavez*, 538 U.S. at 778). Although the court "left open the possibility that a 'powerful showing' might persuade [it] to expand the protection of the self-incrimination clause to the point of civil liability," an expansion of the clause should not be implemented through money damages. *Id.* (quoting *Chavez*, 538 U.S. at 778) (citation omitted).

The Eighth Circuit found that Entzi had made no showing that evidentiary protections were inadequate to protect his constitutional rights. *Id.* at 1002-03. Here, Abdulrazzak alleges more serious consequences than paying an attorney to defend him: he alleges his parole was actually revoked. This was one of the consequences the Supreme Court stated may violate a prisoner's rights in *McKune*. *See Bradford v. Mo. Dep't of Corr.*, 46 F. App'x 857, 858 (8th Cir. 2002) (finding prisoner stated a claim under *McKune* by claiming that defendants' violated his constitutional rights by denying him parole because of his refusal to participate in sex offender treatment). Because the court is viewing this claim in the light most favorable to Abdulrazzak at this stage, the claim is not frivolous or malicious and may state a cause of action.

The court will next consider whether Abdulrazzak has stated a claim against Dooley, Jacobs, and Lippincott. Abdulrazzak fails to allege facts concerning how these individual defendants violated his rights. Based on their

titles, it appears that defendants are prison employees, and such defendants generally are not liable in claims concerning parole. *See Munson v. Norris*, 435 F.3d 877, 879-80 (8th Cir. 2006) (upholding dismissal of prisoner's claims that he was being forced to admit to crimes he was convicted of in sex offender treatment because he sued prison officials who had no authority over prison conditions). Therefore, Abdulrazzak fails to state a claim upon which relief may be granted in Count II, and that claim is dismissed under 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b)(1).

III. Count III

In Count III, Abdulrazzak claims that his rights were violated because defendants did not discuss the new parole requirements with him, and they unconstitutionally added the new requirements without notice. In *Figg v. Russell*, 433 F.3d 593 (8th Cir. 2006), a South Dakota parolee alleged that she was illegally incarcerated after being detained for a parole violation. Figg raised a claim against her parole agent because the agent offered her a parole agreement without giving her notice that the terms applied to her previously suspended sentence. *Id.* at 599. The Eighth Circuit found this function "so associated with the function of the Parole Board that [the parole agent], too, is cloaked in absolute immunity[,]" and dismissed the claim. *Id.* at 599-600 (citing SDCL 24–15–1.1).

Abdulrazzak has not alleged that Dusti Werner, J.C. Smith, and Jushua Kaufman made an independent decision to add parole requirements. In fact, in Count I, Abdulrazzak alleges that this is a policy of the parole board. The

decisions are therefore "so connected to the quasi-judicial role the Parole Board performed in granting parole in the first place, that they were but an extension of that function[,]" and defendants are absolutely immune. Therefore, Abdulrazzak fails to state a claim upon which relief may be granted, and Count III is dismissed under 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b)(1).

IV. Count IV

In Count IV, Abdulrazzak claims that Kaufman denied him treatment for PTSD in order to coerce him to agree to admit to his crimes, that he was completely denied access to legal assistance and computers to do legal research, and that he was denied the ability to do laundry multiple times. Docket 10-1 at 13-14. The Eighth Circuit has found that a parolee states a claim of deliberate indifference to serious medical needs by alleging that a parole officer interfered with the parolee's attempts to receive medical care. *See Jones v. Moore*, 986 F.2d 251, 253 (8th Cir. 1993). Abdulrazzak alleges that Kaufman denied him access to care for his PTSD. Therefore, Abdulrazzak states a deliberate indifference claim against Kaufman, and this claim survives screening.

Abdulrazzak also alleges that Kaufman denied him access to legal assistance or computers to do legal research and the ability to do laundry. Both of these claims fail because Kaufman is a psychologist. Docket 10-1 at 11. As such, Kaufman has no power over whether Abdulrazzak is allowed to use a computer or do his laundry. Therefore, Abdulrazzak fails to state a claim upon which relief may be granted, and these claims against Kaufman for

denial of access to legal assistance on computers and laundry are dismissed under 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b)(1).

V. Count V

In Count V, Abdulrazzak alleges that Werner violated his constitutional rights by denying him access to the courts. Abdulrazzak alleges that Werner denied him access to his legal documents, denied him paper, and denied him access to the law library or any computer. Docket 10-1 at 15. Abdulrazzak alleges that he was working on his habeas petition and an immigration case, and Werner caused him to miss a deadline for filing, although he does not state for which case. *Id.*

"The Constitution guarantees prisoners a right to access the courts." *White v. Kautzky*, 494 F.3d 677, 679 (8th Cir. 2007). This requires " 'prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.' " *Id.* (citation omitted). Although it does not appear that Abdulrazzak was incarcerated in the penitentiary, his amended complaint makes it clear that he was incarcerated in some form at that time and that defendants had control over his access to the courts.

To prove a violation of the right of access to the courts, a prisoner must establish that he has been injured by the violation. *Id.* at 680. Abdulrazzak alleges that he missed a filing deadline because he was not allowed the assistance described above. In fact, he alleges he was purposefully denied.

Therefore, Abdulrazzak states a claim that he was denied access to the courts by Werner.

VI. Count VI

In Count VI, Abdulrazzak repeats the allegations concerning the changes in his parole conditions discussed above. He adds that Werner and Kaufman deprived him of his cell phone, video visitation with his parents, calls to his niece, and Arabic-language media. As discussed above, the addition of these conditions did not violate Abdulrazzak's rights, and these conditions are the type of condition that the Supreme Court found did not constitute compulsion under the Fifth Amendment. *See McKune*, 536 U.S. at 24. Therefore, Abdulrazzak fails to state a claim upon which relief may be granted, and his claim is dismissed under 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b)(1).

VII. Count VII

In Count VII, Abdulrazzak alleges that unknown correctional officers denied him access to the courts. He alleges that his property, including a flash drive which had his legal materials stored on it, was under the control of the unknown correctional officers who had the only key to his locker, which was locked at all times. Docket 10-1 at 18-19. He alleges that unknown correctional officers intentionally "lost" his flash drive in order to stop him from fighting deportation in his immigration case. *Id.* at 18. He also alleges that this was done in order to end his habeas case and the uncovering of unconstitutional actions by the state during his trial. *Id.* at 18-19. Finally,

Abdulrazzak argues that it is unlikely that his flash drive was stolen by another inmate because there were items far more valuable than the flash drive in his locker that were not taken. *Id.* at 20.

"The taking of an inmate's legal papers can be a constitutional violation when it infringes his right of access to the courts." *Goff v. Nix*, 113 F.3d 887, 892 (8th Cir. 1997) (citation omitted). "[T]he destruction or withholding of inmates' legal papers burdens a constitutional right, and can only be justified if it is reasonably related to a legitimate penological interest." *Id.* Defendants have not been served and have not had a chance to justify their actions. At this point, it is premature to dismiss Abdulrazzak's claim. The court finds that he states a denial of access to the courts claim upon which relief may be granted against John Doe 1 and John Doe 2.

VII. Motion to Appoint Counsel

Abdulrazzak moves the Court to appoint him counsel. Docket 11. "A pro se litigant has no statutory or constitutional right to have counsel appointed in a civil case." *Stevens v. Redwing*, 146 F.3d 538, 546 (8th Cir. 1998). In determining whether to appoint counsel to a pro se litigant's civil case, the district court considers the complexity of the case, the ability of the litigant to investigate the facts, the existence of conflicting testimony, and the litigant's ability to present his claim. *Id.* Abdulrazzak's claims are not complex, and he appears able to adequately present his § 1983 claims at this time. Therefore, his motion is denied.

The Court is aware that this situation may change as litigation progresses. As the Eighth Circuit Court of Appeals instructs, the court will "continue to be alert to the possibility that, because of procedural complexities or other reasons, later developments in the case may show either that counsel should be appointed, or that strict procedural requirements should, in fairness, be relaxed to some degree." *Williams v. Carter*, 10 F.3d 563, 567 (8th Cir. 1993).

Thus, it is ORDERED

1. Abdulrazzak's motion to amend (Docket 10) is granted.
2. The clerks office shall refile Docket 10-1 as Abdulrazzak's amended complaint.
3. Abdulrazzak's deliberate indifference claim against Kaufman (part of Count IV), his denial of access to the courts claim against Werner (Count V), and his denial of access to the courts claim against John Doe 1 and John Doe 2 (Count VII) survive screening under 28 U.S.C. § 1915A(b)(1).
4. The remainder of Abdulrazzak allegations fail to state a claim upon which relief may be granted, and these claims are dismissed under 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b)(1). Dennis Kaemingk, Aaron Miller, SD. BD. of Pardons and Paroles, Doug Clark, Robert Dooley, Susan Jacobs, Kim Lippincott, J.C. Smith, Dakota Psychological Services LLC, and Jane Doe are dismissed as defendants.

5. The Clerk shall send blank summons forms to Abdulrazzak so he may cause the summons and amended complaint to be served upon Kaufman, Werner, Doe 1, and Doe 2.

6. The United States Marshal shall serve a copy of the Amended Complaint (Docket 10-1), Summons, and this Order upon defendants as directed by Abdulrazzak. All costs of service shall be advanced by the United States.

7. Defendants will serve and file an answer or responsive pleading to the remaining claims on or before 21 days following the date of service.

8. Abdulrazzak will serve upon defendants, or, if appearance has been entered by counsel, upon their counsel, a copy of every further pleading or other document submitted for consideration by the court. He will include with the original paper to be filed with the clerk of court a certificate stating the date and that a true and correct copy of any document was mailed to defendants or their counsel.

9. Abdulrazzak will keep the court informed of his current address at all times. All parties are bound by the Federal Rules of Civil Procedure and by the court's Local Rules while this case is pending.

Dated July 14, 2017.

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

HAIDER SALAH ABDULRAZZAK, Plaintiff, vs. J.C. SMITH, DUSTI WERNER, JUSHUA J. KAUFMAN, F/N/U BERTSCH, and JOHN DOE 2, Defendants.	4:17-CV-04058-KES AMENDED ORDER DENYING IN PART AND GRANTING IN PART MOTION TO AMEND AND MISCELLANEOUS OTHER MOTIONS

INTRODUCTION

Plaintiff, Haider Salah Abdulrazzak, is an inmate at the Mike Durfee State Prison in Springfield, South Dakota. He filed a pro se civil rights lawsuit under 42 U.S.C. § 1983. Docket 1. Abdulrazzak was later granted permission to amend his complaint. Docket 13. He now has filed multiple motions to amend his complaint again. Dockets 17,18, 31, 44. The court grants Abdulrazzak's motions in part and denies the motions in part. The court also directs service in part.

FACTUAL BACKGROUND

The pertinent facts are set forth in the initial screening order at docket 13.

APPENDIX C

LEGAL STANDARD

Under Rule 15(a) of the Federal Rules of Civil Procedure, a party may amend his pleadings once without court authorization if the motion is made within 21 days after service or within 21 days after service of a responsive pleading. "In all other cases, a party may amend its pleadings only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15 (a)(2). A motion to amend may be denied when the motion would cause undue delay, is made in bad faith or based on a dilatory motive on the part of the movant, or is futile. *Popoalii v. Corr. Med. Servs.*, 512 F.3d 488, 497 (8th Cir. 2008). Leave of court is required here, because Abdulrazzak has previously amended his complaint.

Under 28 U.S.C. § 1915A, the court must screen prisoner complaints and dismiss them if they are "(1) frivolous, malicious, or fail[] to state a claim upon which relief may be granted; or (2) seek[] monetary relief from a defendant who is immune from such relief." 1915A(b).

DISCUSSION

Abdulrazzak has labeled the document at Docket 31-1 as his second amended complaint. The court will screen this document to determine if the motion to amend should be granted.[1]

[1] Dockets 17 and 18 are captioned as motions to amend the complaint. Local Rule 15/1 requires "any party moving to amend a pleading [to] attached a copy of the proposed amended pleading to its motion to amend[.]" Because Abdulrazzak did not comply with this rule, the court denies his motions at amend at dockets 17 and 18. Furthermore, it appears he has incorporated those changes into what he calls his second amended complaint at docket 31-1.

I. Count I

In Count I, Abdulrazzak raises claims under the First, Fifth, Eighth, and Fourteenth Amendments against South Dakota Secretary of Corrections (SD DOC) Dennis Kaemingk, SD DOC Policy Maker Aaron Miller, the SD Board of Pardons and Paroles (the Board), and the Director of the Board Doug Clark. Docket 31-1 at 4. Abdulrazzak states that he brings these claims against defendants "as municipalities" and against the Parole Board members, who he claims "adopted an unconstitutional arbitrary and discriminatory act." *Id.* He alleges that there is a policy to discriminate against him as a non-citizen of the United States. *Id.* He alleges that the policy required him to admit his guilt and participate in sex offender treatment, requirements that were not in his original parole agreement. *Id.*

First, with regard to the claims against Kaemingk, Miller, and Clark, the court addressed this claim previously in its order at Docket 13. The second amended complaint still alleges that the defendants are "municipalities." The defendants are not "municipalities." Municipalities are cities or towns—none of these defendants are cities or towns. Even if they were, a municipality may only be liable for a violation of constitutional rights if the violation was caused by its customs or policies. *Crawford v. Van Buren Cty.*, 678 F.3d 666, 669 (8th Cir. 2012) (quoting *Rynders v. Williams*, 650 F.3d 1188, 1195 (8th Cir. 2011)). Abdulrazzak does not point to a custom or policy that was adopted by a city or town that violated his rights.

Second, Abdulrazzak alleges that the Parole Board members "adopted an unconstitutional arbitrary and discriminatory act by parole officer, where unlike U.S. Citizens, she required me to participate in a sex offender treatment and to admit the guilt almost 2 years into my initial parole release on 6/25/2014." Docket 31-1 at 4. He alleges that defendants adopted such custom to save the Department of Corrections money on rehabilitation programming. Abdulrazzak does not identify an official policy or custom that was adopted by the Parole Board. Instead, he references the actions of one parole officer. He does not explain how his citizenship status or nationality changed and caused the Parole Board members to begin discriminating against him two years after his initial parole release. Therefore, Abdulrazzak fails to state a claim upon which relief may be granted, and it would be futile to allow him to amend Count I.

II. Count II

In Count II, Abdulrazzak raises claims under the First, Fifth, Eighth, and Fourteenth Amendments against Warden Robert Dooley, Deputy Warden Susan Jacobs, and Unit Staff Member Kim Lippincott. Docket 31-1 at 6. Abdulrazzak claims that Dooley, Jacobs, and Lippincott violated his rights by failing to discuss the requirements of parole that were subsequently added. *Id.* He alleges that they discussed the parole requirements with United States citizens. *Id.* He also alleges that if defendants had discussed these parole requirements with him, he would have invoked his Fifth Amendment rights.

Id. He adds no new allegations regarding these defendants as compared to his first amended complaint.

As this court previously found, based on the titles of these defendants, it appears that they are prison employees, and such defendants generally are not liable in claims concerning parole. *See Munson v. Norris*, 435 F.3d 877, 879-80 (8th Cir. 2006) (upholding dismissal of prisoner's claims that he was being forced to admit to crimes he was convicted of in sex offender treatment because he sued prison officials who had no authority over prison conditions).Thus, it would be futile to allow Abdulrazzak to amend his complaint to add this claim against Dooley, Jacobs and Lippincott.

Abdulrazzak moves to add defendants Board of Pardons and Paroles, Parole Board Director, Parole Officer Supervisor and Parole Officer (Dusti Werner) and Treatment Providers (Dakota Psychological Services, LLC, and Joshua Kaufman) as named defendants in Count II. With regard to the Board of Pardons and Paroles, it is well established that " 'in the absence of consent[,] a suit in which the [s]tate or one of its agencies or departments is named as [a] defendant is proscribed by the Eleventh Amendment.' " *Egerdahl v. Hibbing Cmty. Coll.*, 72 F.3d 615, 619 (8th Cir. 1995) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 645 U.S. 89, 100 (1984)). Thus, it would be futile to add the Board of Pardons and Paroles as a named defendant.

With regard to the Parole Board Director and the Parole Officer Supervisor, the proposed second amended complaint does not allege that they

had personal involvement in the alleged deprivation of Abdulrazzak's constitutional rights. "A supervisor is not vicariously liable under 42 U.S.C. § 1983 for an employee's unconstitutional activity." *White v. Holmes*, 21 F.3d 277, 280 (8th Cir. 1994). Thus, it would be futile to add the two supervisors as named defendants in Count II.

Next, the court will discuss the new allegations against the parole officer. In *McKune v. Lile*, 536 U.S. 24 (2002) (plurality opinion), a plurality of the Supreme Court held that prison officials did not violate a prisoner's Fifth Amendment rights when they changed the prisoner's privilege status level and moved him to a maximum-security facility after he refused to participate in a sexual abuse treatment program, which required him to admit all prior improper sexual activities without guaranteed immunity. *Id.* at 36. The Court found that these consequences were not severe enough to constitute "compulsion" for purposes of the Fifth Amendment right against self-incrimination. *Id.* There, the plaintiff complained he would be transferred and lose privileges, but the Court observed that his decision would "not extend his term of incarceration" or affect his parole eligibility. *Id.* at 38.

The Eighth Circuit Court of Appeals discussed *McKune* in *Entzi v. Redmann*, 485 F.3d 998 (8th Cir. 2007). There, Entzi claimed that his probation officer compelled him to be a witness against himself by filing a petition to revoke his probation when it was discovered that Entzi had not finished the sex offender treatment. *Id.* at 1001. The state did not revoke Entzi's probation, but Entzi did have to pay an attorney to defend him in the

revocation process. *Id.* at 1002. The Eighth Circuit found that this did not constitute compulsion. *Id.*

The Eighth Circuit found that, even assuming the probation officer's actions constituted compulsion, Entzi did not have a cause of action for damages under § 1983. *Id.* "[T]he general rule is that a person has no claim for civil liability based on the Fifth Amendment's guarantee against compelled self-incrimination unless compelled statements are admitted against him in a criminal case." *Id.* (citing *Chavez v. Martinez*, 538 U.S. 760, 767 (2003)). The "core guarantee" of the self-incrimination clause is evidentiary. *Id.* (citing *Chavez*, 538 U.S. at 778). Although the court "left open the possibility that a 'powerful showing' might persuade [it] to expand the protection of the self-incrimination clause to the point of civil liability," an expansion of the clause should not be implemented through money damages. *Id.* (quoting *Chavez*, 538 U.S. at 778) (citation omitted).

The Eighth Circuit found that Entzi had made no showing that evidentiary protections were inadequate to protect his constitutional rights. *Id.* at 1002-03. Here, Abdulrazzak alleges more serious consequences than paying an attorney to defend him: he alleges his parole was actually revoked. This was one of the consequences the Supreme Court stated may violate a prisoner's rights in *McKune*. *See Bradford v. Mo. Dep't of Corr.*, 46 F. App'x 857, 858 (8th Cir. 2002) (finding prisoner stated a claim under *McKune* by claiming that defendants' violated his constitutional rights by denying him parole because of his refusal to participate in sex offender treatment). Because

the court is viewing this claim in the light most favorable to Abdulrazzak at this stage, the claim is not frivolous or malicious and may state a cause of action. While defendants claim that Abdulrazzak has not provided the court with all the facts regarding his claim and may be less than candid with the court, at this stage the court can only consider the facts as alleged in the complaint and cannot consider matters outside of the pleadings. Therefore, the motion to amend Count II and add the parole officer as a named defendant is granted.

Finally, the second amended complaint also adds the treatment provider as a named defendant. The second amended complaint, however, contains no allegations that the treatment provider had the power to revoke Abdulrazzak's parole. Thus, it would be futile to allow an amendment of the complaint to add the treatment providers as named defendants in Count II.

III. Count III

In Count III, it appears that Abdulrazzak is raising claims against his parole officer/agent (Dusti Werner) and his parole agent supervisor (J.C. Smith). He claims that his rights were violated because defendants revoked his parole for failure to participate in sex offender treatment. The courts have found, however, that participation in a sex offender treatment program, as a condition of parole, does not violate an inmate's constitutional rights. *See Roman v. DiGuglielmo,* 675 F.3d 204 (3d Cir. 2012); *Schnitzler v. Reisch,* 518 F. Supp. 2d 1098 (D.S.D. 2007). Thus, to the extent Abdulrazzak claims his

rights were violated because he failed to participate in sex offender treatment, his claim is futile.

Abdulrazzak may also be claiming in Count III that Werner and Smith violated his rights because they revoked his parole in retaliation for exercising his Fifth Amendment right to not incriminate himself. As discussed about regarding Count II, such an allegation is not futile and the motion to amend Count III to add this claim against Werner and Smith is granted.

IV. Count IV

In Count IV, Abdulrazzak claims that Kaufman denied him treatment for PTSD in order to coerce him to agree to admit to his crimes, that he was completely denied access to legal assistance and computers to do legal research, and that he was denied the ability to do laundry multiple times. Docket 31-1 at 13-14. As the court previously found, the claim of deliberate indifference to serious medical needs and the denial of access to care claims state claims upon which relief can be granted. To the extent Abdulrazzak's second amended complaint adds additional facts to these claims, the motion to amend is granted.

V. Count V

Abdulrazzak's proposed second amended complaint does not make any changes to Count V. For the reasons stated in docket 13, the court finds that Abdulrazzak states a claim that he was denied access to the courts by Werner.

VI. Count VI

In Count VI, Abdulrazzak repeats the allegations concerning the changes in his parole conditions discussed above regarding Counts II and III. He adds that Werner and Kaufman deprived him of his cell phone, video visitation with his parents, calls to his niece, and Arabic-language media. As discussed above, the addition of these conditions did not violate Abdulrazzak's rights, and these conditions are the type of conditions that the Supreme Court found do not constitute compulsion under the Fifth Amendment. *See McKune*, 536 U.S. at 24. The court previously found that the first amended complaint failed to state a claim upon which relief may be granted, and dismissed this claim under 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b)(1). Abdulrazzak's second amended complaint adds an allegation that defendants were attempting to force him to admit guilt and that he lost some discretionary restrictions. This claim is already addressed in the discussion regarding Claims II and III and is repetitive. The motion to amend is denied.

VII. Count VII

In Count VII, the court previously found that Abdulrazzak has properly stated a denial of access to the courts claim upon which relief may be granted against John Doe 1 and John Doe 2. Abdulrazzak now moves to add defendant Bertsch to count VII. Docket 44. The court finds that the motion to amend is proper and grants the motion to substitute Bertsch for John Doe 1.

VIII. Motion to Respond to Answer and for Summary Judgment

Abdulrazzak moves the court to respond to defendants' answer. A response to an answer is not a recognized pleading and is not necessary. Defendants did not plead a counterclaim in their answer, so no response is needed.

Abdulrazzak also moves for summary judgment. The South Dakota Civil Local Rules state "all motions for summary judgment must be accompanied by a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried." D.S.D. Civ. LR 56.1. Because the motion for summary judgment did not include a statement of material facts, the motion is denied.

IX. Motion for Discovery

Abdulrazzak attempted to have the amended summons served on defendant Joshua Kaufman. It was returned marked "RETURNED UNSERVED" by the United States Marshals Service. Kaufman was formerly an employee of Dakota Psychological Services and he contracted with the South Dakota Department of Corrections to provide treatment for the State's parolees and inmates. It appears Kaufman has moved away from South Dakota. Abdulrazzak has no contact information for Kaufman and as an incarcerated inmate does not have the ability to locate him. Abdulrazzak requests that the court order defendants to provide in a confidential memorandum a current address for Kaufman to the U.S. Marshals Service. Defendants have not responded to this motion. For good cause shown, the court grants

Abdulrazzak's motion and directs the Attorney General's office to provide a current address for Kaufman to the U.S. Marshals Service by December 22, 2017.

Thus, it is ORDERED

1. Abdulrazzak's motions to amend (Dockets 31 and 44) are granted in part and denied in part.
2. Abdulrazzak's motions to amend (Dockets 17 and18) are denied as moot.
3. Abdulrazzak's motion to discover the address of Kaufman (Docket 25) is granted.
4. The clerks office shall refile Docket 31-1 as Abdulrazzak's second amended complaint.
5. Abdulrazzak's claims against Werner and Smith (Counts II and III) of revoking his parole in retaliation for exercising his Fifth Amendment right to remain silent, his deliberate indifference claim against Kaufman (part of Count IV), his denial of access to the courts claim against Werner (Count V), and his denial of access to the courts claim against Bertsh (Count VII) survive screening under 28 U.S.C. § 1915A(b)(1).
6. The remainder of Abdulrazzak allegations fail to state a claim upon which relief may be granted, and these claims are dismissed under 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b)(1). Dennis Kaemingk, Aaron Miller, SD. Board of Pardons and Paroles, Doug Clark, Robert

Dooley, Susan Jacobs, Kim Lippincott, Dakota Psychological Services LLC, Joseph Siemonsma, Robert Berthelson, Greg Erlandson, and Myron Rau are dismissed as defendants.

7. The Clerk shall send blank summons forms to Abdulrazzak so he may cause the summons and second amended complaint to be served upon J.C. Smith and Bertsch. The Clerk shall also send a blank summons form to the Attorney General so he may provide the address to the U.S. Marshal of Joshua J. Kaufman for service of the summons and second amended complaint on Kaufman.
8. The United States Marshal shall serve a copy of the second amended complaint (Docket 31-1), Summons, and this Order upon defendants as directed by Abdulrazzak. All costs of service shall be advanced by the United States.
9. Defendants will serve and file an answer or responsive pleading to the remaining claims on or before 21 days following the date of service.
10. Abdulrazzak will serve upon defendants, or, if appearance has been entered by counsel, upon their counsel, a copy of every further pleading or other document submitted for consideration by the court. He will include with the original paper to be filed with the clerk of court a certificate stating the date and that a true and correct copy of any document was mailed to defendants or their counsel.

11. Abdulrazzak will keep the court informed of his current address at all times. All parties are bound by the Federal Rules of Civil Procedure and by the court's Local Rules while this case is pending.
12. Abdulrazzak's motions to respond to answer and for summary judgment (Docket 33) are denied.

Dated December 12, 2017.

BY THE COURT:

/s/ *Karen E. Schreier*
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

HAIDER SALAH ABDULRAZZAK, Plaintiff, vs. J.C. SMITH, DUSTI WERNER, JUSHUA J. KAUFMAN, F/N/U BERTSCH, and JOHN DOE 2, Defendants.	4:17-CV-04058-KES ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL

Plaintiff, Haider Salah Abdulrazzak, is an inmate at the Mike Durfee State Prison in Springfield, South Dakota. He filed a pro se civil rights lawsuit under 42 U.S.C. § 1983. Docket 1. Abdulrazzak filed multiple motions to amend his complaint. Dockets 17, 18, 31, 44. The court granted Abdulrazzak's motions to amend (Dockets 31 and 44) and screened Abdulrazzak's second amended complaint (Docket 31-1) dismissing it in part and directing service in part. Docket 46. Abdulrazzak now appeals that order. Docket 58.

Under the Prison Litigation Reform Act (PLRA), a prisoner who "files an appeal in forma pauperis . . . [is] required to pay the full amount of a filing fee." 28 U.S.C. § 1915(b)(1). This obligation arises " 'the moment the prisoner . . . files an appeal.' " *Henderson v. Norris*, 129 F.3d 481, 483 (8th Cir. 1997) (quoting *In re Tyler*, 110 F.3d 528, 529–30 (8th Cir. 1997)). Therefore, " '[w]hen an inmate seeks pauper status, the only issue is whether the inmate pays the entire fee at the initiation of the proceedings or over a period of time under an installment plan.' " *Id.* (quoting *McGore v. Wrigglesworth*, 114 F.3d

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601, 604 (6th Cir. 1997)). "[P]risoners who appeal judgments in civil cases must sooner or later pay the appellate filing fees in full." *Id.* (citing *Newlin v. Helman*, 123 F.3d 429, 432 (7th Cir. 1997)).

In *Henderson*, the Eighth Circuit set forth "the procedure to be used to assess, calculate, and collect" appellate filing fees in compliance with the PLRA. 129 F.3d at 483. First, the court must determine whether the appeal is taken in good faith. *Id.* at 485 (citing 28 U.S.C. § 1915(a)(3)). Then, so long as the prisoner has provided the court with a certified copy of his prisoner trust account, the court must "calculate the initial appellate partial filing fee as provided by § 1915(b)(1), or determine that the provisions of § 1915(b)(4) apply." *Id.* The initial partial filing fee must be 20 percent of the greater of:

> (A) the average monthly deposits to the prisoner's account; or
> (B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

28 U.S.C. § 1915(b)(1). Nonetheless, no prisoner will be "prohibited from . . . appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee." 28 U.S.C. § 1915(b)(4).

It appears that Abdulrazzak's appeal is taken in good faith. By filing a motion to appeal Abdulrazzak consented to the deduction of his initial partial appellate filing fee and the remaining installments from his prisoner account. *Henderson*, 129 F.3d at 484. Abdulrazzak did not file new prisoner trust account statement. *Id.* As a result, the initial appellate partial fees must be

assessed as "$35 or such other amount that is reasonable, based on whatever information the court has about the prisoner's finances." *Henderson*, 129 F.3d at 484. In the prisoner trust account report Abdulrazzak submitted for his previous motion for leave to proceed in forma pauperis, he reported average monthly deposits to his prisoner trust account of $91.67 and an average monthly balance of $46.62. Docket 3. Based on this information, Abdulrazzak may proceed in forma pauperis on appeal provided he pays an initial partial appellate filing fee of $18.33, which is 20 percent of $91.67.

Thus, it is

ORDERED that Abdulrazzak may proceed in forma pauperis on appeal. Abdulrazzak will make an initial partial appellate payment of $18.33 by **February 26, 2018**, made payable to the Clerk, U.S. District Court.

IT IS FURTHER ORDERED that the institution having custody of the Abdulrazzak is directed that whenever the amount in his trust account, exclusive of funds available to him in his frozen account, exceeds $10, monthly payments that equal 20 percent of the funds credited to the account the preceding month shall be forwarded to the United States District Court Clerk's office pursuant to 28 U.S.C. § 1915(b)(2), until the appellate filing fee of $505 is paid in full.

DATED this 26th day of January, 2018.

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-1213

Haider Salah Abdulrazzak

Plaintiff - Appellant

v.

J. C. Smith; Dusti Werner; Joshua J. Kaufman; F/N/U Bertsch; John Doe 2

Defendants - Appellees

Appeal from U.S. District Court for the District of South Dakota - Rapid City
(4:17-cv-04058-KES)

JUDGMENT

Before GRUENDER, MURPHY and KELLY, 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, as the appeal is premature.

February 06, 2018

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

/s/ Michael E. Gans

APPENDIX
E

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

HAIDER SALAH ABDULRAZZAK Plaintiff, vs. J.C. SMITH, DUSTI WERNER, JOHN DOE 2, JOSHUA J. KAUFMAN, and F/N/U BERTSCH, Defendants.	CIV 17-4058 CLERK'S DENIAL OF DEFAULT

Plaintiff Haider Salah Abdulrazzak has requested entry of default against defendants (Docket 75). Entry of default is appropriate "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." Fed. R. Civ. P. 55 (a). Here, defendants sought an extension to answer the second amended complaint (Docket 53). The Court granted the state defendants until February 15, 2018 to file their answer (Docket 54). The defendants filed their answer on January 17, 2018,

The Clerk denies plaintiff's request for entry of default.

Dated February 16, 2018

/s/ Matthew W. Thelen
Clerk
U.S. District Court
400 S. Phillips Avenue, Room 128
Sioux Falls, South Dakota 57104
Matt_Thelen@sdd.uscourts.gov

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F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-1213

Haider Salah Abdulrazzak

Appellant

v.

J. C. Smith, et al.

Appellees

Appeal from U.S. District Court for the District of South Dakota - Rapid City
(4:17-cv-04058-KES)

ORDER

The petition for rehearing by the panel is denied.

March 16, 2018

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

/s/ Michael E. Gans

APPENDIX
G

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

HAIDER SALAH ABDULRAZZAK, Plaintiff, vs. J.C. SMITH, in his individual and official capacity; DUSTI WERNER, in his individual and official capacity; JOSHUA J. KAUFMAN, in his individual and official capacity; F/N/U BERTSCH, in his individual and official capacity; and JOHN DOE 2, in his individual and official capacity; Defendants.	4:17-CV-04058-KES JUDGMENT

Pursuant to the Order Granting Defendants' Motion for Summary Judgment, it is

ORDERED, ADJUDGED, AND DECREED that judgment is entered against plaintiff, Haider Salah Abdulrazzak, and in favor of defendants.

DATED this September 26, 2018.

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

APPENDIX
H

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

HAIDER SALAH ABDULRAZZAK, Plaintiff, vs. J.C. SMITH, in his individual and official capacity; DUSTI WERNER, in his individual and official capacity; JOSHUA J. KAUFMAN, in his individual and official capacity; F/N/U BERTSCH, in his individual and official capacity; and JOHN DOE 2, in his individual and official capacity; Defendants.	4:17-CV-04058-KES ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff, Haider Salah Abdulrazzak, is an inmate at the Mike Durfee State Prison in Springfield, South Dakota. He filed a pro se civil rights lawsuit under 42 U.S.C. § 1983. Docket 1. Defendants now move for summary judgment. Docket 81. Abdulrazzak opposes the motion. Docket 99. Abdulrazzak has also filed various miscellaneous motions.

FACTUAL BACKGROUND

Viewing the evidence in the light most favorable to Abdulrazzak, the facts are:

Abdulrazzak is a forty-three years old citizen of Iraq. *See* Dockets 82-11 and 101 at 1. He was admitted to the United States as a refugee on June 30,

2009. *Id.* A Minnehaha County Grand Jury indicted Abdulrazzak on 14 counts of possessing, manufacturing or distributing child pornography in violation of S.D.C.L. § 22-24A-3 on September 9, 2010. Docket 33-4. A jury later returned a guilty verdict on all 14 counts. On December 20, 2011, Abdulrazzak was sentenced to serve consecutively a custody sentence of three years, with two years suspended, on the first six counts and of three years, with one year suspended, on count seven. Docket 82-7. No sentence was imposed on counts eight through fourteen. *Id.*

The Department of Homeland Security (DHS) issued an "Immigration Detainer-Notice of Action" on January 17, 2012. *See* Dockets 82-14 and 86 ¶ 4. The detainer stated that the local United States Immigration and Customs Enforcement (ICE) Office had "initiated an Investigation to determine whether [Abdulrazzak] is subject to removal from the United States." Docket 82-14. DHS requested that the South Dakota State Penitentiary (SDSP) "maintain custody of [Abdulrazzak] . . . beyond the time when [Abdulrazzak] would have otherwise been released from your custody to allow DHS to take custody of the subject." *Id.*

Notice of Parole Conditions

Abdulrazzak was initially paroled on June 25, 2014 and transferred to ICE custody under the Immigration Detainer. Dockets 10-1 at 7 and 86 ¶ 5. Prior to his release into ICE custody, Abdulrazzak signed his first Parole Standard Supervision Agreement (2014 Agreement). The 2014 Agreement included the following provision:

> Upon release from any hold status I will return immediately by phone to the SD Interstate Parole Office at 605-782-3153 and return to SD as directed. Failure to do so will constitute a violation of parole. Upon return to SD I will turn myself in to [Admission & Orientation Unit] at the South Dakota State Penitentiary in Sioux Falls, South Dakota for assessment and placement into the CTP program.

Docket 33-2. The 2014 Agreement did not require Abdulrazzak to undergo sex offender treatment. *Id.* It is undisputed that the 2014 Agreement referred to an "assessment" upon return to the SDSP and before release into the community. Docket 33-2.

Defendants allege that Abdulrazzak was initially not required to undergo sex offender treatment because he faced possible deportation from the United States. Docket 86 ¶ 6. Defendants claim sex offender treatment during this initial parole was premature and unnecessary. *Id.* Abdulrazzak disagrees. He alleges that his risk criteria required that he complete Sex Offender Treatment before being released on parole and that this requirement was hidden from him. Docket 101 at 2. Abdulrazzak further alleges that defendants informed other inmates, with the same risk criteria as Abdulrazzak, that they were required to complete sex offender treatment prior to being released on parole. Docket 31-1 at 6. Abdulrazzak alleges that if defendants had discussed these parole requirements with him, he would have invoked his Fifth Amendment rights. *Id.*

Abdulrazzak was released from the ICE hold on April 20, 2016, because he temporarily settled his immigration case. Dockets 86 ¶ 8 and 82-15. As required under the 2014 Agreement, Abdulrazzak reported to the Admission &

Orientation Unit at the South Dakota State Penitentiary. Dockets 86 ¶ 9 and 82-16. Dusti Werner was then assigned to serve as Abdulrazzak's parole agent. Docket 86 ¶ 9.

Defendants allege that Abdulrazzak was required to have a Pre-Release Psychosexual completed before he could be placed into the Community Transition Program. Dockets 86 ¶ 8 and 82-15. The 2014 Agreement even referred to an "assessment" before release into the community. Docket 33-2. Based on his conviction, Abdulrazzak met the criteria for being a sex offender under SDCL § 22-24B-1. *See* Docket 84 ¶ 3. Under South Dakota Department of Corrections (SDDOC) Policy 1.4.A.3, SDDOC will "offer the Sex Offender Management Program (SOMP) to offenders assessed as needing sex offender treatment." *Id.* ¶ 4. The policy requires a psycho-sexual assessment to be completed and supplied to the Board of Pardons and Paroles and the Warden. *Id.* Abdulrazzak disputes that he was required to complete a pre-release psychosexual assessment, because he contends that he was pre-release status before his initial parole into ICE custody. Docket 101 at 2.

On April 27, 2016, Joshua Kaufman interviewed Abdulrazzak for the interview portion of his Pre-Release Psychosexual Assessment. Dockets 82-1 and 84. The Pre-Release Psychosexual Assessment noted that Abdulrazzak had not completed any form of institutionalized sex offender treatment and recommended that Abdulrazzak "should be required to complete weekly, group sex offender treatment for a period of 18 to 24 months." Dockets 82-1 at 4. The assessment also recommended that Abdulrazzak "should be required to

complete individualized sex offender specific treatment in the community prior to his release." *Id.*

On April 28, 2016, Abdulrazzak signed a "STOP contract" where he agreed to "be completely honest and assume full responsibility for [his] offense(s) and sexual behavior." Docket 82-3. Abdulrazzak contends he never agreed to complete STOP because it was not discussed when he was initially paroled under the 2014 Agreement. Docket 101 at 3. Abdulrazzak alleges that he first learned about STOP on April 27, 2016. *Id.*

On April 29, 2016, Abdulrazzak signed a new Parole Standard Supervision Agreement (2016 Agreement). Docket 33-3. Like the 2014 Agreement, the 2016 Agreement included the provision that Abdulrazzak must "participate, cooperate, and complete any programs as directed." *Id.* This agreement also included the following provision:

> OTHER: 1. Register as a sex offender according to local and state laws.
> 2. No contacts with victims or anyone under 18 years of age, unless approved by treatment provider and parole agent in advance.
> 3. You shall not socialize, date, form a romantic or sexual relationship, or marry anyone with physical custody of children under 18 years of age.
> 4. You shall submit, at your own expense, to any program of psychological or physiological assessment and monitoring at the direction of parole agent or treatment provider[.] This includes, but not limited to the polygraph, plethysmograph, and Abel Screen to assist in treatment, planning and case monitoring.
> 5. You shall notify third parties of your complete criminal record, permit the parole agent or treatment provider to confirm compliance with this notification requirement and make any other notifications as the parole agent deems appropriate. You shall inform all persons with whom you have an established or ongoing relationship about your complete criminal history.

> 6. You shall not go to or loiter near school yards, parks, playgrounds, swimming pools, arcades, or other places primarily used by children under the age of 18 years old.
> 7. You shall not be employed or participate in any volunteer activity where you have contact with children under the age of 18 years old unless approved by treatment provider and parole agent.
> 8. You will not own, operate, or possess any cell phone with a camera, internet access, or text messaging.
> 9. No computer internet/on-line access or use without prior approval of parole agent and treatment provider. Any internet use will be subject to monitoring at the discretion of the parole agent or treatment provider.

Docket 33-3 at 2. Abdulrazzak contends this is a "modified" agreement and he signed it under duress. Docket 101 at 3.

On May 17, 2016, Abdulrazzak signed an Individualized Supervision Agreement for the South Dakota Department of Corrections Sex Offender Management Program. Docket 82-2. A translator from A to Z World Languages, parole agent Werner, treatment provider Joshua Kaufman, and Abdulrazzak were present at this meeting. Docket 86 ¶ 28. Defendants allege that, by signing the Individualized Supervision Agreement, Abdulrazzak agreed to "attend and participate in weekly individualized supervision meetings with [his] treatment provider and parole officer." Dockets 82-2 and 86 ¶ 6. And Abdulrazzak agreed that he would "honestly review all of my sexual behavior including all of [his] sexual behaviors including all of [his] sexual relationships." Abdulrazzak also agreed to "take clinical polygraph examinations at least every 3 months while [he is] in the community." Dockets 82-2 and 86 ¶ 17. Werner, assisted by a translator from A to Z World Languages, also reviewed the 2016 Agreement. Docket 86 ¶ 28. Under the 2016 agreement, Abdulrazzak agreed to "participate | cooperate | and

complete any programs as directed" and to "comply with all instructions in matters affecting my supervision | and cooperate by promptly and truthfully answering inquiries directed to me by a Parole Agent." Docket 33-9.

Revocation of Parole

On October 27, 2016, Werner submitted a Violation Report that Abdulrazzak was "non-compliant in regards to his sex offender programming and was subsequently terminated from community-based sex offender programming." Dockets 33-9 and 87 ¶ 12. The Report noted that Abdulrazzak "had multiple instances in which he did not comply with directions given to him such as completing some of his homework assignments." Docket 33-9. "He also left the unit when he was instructed that he could not." *Id.* at 2. Abdulrazzak contends that he complied with treatment and answered all questions truthfully. Docket 101 at 4.

As part of the sex offender programing, Abdulrazzak was "assigned homework which was to be reviewed with the program provider and Agent Werner." Dockets 86 ¶ 22, 82-5, 82-34 at 10-14. Werner alleges that there were occasions where Abdulrazzak "failed to complete the assigned homework in the time allotted" and had to be "given more time to complete the homework." Dockets 86 ¶ 23 and 82-34 at 13. And occasionally when Abdulrazzak attempted to complete the assignments asked of him he "would copy the examples instead of coming up with his own." Docket 33-9.

At the direction of his treatment provider, Abdulrazzak was scheduled to take "an instant offense polygraph" on October 19, 2016 "to determine where

his programming should go as he was continuing to deny and make no progress." Docket 33-9 at 2. The day before the exam, Abdulrazzak told Werner that he was "ready for it" and "would pass no problem." Dockets 86 ¶ 28 and 82-34 at 22-23. Abdulrazzak alleges he made these statements under the threat of a parole violation. Docket 101 at 5.

At the scheduled exam, Abdulrazzak expressed concern that the outcome of the polygraph would be used to bring about new criminal charges or affect his ongoing habeas corpus proceeding. Dockets 82-24 and 101 at 5. Abdulrazzak claims he "was informed that the outcome of said polygraph would be used to bring new criminal charges." Docket 101 at 5. Defendants allege that the polygraph examiner "attempted to re-assure him that the exam was solely for his treatment assessment and parole status." Dockets 82-24 and 86 ¶ 30. But the examiner determined that a polygraph exam should not be administered "[b]ased on [Abdulrazzak's] reservations and the fear of violating [Abdulrazzak's] civil rights." Docket 82-24. The examiner explained that "until he had this resolved with his attorney I could not ethically give him the polygraph exam." *Id.*

Abdulrazzak's attorney later contacted Werner and stated that she was "fine with him taking the polygraph." Dockets 86 ¶ 32 and 82-25. Abdulrazzak's attorney further advised Werner that Abdulrazzak would like to take the polygraph. Docket 86 ¶ 35 and Docket 82-25. Abdulrazzak was provided with an opportunity to take a polygraph exam again on October 24, 2016. Docket 33-9 at 2. The Violation Report stated that "[d]uring this exam,

Mr. Abdulrazzak blatantly failed to follow directions but the exam was still valid and found that Mr. Abdulrazzak was deceptive in regards to questions about committing the crime he was serving time for." *Id.*

After the failed polygraph exam, Werner alleges that she verbally directed Abdulrazzak not to leave Unit C. Docket 86 ¶ 51. Abdulrazzak alleges that he did not leave Unit C without permission. Docket 101 at 7. But Abdulrazzak stated that he left Unit C on October 25, 2018 to attend his driving license examination at 10:00. Docket 82-34 at 20-21.

Dakota Psychological Services (DPS) sent Abdulrazzak a treatment termination letter dated October 31, 2016, stating that he "has not responded to various treatment efforts provided so far DPS to help him work through his denial and address the sexual problems indicated by his conviction." Docket 33-9 at 4. Abdulrazzak claims that this letter "did not present any kind of problems in my answer to defendant Kaufman." Docket 101 at 6.

On March 13, 2017, there was a hearing before the Board of Pardons and Paroles as to whether Abdulrazzak's parole should be revoked. Docket 36-1. The Parole Board determined that Abdulrazzak violated both Conditions 10 and 13E of his Supervision Agreement. Docket 36-1. The Parole Board found that "explanations offered by the inmate do not mitigate, justify or excuse conduct while on supervision." *Id.*

Access to Documents

After release from ICE custody, Abdulrazzak returned to SDSP with a large box of legal documents and paperwork. Docket 82-15 at 2. Abdulrazzak

alleges that he was working on a state habeas petition and a motion to reconsider/reopen his immigration case. *See* Docket 101 at 12-14. Abdulrazzak alleges that he needed digital material on a CD for his immigration case and a USB drive for his habeas case. Docket 101 at 10.

Abdulrazzak maintains that Werner knew he needed access to digital information but denied him that access. Docket 31-1. As a result, Abdulrazzak alleges that he missed deadlines, although he does not specify whether it was in his state habeas corpus case or immigration case. Docket 10-1 at 15.

Werner alleges that she first learned about the box of legal materials from an April 19, 2016 email. Dockets 86 ¶ 58 and 85-15. Werner and Abdulrazzak later discussed the legal materials at their first meeting on May 10, 2016. Werner's notes read:

> Agent Schaaf and I met with Haider at intake in Jameson today. He was upset that he couldn't get paperwork done for his immigration. I told him I would get him the paperwork he needs, he said he keeps it on a disc in his property. We explained to him that he cannot be in the library as he stated he would go due to his sex offense and cannot be on a computer since he is not allowed to use the internet. He stated he needed it to get his paperwork completed as his handwriting is not good. He went back and forth on his story about his paperwork being due Friday, then Thursday, then 30 days. He also kept stating that we were keeping him from filing his legal paperwork. He was explained that he may complete his paperwork, but could not use a computer to do so. To assist him, I requested that his paperwork in property be moved to Unit C for him to work on. I also told him that I would pick him up Tuesday morning for our appointment and bring him here, that if I could get him an ICE appointment, I would bring him there after. He also requested I set up an appointment [sic] with Julie Hofer, his public advocate that day. I told him I would try to get in contact with her. He was placed on GPS by the Glory House as I was leavign [sic].

Docket 82-28. Abdulrazzak alleges that he was never allowed access to his digitally stored legal documents. Docket 101 at 9.

After their initial meeting, Werner contacted the Sioux Falls ICE office. Dockets 86 ¶ 87 and 82-38. In a May 10, 2016 email to Deportation Officer Darin Gergen, Werner indicated that she "would like to know the next steps in regards to Mr. Abdulrazzak as I am not familiar with the ICE process and how goes about getting a work permit." Dockets 86 ¶ 87 and 82-38. Werner does not claim that she ever asked about Abdulrazzak's immigration case or any possible deadlines.

Werner also contacted Abdulrazzak's public advocate Julie Hofer. Hofer was appointed to represent Abdulrazzak in his state habeas corpus case. Docket 82-8 at 2. Hofer informed Werner that "All the paperwork she needed for his legals had been filed a year and a half ago." Docket 86 ¶ 68. Hofer stated that there were "no more deadlines and the information [Abdulrazzak] is trying to get to her (his personal arguments) will not be what she uses as her argument."

Werner contacted Kingdom Boundaries about supervising Abdulrazzak's computer use. Dockets 86 ¶ 79 and 82-20. The Kingdom Boundaries' computer was available on July 7, 2016. *Id.* Werner also consulted the Sex Offender Management Program in an attempt to find a way for Abdulrazzak to use a computer. Docket 86 ¶ 67.

At a May 31, 2016 meeting, Abdulrazzak asked Werner for more hours to use the Department of Labor computer. Dockets 86 ¶ 69 and 82-32. Werner

responded that "[i]f his lawyer verified that he needed the 3 days that he requested to work on his argument" she "would give him the time." *Id.* On June 7, 2016, Werner again contacted Hofer and stated that they needed to figure out how to get Abdulrazzak to a computer that did not violate his parole agreement. Dockets 86 ¶ 70 and 82-19. Werner again asked if there were any impending deadlines and Hofer responded that there were no upcoming deadlines. Dockets 86 ¶ 72 and 82-37. At some intervening time, Abdulrazzak went to the Department of Labor and learned he could not use its computers because they are for job searches. *Id.*

At a June 14, 2016 meeting, Abdulrazzak asked Werner for three more hours for community use. Dockets 86 ¶ 73 and 82-32. Werner denied the request explaining that there was nowhere appropriate for Abdulrazzak to use a computer in the community. *Id.* Werner provided Abdulrazzak two options: Abdulrazzak could complete his work by hand as there was no need for it to be typed or Abdulrazzak could use a computer under the supervision of his lawyer to finish up his work. Dockets 86 ¶ 74 and 82-32.

At a June 21, 2016 meeting, Abdulrazzak told Werner that he filed a lawsuit to address his legal access issues. Dockets 86 ¶ 77 and 82-29. Werner reminded Abdulrazzak that she would allow him to use a computer under appropriate supervision, such as under the supervision of his lawyer. *Id.*

At a July 12, 2016 meeting, Abdulrazzak informed Werner that he was "done with his argument" and therefore "didn't need to ask about computer use again." Dockets 86 ¶ 85 and 82-29.

Werner maintains that she was not aware of any deadline missed in his state habeas proceed or immigration case. Docket 86 ¶¶ 82, 96. Werner further alleges that, by signing the Parole Supervision Agreement on April 29, 2016, Abdulrazzak expressly agreed that he would not be allowed any computer internet access without prior approval of his parole agent and treatment provider. Docket 33-3. The agreement also stated that "any internet use would be subject to monitoring at the discretion of the parole agent or treatment provider." *Id.* Abdulrazzak contends these restrictions were added because he would not admit guilt. Docket 101 at 9. Abdulrazzak further alleges that he signed the 2016 Agreement under threat of a parole violation. *Id.*

Loss of USB Memory Flash Drive

Abdulrazzak alleges that Bertsch and John Doe 2 intentionally lost Abdulrazzak's legal materials created during Abdulrazzak's two years on parole. Docket 47. Abdulrazzak claims this was done to hinder his ability to fight his immigration case and enable the government to deport him to Iraq. *Id.* Abdulrazzak alleges that the USB drive was located in a black bag stored "in the outside locker at Unit C" during the time he was in the Community Transition Program, which was from April 20, 2016 until November 2, 2016. Dockets 31-1 and 101 at 16. Abdulrazzak stated, "It makes no sense that my USB flash memory drive would be *accidentally* (lost or stolen) without the staff consent since those officers reasonably would be the only people who would have access to my outside locker, taking in consideration that the lost was

selective in nature . . . ." Docket 47 at 20. Abdulrazzak alleges that there were more valuable items in his locker that were not taken. *Id.*

Defendant Bertsch alleges that she was not working in Unit C between April 20, 2016 until November 2, 2016 and therefore was not in charge of Abdulrazzak's property. Docket 85 ¶ 7. At that time, Bertsch served as a Unit Manager of the Special Housing Unit on the "Hill" at the SDSP. *Id.* ¶ 8. Bertsch also contends she did not "rotate out to Unit C" until December 2016. Bertsch denies any knowledge of any "black bag" or a USB drive. *Id.* ¶¶ 9, 10. Bertsch contends that her only involvement was signing the "Prohibited Property, Disposition of" sheet used in connection with disposition of certain items of Abdulrazzak's personal belongings not allowed inside the SDSP. Dockets 85 ¶ 2 and 82-16. The only prohibited items referred to in the sheet are a cell phone and charger and $1.18. Docket 82-16.

DISCUSSION

I. Motion to Refile Interrogatories and Requests for Admission

Abdulrazzak asks this court to accept his interrogatories and requests for admissions for filing. Docket 51. Abdulrazzak attempted to file his interrogatories and requests for admission on December 7, 2017. The Clerk of Court returned the interrogatories and requests for admission along with a letter explaining D.S.D. Civ. LR 26.1(A). Under D.S.D. Civ. LR 26.1(A), "depositions, interrogatories, requests for documents, requests for admissions, and answers and responses thereto must not be filed." Thus, Abdulrazzak's motion to refile (Docket 51) is denied.

II. Motion to Appoint Counsel

Abdulrazzak moves the Court to appoint him counsel. Docket 56. "A pro se litigant has no statutory or constitutional right to have counsel appointed in a civil case." *Stevens v. Redwing*, 146 F.3d 538, 546 (8th Cir. 1998). In determining whether to appoint counsel to a pro se litigant's civil case, the district court considers the complexity of the case, the ability of the litigant to investigate the facts, the existence of conflicting testimony, and the litigant's ability to present his claim. *Id.* Abdulrazzak's claims are not complex, and he appears able to adequately present his § 1983 claims. Therefore, his motion (Docket 56) is denied.

III. Motion to Reconsider Amended Order Denying in Part and Granting in Part Motion to Amend and Miscellaneous Other Motions

Abdulrazzak moves this court to reconsider its Amended Order Denying in Part and Granting in Part Motion to Amend and Miscellaneous Other Motions filed on December 17, 2017 (Docket 46). Docket 57. But before the court ruled on the motion to reconsider, Abdulrazzak filed a notice of interlocutory appeal as to the same December 17, 2017 order. Docket 58. The court stayed this case pending resolution of Abdulrazzak's interlocutory appeal. Docket 71. On March 26, 2018, the Eighth Circuit dismissed the appeal for lack of jurisdiction (Docket 74) and declined a rehearing by panel (Docket 97). The court now lifts the stay (Docket 71) and takes up Abdulrazzak's motion to reconsider (Docket 46).

A district court's decision on a motion for reconsideration rests within its discretion. *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 413 (8th Cir.

1988). " 'Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence.' " *Id.* at 414 (quoting *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir.), *as amended*, 835 F.2d 710 (7th Cir. 1987)). The court has reconsidered its order and attempted to discuss each claim within separate counts despite significant overlap.

A. Count I - Discrimination

In Count I, Abdulrazzak asserts claims under the First, Fifth, Eighth, and Fourteenth Amendments against South Dakota Secretary of Corrections (SD DOC) Dennis Kaemingk, SD DOC Policy Maker Aaron Miller, the SD Board of Pardons and Paroles (the Board), and the Director of the Board Doug Clark. Docket 31-1 at 4. Initially, Abdulrazzak stated that he brings these claims against defendants "as municipalities." In his motion to reconsider, Abdulrazzak explains that his claim against defendants "as municipalities" was based on a misunderstanding of the word municipalities. Docket 57 at 2. The court rescreens his claim against these defendants.

Abdulrazzak alleges that Kaemingk, Miller, the Board, and Clark discriminated against him as a non-citizen by requiring him to admit his guilt and participate in sex offender treatment, requirements that were not in his original parole agreement. Docket 31-1 at 4. Abdulrazzak claims that these parole requirements were added later because his immigration case was settled. Other offenders with the parole requirement of admitting guilt learn of the requirement earlier than two years into their parole. Docket 57 at 3.

Abdulrazzak claims that Kaemingk, Miller, the Board, and Clark had access to the COMS system and they failed to take action to correct the events that led to his parole revocation. Docket 57 at 2.

Abdulrazzak fails to demonstrate how this alleged discrimination violated his First, Fifth, or Eighth Amendment rights. Although pro se complaints are to be construed liberally, "they still must allege sufficient facts to support the claims advanced." *Stone v. Harry*, 364 F.3d 912, 914 (8th Cir. 2004). The court is not required to construct a legal theory that assumes facts which have not been pleaded. *Id.* Thus, Abdulrazzak fails to state a claim under the First, Fifth, or Eighth Amendments in Count I.

As to the Fourteenth Amendment claim, Abdulrazzak now alleges a "class of one" Equal Protection claim, which was recognized by the Supreme Court in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam). Docket 57 at 5. The Eighth Circuit applied the class of one analysis to a prison inmate who alleged that he was being discriminated against because the parole board denied him parole while granting parole to similarly situated inmates. *Nolan v. Thompson*, 521 F.3d 983, 989 (8th Cir. 2008). Because Nolan did not allege he was a member of a protected class or that his fundamental rights had been violated, he had to show that "the Board systematically and 'intentionally treated [him] differently from others similarly situated and that there is no rational basis for the difference in treatment.' " *Id.* (quoting *Olech*, 528 U.S. at 564). To do this, Nolan had to " 'provide a specific and detailed account of the nature of the preferred treatment of the

favored class,' especially [because] the state actors exercise broad discretion to balance a number of legitimate considerations." *Id.* at 990 (quoting *Jennings v. City of Stillwater*, 383 F.3d 1199, 1214-15 (10th Cir. 2004)).

At the summary judgment stage, the court held that Nolan failed to provide the evidence necessary to meet his burden because he did not demonstrate that the board "intentionally discriminated against him or even denied him parole on an irrational basis." *Id.* The board had consistently given legitimate reasons for denying parole. *Id.* The record also lacked "sufficient evidence about Nolan's own parole file to enable a meaningful comparison between him and those he claims are similarly situated." *Id.* Even though Nolan provided "a spreadsheet listing the names of approximately twenty other inmates, together with their races, the names of their offenses, sentence length, time served, parole hearing dates, and release dates[,]" the court found that this was insufficient for the court to meaningfully compare Nolan with other inmates. *Id.*

Under the analysis in *Nolan*, Abdulrazzak fails to state an Equal Protection claim. Abdulrazzak provides no specific examples of others who were similarly situated but treated differently. Although Abdulrazzak sets forth facts suggesting pretext on defendants' part, he has not provided a spreadsheet as Nolan did, much less "a specific and detailed account of the nature of the preferred treatment of the favored class," which the *Nolan* court held was necessary to support an Equal Protection claim. *Id.* Abdulrazzak only sets forth conclusory allegations that defendants "will inform other individuals (U.S.

citizens) who their conviction circumstances similar to mine about the programing requirement prior to their release on parole and not 2 years later without a parole violation or change in the allegations of their conviction." Docket 57 at 3.

Even if the court found adequate specificity to state a valid Equal Protection claim, a prisoner must allege facts demonstrating that prison officials intentionally treated him differently than similarly situated inmates. *Nolan*, 521 F.3d 989-90. Abdulrazzak alleges that defendants admit that they did not discuss the treatment requirements until after his initial parole on May 17, 2016. But this does not demonstrate that prison officials intentionally treated him differently. Abdulrazzak makes no such allegation. Thus, Abdulrazzak's Equal Protection claim fails.

In Count I, Abdulrazzak also alleges that Greg Erlandson and Myron Rau violated Abdulrazzak's substantive due process rights by adopting the parole officer's report when they knew Abdulrazzak was invoking his Fifth Amendment rights. Docket 57 at 4. But members of the parole board are " 'absolutely immune from suit when considering and deciding parole questions.' " *Figg v. Russell*, 433 F.3d 593, 598 (8th Cir. 2006) (quoting *Patterson v. Von Riesen*, 999 F.2d 1235, 1238-39 (8th Cir.1993)).

After reconsideration, the court finds that Abdulrazzak fails to state a claim upon which relief may be granted in Count I.

B. Count II – Notice of Parole Conditions

In Count II, Abdulrazzak asks this court to reconsider his claims against defendants that did not survive screening and to consider his Equal Protection claims as a "class of one." Docket 57 at 7. Abdulrazzak reiterates that Warden Dooley, Deputy Warden Susan Jacobs, Unit Staff Member Kim Lippincott, parole officers, and treatment providers are members of the Sex Offender Management Program (SOMP) team and were therefore personally involved in failing to inform him of the treatment requirements. This is not new evidence. Abdulrazzak alleged in his second amended complaint that these defendants are members of the SOMP team. Docket 31-1 at 6. In its order at Docket 46, the court found that Abdulrazzak failed to state a claim against Dooley, Jacobs, Lippincott, the Board, Clark, Dakota Psychological Services, LLC, and Joshua Kaufman. Abdulrazzak claims no error of law or fact or newly discovered evidence. After reconsideration, the court finds that Abdulrazzak fails to state a claim upon which relief may granted in Count II against defendants except the claim it previously found survived screening against parole officer Werner. *See* Docket 46 at 5.

Even considering Count II as a "class of one," Abdulrazzak fails to state a claim for the same reasons stated above in Count I. Abdulrazzak fails to provide specific examples of others who were similarly situated but treated differently. To state a valid Equal Protection claim a prisoner must allege facts demonstrating that prison officials intentionally treated him differently than similarly situated inmates. *Nolan,* 521 F.3d 989-90. Abdulrazzak fails to allege

that defendants intentionally treated him differently than similarly situated inmates. After reconsideration, the court finds that Abdulrazzak fails to state a "class of one" claim.

C. Count III - Retaliation

In Count III, Abdulrazzak asks this court to reconsider his allegations against Werner and J.C. Smith. Docket 57 at 7. Abdulrazzak's claim that Werner and Smith revoked his parole in retaliation for exercising his Fifth Amendment right to not incriminate himself already survived screening. *See* Docket 46. In his motion to reconsider, Abdulrazzak now alleges that Werner and J.C. Smith violated his right to equal protection because defendants exceeded their authority when they waited two years to impose a treatment requirement without a parole violation or change in allegation of conviction. Abdulrazzak states, "the allegation is not against . . . imposing the treatment itself, rather . . . the timing of imposing the treatment by defendants 2 years . . . into my parole rather than prior to my release on parole[.]" Docket 57 at 7. But in the court's order at Docket 13, the court noted that in Count I Abdulrazzak alleged that the decision to add parole requirements is a policy of the parole board. *See* Docket 13 at 9. Thus, Abdulrazzak fails to allege that Werner and J.C. Smith were responsible for imposing the treatment requirement.

D. Count IV

Abdulrazzak claims that the court missed his allegation against Kaufman and Dakota Psychological Services. Docket 57 at 8. Abdulrazzak alleges that

Kaufman and Dakota Psychological Services violated his rights because they terminated him from treatment in retaliation for exercising his Fifth Amendment right to not incriminate himself. *Id.* The court's order at Docket 46 addressed Abdulrazzak's motion to amend to add the treatment provider under Count II. The court stated, "The second amended complaint, however, contains no allegation that the treatment provider had the power to revoke Abdulrazzak's parole. Thus, it would be futile to allow an amendment of the complaint to add the treatment providers as named defendants in Count II." *See* Docket 46 at 8. Abdulrazzak's motion to reconsider provides no information that would change the court's previous finding and therefore is denied.

Abdulrazzak further requests that this court reconsider his claim against Kaufman and Dakota Psychological Services for their alleged participation in denying him access to the court by denying him access to a computer with internet to do his legal work while on parole when he did not admit guilt. As the court previously found, Kaufman and Dakota Psychological Services, as psychologist and service provider, have no absolute power over whether Abdulrazzak is allowed to use a computer. *See* Docket 13 at 10. Furthermore, Abdulrazzak fails to allege that Kaufman and Dakota Psychological Services ever denied his request to use the computer. Thus, Abdulrazzak fails to state a claim against Kaufman and Dakota Psychological Services.

E. Count VI

Abdulrazzak asks this court to reconsider his allegations concerning changes in his parole conditions discussed above and the deprivation of a smart phone, video visitation with his parents, calls to his niece, and Arabic-language media. Docket 57 at 9. First, Abdulrazzak argues that *McKune v. Lile*, 536 U.S. 24 (2002) does not apply to his claims because he was not in prison. This argument fails because it does not address the reason for which the court relied on *McKune*. In *McKune*, a plurality of the Supreme Court held that prison officials did not violate a prisoner's Fifth Amendment rights when they changed the prisoner's privilege status level and moved him to a maximum-security facility after he refused to participate in a sexual abuse treatment program, which required him to admit all prior improper sexual activities without guaranteed immunity. *See McKune*, 536 U.S. at 24. The Court found that these consequences were not severe enough to constitute "compulsion" for purposes of the Fifth Amendment right against self-incrimination. *Id.*

Abdulrazzak cites several Eighth Circuit opinions where the Eighth Circuit invalidated conditions of supervised release that banned internet or computer use as overly broad. Docket 57 at 9-10. None of the cases Abdulrazzak cites address the Fifth Amendment or the use parole conditions to force a parolee to admit guilt. Thus, Abdulrazzak fails to state a claim.

F. Count VII

Abdulrazzak ask the court to add defendants Joseph Siemonsma and Robert Berthelson. Docket 57 at 12. This court dismissed Siemonsma and

Berthelson because Abdulrazzak failed to state a claim upon which relief may be granted. Docket 46 at 12-13. In his second amended complaint, Abdulrazzak fails to allege any facts against Siemonsma or Berthelson. Their names are not even mentioned in Count VII. *See* Docket 47 at 18-20. Abdulrazzak's motion to reconsider fails to rectify the deficiencies of his second amended complaint. Thus, the court will not add Siemonsma and Berthelson as defendants.

IV. Motion to Reconsider Order Granting Extension of Time to Answer

Abdulrazzak asks the court to reconsider its order granting defendants' motion for an extension of time to file an answer. Docket 59. Defendants filed their answer on January 17, 2018. Thus, Abdulrazzak's motion to reconsider order granting extension (Docket 59) is denied as moot.

V. Motion for Discovery of Plaintiff's File

Abdulrazzak moves this court to order defendants' counsel to turn over Abdulrazzak's institutional file. Docket 60. Such a request should have been made to defendants through a request for production of documents. There is no indication that any such request was ever made. Therefore, Abdulrazzak's motion (Docket 60) is denied.

VI. Motion to Strike Defendants' Answer to Second Amended Complaint

Abdulrazzak moves to strike portions of defendants' answer to the Second Amended Complaint under Fed. R. Civ. P. 12(f). Docket 72. Under Rule 12(f) "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The court enjoys

"liberal discretion" in determining whether to strike a party's pleadings but it is an "extreme measure." *Stanbury Law Firm v. I.R.S.*, 221 F.3d 1059, 1063 (8th Cir. 2000). Thus, motions to strike under Rule 12(f) are "infrequently granted." *Id.* Abdulrazzak failed to demonstrate how defendants' answer is a "redundant, immaterial, impertinent, or scandalous matter." Rather, Abdulrazzak's motion shows that he disagrees with the defendants' answer, but that is not a basis to strike pleadings. Abdulrazzak also argues that defendants' affirmative defenses should be stricken because "defendants failed to prove them." Defendants are under no obligation to prove their affirmative defenses in their answer. Thus, Abdulrazzak's motion to strike (Docket 72) is denied.

VII. Motion for Entry of Default and Reconsideration of Clerk's Denial of Entry of Default

Abdulrazzak moved for default judgment on his motion to impose sanctions (Docket 75) and the Clerk of Court denied his request for entry of default (Docket 78). Abdulrazzak now moves the court to reconsider the clerk's entry of default. Docket 92. Abdulrazzak argues he is entitled to default judgment because defendants never opposed his motion for sanctions. Entry of default is appropriate "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend[.]" Fed. R. Civ. P. 55(a). Defendants' lack of response to a motion is not a failure to plead or otherwise defend. Defendants filed an answer with affirmative defenses on January 17, 2018. Docket 64. Thus, Abdulrazzak's motion to reconsider clerk's entry of default (Docket 92) is denied.

Abdulrazzak moves the court for entry of default judgment against Kaufman (Docket 77) and moves the court to reconsider that motion (Docket 91). Abdulrazzak requests that default be entered against defendant Kaufman because Abdulrazzak claims Kaufman is evading service of process. To date, Kaufman has not been served. Default judgment cannot be entered against a party who has not been served. Thus, Abdulrazzak's motion for entry of default judgment (Docket 77) and motion to reconsider the same (Docket 91) are denied.

VIII. Motions for Sanctions

Abdulrazzak moves this court to impose sanctions against defendants. Docket 76. Abdulrazzak alleges that defendants failed to comply with this court's December 12, 2017 order (Docket 46) directing defendants to disclose any contact information of Kaufman. Docket 76. Defendants responded to the court's order and explained they only had a phone number. Docket 55. Defendants also stated, "Counsel, however, is willing to provide the Court or the U.S. Marshals Service with the limited information now available if the Court deems it necessary. Counsel, if directed to do so by the Court, could provide said contact information to the U.S. Marshal's Service in a 'confidential memorandum' or furnish the same to the Court provided that said telephone number is under seal by the Court and not be a matter of public record." *Id.* The court has not yet ordered counsel to turn over the phone number. Thus, defendants have complied with the court's order and Abdulrazzak's motion (Docket 76) is denied.

IX. Motion to Dismiss Defendants' Motion for Summary Judgment

Abdulrazzak moves to dismiss defendants' motion for summary judgment. Abdulrazzak argues that the motion is premature and that defendants exceed the scope of Abdulrazzak's claims. The court set February 28, 2018 as the deadline for defendants' motion for summary judgment based on qualified immunity. Docket 50. Defendants filed their motion for summary judgment on February 23, 2018. Docket 81. Thus, defendants' motion is not premature. Abdulrazzak contends that defendants should not raise issues involving his underlying state criminal conviction or his habeas petition. Docket 94. Abdulrazzak raised claims that implicate both his underlying conviction and his habeas proceeding. Thus, Abdulrazzak's motion to dismiss defendants' motion for summary judgment (Docket 94) is denied.

X. Defendants' Motion for Summary Judgment

A. Individual Capacity Claims

Defendants in their individual capacities contend that they are entitled to qualified immunity. Section 1983 provides a cause of action against any "person who, under color of any statute, ordinance, regulation, custom, or usage, of any state" causes the deprivation of a right protected by federal law or the United States Constitution. 42 U.S.C. § 1983. The doctrine of qualified immunity, however, generally shields " 'government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Smith v. City of Minneapolis*,

754 F.3d 541, 545 (8th Cir. 2014) (alteration omitted) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

To overcome a qualified immunity defense at the summary judgment stage, a plaintiff must show: "(1) the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional or statutory right; and (2) the right was clearly established at the time of the deprivation." *Howard v. Kan. City Police Dep't*, 570 F.3d 984, 988 (8th Cir. 2009). The court may analyze these two factors in either order. *Hutson v. Walker*, 688 F.3d 477, 483 (8th Cir. 2012) (citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)). But "[t]o deny the officers qualified immunity, [the court] must resolve both questions in [the plaintiff's] favor." *Hawkins v. Gage Cty.*, 759 F.3d 951, 956 (8th Cir. 2014).

1. Count II – Notice of Parole Conditions

"[T]he general rule is that a person has no claim for civil liability based on the Fifth Amendment's guarantee against compelled self-incrimination unless compelled statements are admitted against him in a criminal case." *Entzi v. Redmann*, 485 F.3d 998, 1002 (8th Cir. 2007) (citation omitted). The Supreme Court "left open the possibility that a 'powerful showing' might persuade [it] to expand the protection of the self-incrimination clause to the point of civil liability[.]" *Id.* (quoting *Chavez v. Martinez*, 538 U.S. 760, 778 (2003)(plurality opinion)).

In *McKune*, a plurality of the Supreme Court held that prison officials did not violate a prisoner's Fifth Amendment rights when they changed the prisoner's privilege status level and moved him to a maximum-security facility after he refused to participate in a sexual abuse treatment program, which required him to admit all prior improper sexual activities without guaranteed immunity. *McKune v. Lile*, 536 U.S. 24, 38 (2002) (plurality opinion). The Court found that these consequences were not severe enough to constitute "compulsion" for the purposes of the Fifth Amendment right against self-incrimination. *Id.* There, the plaintiff complained he would be transferred and lose privileges, but the Court observed that this decision would "not extend his term of incarceration" or affect his parole eligibility. *Id.* at 38.

In *Entzi*, the Eighth Circuit denied a sex offender's claim that a probation officer violated his Fifth Amendment rights by filing a petition to revoke his probation when it was discovered that Entzi had not finished sex offender treatment where he would have had to admit his offense. *Entzi*, 485 F.3d at 1001. Relying on *McKune*, the Eighth Circuit found that the loss of an opportunity for a discretionary sentence-reduction credit "is not among the consequences for noncompliance that go 'beyond the criminal process and appear, starkly, as government attempts to compel testimony.'" *Entzi*, 485 F.3d at 1004 (quoting *McKune*, 536 U.S. at 53 (O'Connor, J., concurring)).

Here, Abdulrazzak's claim against Werner survived screening because he alleges that his parole was revoked after he refused to incriminate himself. Docket 46 at 7. Abdulrazzak claims that he would have invoked the Fifth

Amendment before his first release in 2014 if Werner would have provided adequate notice to him that he would later be required to admit guilt in sex offender treatment. Abdulrazzak alleges that this would have allowed him to "stay in prison until [he] flat time[d] without imposing the extra damages that may applied to me while on parole like parole violation consequences[.]" Docket 47 at 6.

The undisputed facts fail to show that Werner served as Abdulrazzak's parole agent in 2014, the time he claims he was constitutionally entitled to notice of the required sex offender treatment. It is well established that " 'liability under section 1983 requires a causal link to, and direct responsibility for, the alleged deprivation of rights.' " *Armour v. St. Louis Cty. Work*, 2008 WL 619381, *1 (E.D. Mo. Mar. 5, 2008) (quoting *Madewell v. Roberts*, 909 F.2d 1203, 1208 (8th Cir. 1990)). To state a claim under § 1983, Abdulrazzak must show that Werner "personally violated" his constitutional rights. *Jackson v. Nixon*, 747 F.3d 537, 543 (8th Cir. 2014). Abdulrazzak was released from the ICE hold on April 20, 2016, because he temporarily settled his immigration case. Dockets 86 ¶ 8 and 82-15. After he reported to the Admission & Orientation Unit at the SDSP, Dusti Werner was then assigned to serve as Abdulrazzak's parole agent. Docket 86 ¶ 9. Abdulrazzak contends that Werner failed to provide notice of required sex offender treatment before he was initially released on parole in 2014. Because Werner was not assigned to serve as Abdulrazzak's parole agent until after Abdulrazzak's release on April 20, 2016, Werner lacked the personal involvement in failing to provide

notice that is necessary to state a claim under § 1983. Thus, Abdulrazzak fails to state a claim against Werner.

Even if Abdulrazzak did state a claim, Werner asserts that she is entitled to absolute immunity for her role in imposing, and enforcing, the various conditions set out in the parole supervision agreement. Docket 82 at 11. Werner cites *Figg v. Russell*, 433 F.3d 593, 599 (8th Cir. 2006) as support for her argument. In *Figg*, a South Dakota parolee alleged that she was illegally incarcerated after being detained for a parole violation. 433 F.3d at 596. Figg raised a claim against her parole agent because the agent offered her a parole agreement without giving her notice that the terms applied to her previously suspended sentence. *Id.* at 599. The Eighth Circuit found this function "so associated with the function of the Parole Board that [the parole agent], too, is cloaked in absolute immunity[,]" and dismissed the claim. *Id.* at 599-600 (citing SDCL 24–15–1.1). "[T]he extent of immunity accorded an official depends solely on the official's function." *Id.* at 599 (quoting *Nelson v. Balazic*, 802 F.2d 1077, 1078 (8th Cir. 1986).

Werner claims that she "was merely 'acting as a representative of the parole board' when, on May 17, 2016, she presented the 'Parole Standard Supervision Agreement' to Abdulrazzak for him to sign." Docket 82 at 9. "[T]he supervision agreements are prepared by the Director and Parole Board staff at the direction of the Parole Board." *Castaneira v. Ligtenberg*, 2006 WL 571985, at *4 (D.S.D. Mar. 7, 2006). The court finds that Werner is entitled to absolute immunity as an agent of the Parole Board for presenting the 2016 Agreement

to Abdulrazzak. Abdulrazzak's claim against Werner in her individual capacity must be dismissed, as "absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity." *Figg*, 433 F.3d at 597.

2. Count III – Retaliation

To establish a retaliation claim, Abdulrazzak must show "(1) he engaged in a protected activity, (2) the government official took adverse action against him that would chill a person of ordinary firmness from continuing in the activity, and (3) the adverse action was motivated at least in part by the exercise of the protected activity." *Spencer v. Jackson Cty.*, 738 F.3d 907, 911 (8th Cir. 2013) (quoting *Revels v. Vincenz*, 382 F.3d 870, 876 (8th Cir. 2004)). In order to succeed on a retaliation claim, a plaintiff must show that the "adverse action taken against him was 'motivated at least in part' by his protected activity . . . ." *Id.* (quoting *Revels*, 382 F.3d at 876). Although "[t]he causal connection is generally a jury question, . . . it can provide a basis for summary judgment when the question is so free from doubt as to justify taking it from the jury." *Beaulieu v. Ludeman*, 690 F.3d 1017, 1025 (8th Cir. 2012) (quoting *Revels*, 382 F.3d at 876).

Abdulrazzak claims that Werner and Smith violated his constitutional rights because they revoked his parole in retaliation for exercising his Fifth Amendment right to not incriminate himself. Docket 46 at 8. Defendants argue that Abdulrazzak's retaliation claim is barred by the "favorable termination" rule established in *Heck v. Humphrey*, 512 U.S. 477 (1994).

Abdulrazzak disagrees and argues that defendants know this is not a habeas petition because he does not seek release from prison. Docket 100 at 4.

The Eighth Circuit has held that *Heck* applies to decisions concerning parole. *Schafer v. Moore*, 46 F.3d 43 (8th Cir. 1995). Defendants cite *Round v. Party*, 2016 WL 4123671, at *2 (S.D. Ill. Aug. 3, 2016). In *Round*, the plaintiff alleged that a member of the Illinois Prisoner Review Board "retaliated against him for threatening to take legal action by terminating his MSR [Mandatory Supervised Release]." *Round*, 2016 WL 4123671, at *2. The court, however, found that, "as a threshold matter," the plaintiff "cannot challenge the propriety of . . . the PRB ruling revoking his MSR[] by bringing a claim for money damages against Defendant Doe under § 1983." *Id.* The court continued that "a claim for damages arising from the wrongful revocation of Plaintiff's MSR is barred by *Heck* and *Edwards*." *Id.*

When a state prisoner seeks relief under 42 U.S.C. § 1983, the district court must consider whether a judgment in favor of the plaintiff would necessarily invalidate plaintiff's conviction or sentence. *Heck*, 512 U.S. at 486-87. Because that is the case here, Abdulrazzak must "show 'that his parole revocation has been overturned by either a . . . state court or a federal habeas corpus decision.'" *Freeman v. Kentucky Parole Bd.*, 2017 WL 4274172, at *2 (W.D. Ky. Sept. 26, 2017) (quoting *Norwood v. Mich. Dep't. of Corr.*, 67 F. App'x 286, 287 (6th Cir. 2003)). Although Abdulrazzak explains that he has appealed the parole board's decision to state court, it appears that no decision has been reached. Docket 100 at 20. Because Abdulrazzak cannot show that

his parole revocation has been overturned, his claim is dismissed without prejudice for failure to state a claim upon which relief may be granted.

3. Count V – Access to Documents

"The Constitution guarantees prisoners a right to access the courts." *White v. Kautzky*, 494 F.3d 677, 679 (8th Cir. 2007). This "requires 'prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.'" *Id.* (citation omitted). To prove a violation of the right of access to the courts, a prisoner must establish that he has been injured by the violation. *Id.* at 680.

Abdulrazzak alleges that he missed a filing deadline because Werner would not allow him to access a computer and his digitally stored files. Docket 31-1. Abdulrazzak alleges that Werner "knew about my need to have access to digital information stored in CD and they kept away from me." *Id.* Abdulrazzak first alleged that the CD contained information from his original conviction for his habeas petition. *Id.* Abdulrazzak later stated that his CD contained his immigration documents. Docket 100 at 32.

Defendants argue that Abdulrazzak has not and cannot "designate specific facts showing that he suffered prejudice" as a result of his limited access. Docket 82 at 45 (citing *Cody v. Weber*, 256 F.3d 764, 770 (8th Cir. 2001). "To prove actual injury, [a prisoner] must demonstrate that a nonfrivolous legal claim has been frustrated or was being impeded." *Hartsfield*

v. Nichols, 511 F.3d 826, 832 (8th Cir. 2008)(alteration in original)(internal quotation omitted).

It is undisputed that Werner "offered to print off [Abdulrazzak's] paperwork so that he could continue to write out his argument for his court case." Docket 86 ¶ 66. Abdulrazzak even claims that Werner "offered to take my CD to her office." Docket 33. It is also undisputed that Werner provided Abdulrazzak two options to meet his deadlines: Abdulrazzak could complete his work by hand or Abdulrazzak could use a computer under the supervision of his lawyer. Dockets 86 ¶ 74 and 82-32. The record contains numerous examples of Werner looking for a way Abdulrazzak could use a computer. Docket 86. Those efforts only ceased when Abdulrazzak informed Werner that he was "done with his argument" and therefore "didn't need to ask about computer use again" during their July 12, 2016 meeting. Dockets 86 ¶ 85 and 82-29.

Abdulrazzak has a court-appointed attorney in his state habeas proceeding. Defendants contend that Abdulrazzak's access to his court-appointed counsel was never hindered. Courts have recognized that a prison official's obligation to assist inmate with their legal matters by providing a law library or legal assistance "is satisfied when the prisoner has been offered or provided a lawyer." *Stanko v. Patton*, 568 F. Supp. 2d 1061, 1075 (D. Neb. 2008) (citing *Kane v. Garcia Espitia*, 546 U.S. 9 (2005)). It is undisputed that there was frequent communication between Werner and Hofer about Abdulrazzak's petition. *See* Dockets 82-2, 82-19, 82-28, 82-37, 86 ¶¶ 68-72.

Thus, Abdulrazzak fails to state a legal access claim against defendants as it relates to his state habeas petition.

Defendants argue that Abdulrazzak's immigration case was frivolous as the BIA had already denied reopening his case on two prior occasions. Docket 82 at 50. Defendants allege that Abdulrazzak already "filed a timely motion to reconsider our [BIA] December 3, 2015 decision which was denied on February 9, 2016." Docket 33-7. According to the BIA, Abdulrazzak "has not demonstrated any prejudice which would warrant reopening based on an ineffective assistance claim." Docket 82-5. On April 15, 2016, the BIA re-issued their decision denying Abdulrazzak's motion to reconsider to correct a clerical mistake. *Id.*

Abdulrazzak maintains that he had a deadline for filing a new motion to reopen/reconsider with the Board of Immigration Appeals and an appeal with the Eighth Circuit. Docket 100 at 28. Abdulrazzak contends he had 90 days after the BIA re-issued a decision on April 15, 2016. Docket 100 at 31. Abdulrazzak planned to argue that the BIA failed to consider supplemental materials. *Id.* Even if this was a non-frivolous argument, Abdulrazzak fails to demonstrate that Werner's offer to print Abdulrazzak's documents and permission for him to handwrite his motion to reconsider was inadequate. As such, Abdulrazzak fails to demonstrate a violation of a constitutional right necessary to overcome qualified immunity.

4. Count VII – Loss of Flash Drive

"The taking of an inmate's legal papers can be a constitutional violation when it infringes his right of access to the courts." *Goff v. Nix*, 113 F.3d 887, 892 (8th Cir. 1997) (citation omitted). "[T]he destruction or withholding of inmates' legal papers burdens a constitutional right, and can only be justified if it is reasonably related to a legitimate penological interest." *Id.*

It is undisputed that Bertsch did not work in Unit C at the time the USB drive was lost. Docket 85 ¶ 7. As previously stated, it is well established that " 'liability under section 1983 requires a causal link to, and direct responsibility for, the alleged deprivation of rights.' " *Armour*, 2008 WL 619381, at *1 (quoting *Madewell*, 909 F.2d at 1208)). To state a claim under § 1983, Abdulrazzak must show that Bertsch "personally violated" his constitutional rights. *Jackson v. Nixon*, 747 F.3d 537, 543 (8th Cir. 2014). Abdulrazzak is unable to demonstrate that Bertsch could have been involved in the alleged loss of the USB drive. Thus, Abdulrazzak fails to demonstrate a violation of his constitutional rights necessary to overcome qualified immunity.

B. Official Capacity

Abdulrazzak sued defendants in their official capacity. Docket 47. As the Supreme Court has stated, "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (citing *Brandon v. Holt*, 469 U.S. 464, 471 (1985)). Thus, it is a suit against the state itself. *Id.* While "[§] 1983 provides a federal forum to remedy many deprivations

of civil liberties . . . it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties." *Id.* at 66. The Eleventh Amendment generally acts as a bar to suits against a state for money damages unless the state has waived its sovereign immunity. *Id.*

Here, as part of Abdulrazzak's requested remedy, he seeks to recover money damages. Docket 47 at 9. Because Abdulrazzak sued defendants in their official capacity, Abdulrazzak has asserted a claim for money damages against the state of South Dakota. The state of South Dakota has not waived its sovereign immunity, however, so the Eleventh Amendment acts as a bar to Abdulrazzak's monetary damage claims against the state officials acting in their official capacities.

Abdulrazzak also seeks declaratory and injunctive relief. Docket 100 at 10. Declaratory and prospective injunctive relief are available as remedies against a state officer in his or her official capacity. *Pulliam v. Allen*, 466 U.S. 522, 541 (1984). Immunities, i.e., absolute, prosecutorial or qualified immunity are not a bar "to plaintiff's action for injunctive and declaratory relief under Section 1983." *Timmerman v. Brown*, 528 F.2d 811, 814 (4th Cir. 1975).

Here, Abdulrazzak is not entitled to injunctive or declaratory relief because he has failed to demonstrate a deprivation of his constitutional rights. As discussed in the individual capacity claims section, evidence of any past wrong on the part of defendants is lacking. Because there is no constitutional wrong that can be imputed to the state, defendants are entitled to summary judgment on Abdulrazzak's official capacity claim.

XI. Kaufman

Abdulrazzak has not yet served Joshua Kaufman and asks the court to authorize service by publication. Kaufman was formerly an employee of Dakota Psychological Services and he contracted with the South Dakota Department of Corrections to provide treatment for the State's parolees and inmates. A single deliberate indifference to serious medical needs claim against Kaufman survived the initial screening. *See* Dockets 13 at 10 and 45 at 9. The court now reconsiders its prior screening order.

"[T]o state a claim for relief under § 1983, a plaintiff must allege sufficient facts to show '(1) that the defendant(s) acted under color of state law, and (2) that the alleged wrongful conduct deprived the plaintiff of a constitutionally protected federal right.' " *Zutz v. Nelson*, 601 F.3d 842, 848 (8th Cir. 2010) (quoting *Schmidt v. City of Bella Villa*, 557 F.3d 564, 571 (8th Cir. 2009)). Acting under the color of state law means that the defendant must "have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

In *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001), the Supreme Court stated that "there is no single test to identify state actions and state actors . . . ." *Id.* at 294. The Court undertook a fact-intensive inquiry to determine whether a private entity acted under color of state law in a § 1983 claim. *Id.* at 298. The Court applied its analysis from

Rendell-Baker v. Kohn, 457 U.S. 830 (1982). In *Rendell-Baker*, the Supreme Court determined that "a private school, whose income is derived primarily from public sources and which is regulated by public authorities," did not "[act] under color of state law when it discharged certain employees." *Id.* at 831.

First, the Court in *Rendell-Baker* reasoned that actions of private contractors are not state actions "by reason of [the contractor's] significant or event total engagement in performing public contracts." *Id.* at 841. Second, the Court held that state regulation, "even if 'extensive and detailed,' " does not make a private contractor's actions state action. *Id.* Third, the Court held that a private entity is a state actor not when the entity merely performs a public function, but when "the function performed has been 'traditionally the exclusive prerogative of the State.' " *Id.* at 842 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974). Fourth, the court held that there was not a "symbiotic relationship" between the government and the private school. *Id.* at 843; *see Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

Using the reasoning outlined in *Rendell-Baker*, Abdulrazzak has not pleaded sufficient facts to show that Kaufman acted under color of state law when he denied Abdulrazzak treatment. Abdulrazzak fails to allege any facts to suggest the State exercised any power over Kaufman's treatment decisions in carrying out the state contract. Abdulrazzak did not allege facts indicating that providing sex offender treatment is a traditional and exclusive function of the state. *See Reinhardt v. Kopcow*, 65 F. Supp. 3d 1164, 1172 (D. Colo. 2014) (sex offender treatment is not traditional and exclusive state function). Abdulrazzak

did not allege any facts suggesting a "symbiotic relationship" between the state defendants and Kaufman regarding Abdulrazzak's treatment. Thus, Abdulrazzak fails to demonstrate that Kaufman acted under the color of state law as is necessary to obtain relief under § 1983.

The United States Court of Appeals for Tenth Circuit reached the same conclusion in *Gross v. Samudio*, 630 F. App'x. 772, 778-80 (10th Cir. 2015). The Tenth Circuit held that a private sex offender treatment provider did not act under color of state law when a sex offender treatment provider refused to admit a parolee into a sex offender treatment program when the parolee challenged the program's "acceptance-of-responsibility treatment requirement." *Id.* at 775.

Because Abdulrazzak failed to state a claim under § 1983, Abdulrazzak relies on a state-law cause of action for his claim against Kaufman. Under 28 U.S.C. § 1367(c)(3), the district court "may decline to exercise supplemental jurisdiction over a claim" if "the district court has dismissed all claims over which it has original jurisdiction." Because the § 1983 claim against the other defendants was the only claim over which this court had original jurisdiction, the court exercises its discretion and dismisses the state-law claim against Kaufman. If Abdulrazzak wants to pursue his state-law claim, he should do so in state court. Thus, Abdulrazzak's claim against Kaufman is dismissed without prejudice.

Thus, it is ORDERED:

1. Abdulrazzak's motion for discovery (Docket 51) is denied.

2. Abdulrazzak's motion to appoint counsel (Docket 56) is denied.

3. Abdulrazzak's motion to reconsider (Docket 57) is denied.

4. The stay (Docket 71) is lifted.

5. Abdulrazzak's motion to reconsider order granting extension (Docket 59) is denied as moot.

6. Abdulrazzak's motion for discovery of plaintiff's file (Docket 60) is denied.

7. Abdulrazzak's motion for sanctions (Docket 65) is denied.

8. Abdulrazzak's motion to strike (Docket 72) is denied.

9. Abdulrazzak's motion to reconsider clerk's entry of default (Docket 92) is denied.

10. Abdulrazzak's motion for entry of default judgment (Docket 77) and motion to reconsider motion for entry of default judgment (Docket 91) are denied.

11. Abdulrazzak's motion to follow on Abdulrazzak's motion for default (Docket 109) is denied.

12. Abdulrazzak's motion for sanctions (Docket 76) is denied.

13. Abdulrazzak's motion to take judicial notice of exhibit (Dockets 104 and 105) and then his motion to amend motion to take judicial notice (Docket 108) are denied. The exhibit is filed in the record of this case.

14. Abdulrazzak's motion re service (Docket 106) is granted. Abdulrazzak may satisfy his obligation to serve copies of pleadings

upon defendants by sending a letter to defendant's counsel identifying all documents that he files with the clerk of court. Defense counsel will receive notice from the clerk of court when those document have been filed.

15. Abdulrazzak's motion for service by publication (Docket 62) is denied as moot.

16. Abdulrazzak's claim against Kaufman is dismissed without prejudice.

17. Defendants' motion for summary judgment (Docket 81) is granted.

DATED this September 25, 2018.

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

HAIDER SALAH ABDULRAZZAK, Plaintiff, vs. DUSTI WERNER, SR. PAROLE OFFICER, SD. BD. OF PARDONS AND PAROLES, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; JOSHUA J. KAUFMAN, J.C. SMITH, PAROLE OFFICER SUPERVISOR, SD BD. OF PARDONS AND PAROLES, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES; JOHN DOE 2, CORRECTIONAL OFFICER, SOUTH DAKOTA STATE PENITENTIARY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES; AND F/N/U BERTSCH, UNIT MAMAGER, SDSP, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES; Defendants.	4:17-CV-04058-KES ORDER DENYING MOTION TO RECONSIDER

INTRODUCTION

On September 26, 2018, a judgment was entered in favor of defendants in the above-captioned case. Docket 111. This court granted defendants' motion for summary judgment and dismissed Abdulrazzak's remaining claim. Docket 110. Abdulrazzak now moves for reconsideration (Docket 112) and to proceed in forma pauperis on appeal (Docket 113).

APPENDIX
I

DISCUSSION

I. Motion to Reconsider

Although "a self-styled motion to reconsider . . . 'is not described by any particular rule of federal civil procedure,'" the court typically construes "such a filing as a Rule 59(e) motion to alter or amend the judgment or as a Rule 60(b) motion for relief from judgment." *Ackerland v. United States*, 633 F.3d 698, 701 (8th Cir. 2011) (quoting *Sanders v. Clemco Indus.*, 862 F.2d 161, 168 (8th Cir. 1988); citing *Auto Servs. Co. v. KPMG, LLP*, 537 F.3d 853, 855 (8th Cir. 2008)). "[A]ny motion that draws into question the correctness of the judgment is functionally a motion under Fed. R. Civ. P. 59(e), whatever its label." *Quartana v. Utterback*, 789 F.2d 1297, 1300 (8th Cir. 1986) (internal quotation omitted). In the Eighth Circuit, a court must find a manifest error of law or fact in its ruling to alter or amend its judgment under Rule 59(e). *See Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir. 1988). But Rule 59(e) motions may not be used to introduce evidence, tender new legal theories, or raise arguments that could have been offered or raised prior to the entry of judgment. *Id.*

Abdulrazzak first asks the court to reconsider his request for a new parole revocation hearing. Docket 112 at 1. Abdulrazzak claims he established a due process violation during his parole revocation proceeding. *Id.* at 2. This court did not find that Abdulrazzak adequately pleaded a due process claim during the screening of his initial complaint, amended complaint, or second amended complaint. *See* Dockets 13 at 5-6, 46 at 3-4, 110 at 16-19. Thus, there is no order for the court to reconsider.

Even if the court were to find that Abdulrazzak adequately pleaded a due process claim in his second amended complaint, Abdulrazzak's due process claim fails. In his second amended complaint, Abdulrazzak alleges that "parole board members did not find that my [F]ifth Amendment while on parole and refusal to incriminate myself as an excuse applied to me as parolee when I refused to admit the guilt, making their decision to be in contrary to Federal laws and U.S. Supreme Court without showing any reasons for such disagreement, and violating my due process constitutional rights[.]" Docket 47 at 5. Abdulrazzak then claims "Defendants parole officer, parole officer supervisor, SD Parole Board, SD Parole Board director, and treatment provider, in their attempt to force me to admit the guilt violated my Due Process just because I am not a U.S. citizen who was granted temporary relief from immigration, adding more restrictions without any specific reason beside the one listed above. The result was losing liberty interest in privileges/rights granted to me 8th Cir. Court decisions. In part, I lost access to my smartphone which I paid for prior to those modifications . . . . I was deprived as well having access to any media in my own language . . . ." *Id.* at 17.

The court construes Abdulrazzak's due process claim as challenging the procedures used in his parole-revocation proceedings, because success would not necessarily demonstrate the invalidity of his current confinement or its duration. *See Wilkinson v. Dotson*, 544 U.S. 74, 81–82 (2005) ("state prisoner's § 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state

conduct leading to conviction or internal prison proceedings)—*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration").

In *Morrissey v. Brewer*, 408 U.S. 471 (1972), the Supreme Court set the "minimum requirements of due process" for parole revocation hearings. *Id.* at 488-89 (quotations omitted). The Supreme Court specified that "the liberty of a *parolee*, although indeterminate, includes many of the core values of unqualified liberty and its termination . . . calls for some orderly process, however informal." *Id.* at 482 (emphasis added). The Court mandated the following requirements:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body . . . ; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

408 U.S. at 489.

Abdulrazzak refers the court to his reply to defendants' motion for "more details of violations to his due process right." Docket 112 at 2. This court is not required to search the record for a claim. After reviewing the second amended complaint again, the court still finds that Abdulrazzak failed to plead facts necessary to state a due process claim.

In the second amended complaint, Abdulrazzak alleges the board did not state what evidence it relied upon in reaching its decision. Docket 36 at 19. But

Abdulrazzak fails to identify what was inadequate about the process he received. Thus, Abdulrazzak has failed to state a claim for relief.

Abdulrazzak also claims Kaufman is a state actor and as a named defendant should have survived initial screening. Docket 112 at 3. For the reasons previously stated in the order granting summary judgment (Docket 110 at 39-41), the court disagrees and relies on its prior holding.

With regard to the other issues raised by Abdulrazzak in his motion to reconsider, the court finds that Abdulrazzak has not shown a manifest error of law or fact sufficient to justify an amendment or change in the court's prior ruling. Any arguments made by Abdulrazzak could have been offered or raised earlier. Abdulrazzak is simply trying to make the same arguments again. As a result, the motion for reconsideration is denied.

II. Motion for Leave to Proceed In Forma Pauperis on Appeal

Under the Prison Litigation Reform Act (PLRA), a prisoner who "files an appeal in forma pauperis . . . [is] required to pay the full amount of a filing fee." 28 U.S.C. § 1915(b)(1). This obligation arises " 'the moment the prisoner . . . files an appeal.' " *Henderson v. Norris*, 129 F.3d 481, 483 (8th Cir. 1997) (quoting *In re Tyler*, 110 F.3d 528, 529–30 (8th Cir. 1997)). Therefore, " '[w]hen an inmate seeks pauper status, the only issue is whether the inmate pays the entire fee at the initiation of the proceeding or over a period of time under an installment plan.' " *Id.* (quoting *McGore v. Wrigglesworth*, 114 F.3d 601, 604 (6th Cir. 1997)). "[P]risoners who appeal judgments in civil cases

must sooner or later pay the appellate filing fees in full." *Id.* (citing *Newlin v. Helman*, 123 F.3d 429, 432 (7th Cir. 1997)).

In *Henderson*, the Eighth Circuit set forth "the procedure to be used to assess, calculate, and collect" appellate filing fees in compliance with the PLRA. 129 F.3d at 483. First, the court must determine whether the appeal is taken in good faith. *Id.* at 485 (citing 28 U.S.C. § 1915(a)(3)). Then, so long as the prisoner has provided the court with a certified copy of his prisoner trust account, the court must "calculate the initial appellate partial filing fee as provided by § 1915(b)(1), or determine that the provisions of § 1915(b)(4) apply." *Id.* The initial partial filing fee must be 20 percent of the greater of:

> (A) the average monthly deposits to the prisoner's account; or
> (B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

28 U.S.C. § 1915(b)(1). Nonetheless, no prisoner will be "prohibited from . . . appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee." 28 U.S.C. § 1915(b)(4).

It appears that Abdulrazzak's appeal is taken in good faith. But Abulrazzak has not filed the requisite paperwork to proceed in forma pauperis or paid the appellate filing fee. "If the district court does not receive a certified copy of the prisoner's prison account within 30 days of the notice of appeal, it shall calculate the initial appellate filing fee at $35 *or such other reasonable amount warranted by available information*[.]" *Henderson*, 129 F.3d at 485

(emphasis added). Abdulrazzak was granted leave to litigate in forma pauperis at the district court level. *See* Docket 5. At that time, Abdulrazzak reported average monthly deposits to his prisoner trust account of $91.67 and an average monthly balance of $46.62. Docket 3. Thus, an initial partial filing fee of $35 appears reasonable.

Thus, it is ORDERED

1. Abdulrazzak is granted leave to proceed in forma pauperis on appeal.
2. Abdulrazzak must pay an initial partial filing fee of $35 by July 5, 2019, made payable to the Clerk, U.S. District Court.
3. The institution having custody of Abdulrazzak is directed that whenever the amount in Abdulrazzak's trust account, exclusive of funds available to him in his frozen account, exceeds $10, monthly payments that equal 20 percent of the funds credited to the account the preceding month shall be forwarded to the United States District Court Clerk's office pursuant to 28 U.S.C. § 1915(b)(2), until the appellate filing fee of $505 is paid in full.

DATED this 5th day of June, 2019.

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-1213

Haider Salah Abdulrazzak

Appellant

v.

J. C. Smith, et al.

Appellees

Appeal from U.S. District Court for the District of South Dakota - Rapid City
(4:17-cv-04058-KES)

ORDER

Appellant's motion to reinstate the appeal is denied.

June 17, 2019

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

/s/ Michael E. Gans

APPENDIX
J

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

HAIDER SALAH ABDULRAZZAK, Plaintiff, vs. DUSTI WERNER, SR. PAROLE OFFICER, SD. BD. OF PARDONS AND PAROLES, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; JOSHUA J. KAUFMAN, J.C. SMITH, PAROLE OFFICER SUPERVISOR, SD BD. OF PARDONS AND PAROLES, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES; JOHN DOE 2, CORRECTIONAL OFFICER, SOUTH DAKOTA STATE PENITENTIARY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES; AND F/N/U BERTSCH, UNIT MAMAGER, SDSP, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES; Defendants.	4:17-CV-04058-KES ORDER DENYING MOTION TO RECONSIDER

Abdulrazzak moves for reconsideration (Docket 120) of the court's June 5, 2019 order (Docket 114). On June 5, 2019, the court ordered Abdulrazzak to pay an initial partial appellate filing fee of $35. Docket 114. Abdulrazzak argues his previous appeal should be reinstated and no new appellate filing fee assessed. Docket 120. This court has no authority to reinstate Abdulrazzak's earlier appeal or waive the initial partial appellate filing fee required by

APPENDIX K

28 U.S.C. § 1915(b)(1). The Court of Appeals for the Eighth Circuit will determine whether to reinstate Abdulrazzak's earlier appeal and will direct this court on the collection of the appellate filing fee. Thus, it is

ORDERED that Abdulrazzak's motion to reconsider (Docket 120) is denied.

DATED this 25th day of June, 2019.

BY THE COURT:

/s/ *Karen E. Schreier*
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-2170

Haider Salah Abdulrazzak

Plaintiff - Appellant

v.

J. C. Smith; Dusti Werner; Joshua J. Kaufman; F/N/U Bertsch; John Doe 2, in their individual and official capacities

Defendants - Appellees

Appeal from U.S. District Court for the District of South Dakota - Rapid City
(4:17-cv-04058-KES)

JUDGMENT

Before COLLOTON, WOLLMAN, and KELLY, Circuit Judges.

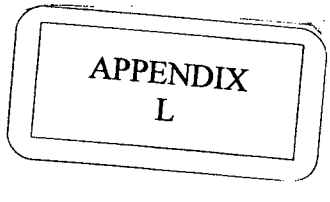
This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

March 19, 2020

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans



United States Court of Appeals
For the Eighth Circuit

No. 19-2170

Haider Salah Abdulrazzak,

Plaintiff - Appellant,

v.

J. C. Smith; Dusti Werner; Joshua J. Kaufman; F/N/U Bertsch; John Doe 2, in their individual and official capacities,

Defendants - Appellees.

Appeal from United States District Court
for the District of South Dakota - Rapid City

Submitted: March 16, 2020
Filed: March 19, 2020
[Unpublished]

Before COLLOTON, WOLLMAN, and KELLY, Circuit Judges.

PER CURIAM.

Haider Salah Abdulrazzak appeals the district court's[1] dismissal of some of his claims for failure to state a claim, and adverse grant of summary judgment on his remaining claims. After *de novo* review of the record and the parties' arguments on appeal, the court finds no basis to reverse the court's orders. To the extent Abdulrazzak challenges any other court orders on appeal, we find no basis for reversal. Accordingly, we affirm. *See* 8th Cir. R. 47B.

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[1]The Honorable Karen E. Schreier, United States District Judge for the District of South Dakota.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-2170

Haider Salah Abdulrazzak

Appellant

v.

J. C. Smith, et al.

Appellees

Appeal from U.S. District Court for the District of South Dakota - Rapid City
(4:17-cv-04058-KES)

ORDER

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

April 29, 2020

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

/s/ Michael E. Gans

APPENDIX
M

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

HAIDER SALAH ABDULRAZZAK **Plaintiff,** **vs.** **DENNIS KAEMINGK et al,** **Defendants.**	**Civ. (4:17-CV-04058-KES)** **MOTION TO AMEND (SECOND)**

Pursuing to this Court order (dated August 18th, 2017), plaintiff respectfully submitting now this **SECOND AMENDED COMPLIANT**, to rectify the deficiencies that was recognize by this Court when screening the First Amended Complaint on (July 14th, 2017) and to add new defendants as follow:

1) Correct Defendant (**JUSHUA KAUFMAN**) first name as defendants' attorney of records noticed it. The correct spelling will be (**JOSHUA KAUFMAN**).

2) To use the correct names of defendants (**John Doe 1**) and (**John Doe 2**) to be (**JOSEPH SIEMONSMA**) and (**ROBERT BERTHELSON**) to be the correct named defendants in connect to **COUNT VII**.

3) **COUNT I**:

(a) To add new defendants Parole Board Members (**GREG ERLANDSON**) and (**MAYRON RAU**). Thereafter, the named defendants in connect with this Count will be: South Dakota Secretary of Corrections, South Dakota Department of Corrections Policy

APPENDIX N

Maker, South Dakota Board of Pardons and Paroles South Dakota Parole Board Director (to be all Municipalities) and defendants Parole Board Members.

(b) The allegations in connect to this Count will be that defendants knowingly adopted parole officer acts under the specific circumstances in this Count as unconstitutional custom instead as a policy.

4) **COUNT II:**

(a) To name additional defendants that were already mention in the First Amended Compliant. Thereafter, the named defendants in connect with this Count will be: Mike Durfee State Prison ("MDSP") warden, MDSP Deputy/associate warden, MDSP Unit Staff Member, South Dakota Board of Pardons and Paroles, South Dakota Parole Board Director, Parole officer Supervisor and Parole Officer, and treatment provider(s). (Sex offender Management Program's SOMP) team)

(b) The allegations in connect with this Count will remain without change.

5) **COUNT III:**

a) The original named defendants will remain without change.

b) The allegations will remain the same with an emphasis to be added to the personal involvement of the named defendants (line 6), and to the other claims that came under this count that plaintiff would pray to this Court to reconsider them under the circumstances, as well the responsibility of Parole officer supervisor when he knowingly concur on the parole officer report adding other conditions represented by (passing a polygraph related to original offenses to prove that I did not committed these crimes if I wanted to be paroled again). I added a new Pargraph to the end of this count related to parole officer harassing me in my monthly visitation to immigration authorities.

6) **COUNT IV:**

a) The original named defendants will remain without change.

b) The allegations would remain without change, considering that my parole conditions put the treatment provider and parole officer at the same level when supervising me on parole. Plaintiff prays to this Court to reconsider all the claims that came under this Count. Plaintiff prays to this Court to consider the fact of defendant previously knowledge or (should have reasonably know) that I was released on parole on 6/25/2014 without any requirement of admitting the guilt or ever such treatment was discussed prior to my parole release; defendant Kaufman should not punish individual parolee (i.e. me) when practicing a constitutional right of refusing to incriminate myself; defendant Dakota Psychological Service LLC (municipal) should abstain from adopting any unconstitutional custom of punishing individuals (i. e. me) when I invoked my right of refusing to incriminate myself when I was parolee.

7) **COUNT V:**

All the allegations and defendants will remain the same. Plaintiff would add emphasis to the allegations that defendants did not give me free community hours as parolee to enable me challenge the parole modifications or any access to any library while on parole to search for any legal materials that may help me doing so.

8) **COUNT VI:**

a) To add defendants those were already named as defendants in this case. Thereafter, the named defendants in connect with this Count will be South Dakota Board of Pardons and Paroles, South Dakota Parole Board Director, Parole Officer Supervisor, Parole Officer and the treatment provider.

b) Defendants know or should reasonably have knowledge that my court records contain allegations of convictions related to possession of child pornography and nothing else and such like wide band of computer/internet or smart-phone usage constitute unreasonable restrictions and a greater deprivations to my First Amendment Right, noticing that the Sentencing Court did not impose such like restrictions; was no such like in my parole conditions signed on 6/18/2014 and nothing have been changed to the records of my convictions nor a parole violation was committed that may constitute such like modifications. And I should not be punished to invoking my constitutional rights when on parole and refused to incriminate myself. Defendants also should know it is unconstitutional to harass a parolee for invoking his Fifth Amendment.

8) **COUNT VII:**

a) The allegations against named defendants will remain the same.

b) Plaintiff respectfully prays to the Court to screen this Count under retaliations as another claim beside what was found as denial of Access to Courts.

9) **Additional request for relieves:**

Beside what was mention in request for relieves in the Second Amended Complaint, plaintiff pray to this Court to consider;

a) If this Court found that a relief against any named was barred by the Eleventh Amendment/absolute immunity in their official capacity, plaintiff prays to this Court to grant a relief in the form of injunctive/declaratory relieves since such relieves not barred by the absolute immunity, and to find the my constitutional rights were violated by the acts of named defendants for each Count/Claim.

b) Order each defendant to recognize the Federal Laws controlled under the circumstances of my case, and not to make/adopt decisions that otherwise in contrary to the United States Supreme Courts and to remained defendant(s) of the (Supremacy Clause) in any in any future decisions related to revoke parole;

c) To abstain from any discriminatory/or any similar acts when treating non-U.S. citizens who confined in State prisons and to be treated equally when there is a mandatory programming related to own offences prior to initial parole date and not to surprise individuals by such like programming months or years after their initial parole under the threat of parole violations and thereafter be subjected to any all consequences related to parole violations.

d) Expunge the records of my parole hearing held on March 13, 2017 as unconstitutional in violation to my Due Process rights, and order defendant(s) to recognizing my rights under the Fifth Amendment and not to honor a parole officer decisions that may constitute a punishment on individual (i.e. me) when I refused to incriminate myself.

e) Hold new parole revocation hearing within 30 days or any time that this Court to be sufficient under those circumstances.

f) After such finding, plaintiff pray to this Court to order that (A state official who acts unconstitutionally to be stripped of his official or representative character and therefore should be subjected in his person to the consequences of his individual conduct, and that the State has no power to impart to him/her any immunity from responsibility to the supreme authority of the United States.

g) Order relieves on each defendants in there individual capacity.

10) Renew my motion to appoint attorney under the new circumstances of this Second Amended Compliant.

11) Order any relieves that this Court may be find suitable against any and each defendants for each claim/count under the circumstances of my case.

Respectfully Submitted,

Dated this 5th of September, 2017

Plaintiff Pro Se

Haider Salah Abdulrazzak, ID# 04373
Mike Durfee State Prison
1412 Wood St.
Springfield, SD 57062

HAIDER ABDULRAZZAK/ 2011-029262
Name and Prisoner/Booking Number

MIKE DURFEE STATE PRISON
Place of Confinement

1412 WOOD STREET
Mailing Address

SPRINGFIELD, SD 57062
City, State, Zip Code

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

HAIDER SALAH ABDULRAZZAK,
(Full Name of Plaintiff)
Plaintiff,

vs.

DENNIS KAEMINGK,
AARON MILLER,
SD. BD. OF PARDONS AND PAROLES,
DOUG CLARK,
ROBERT DOOLEY, SUSAN JACOBS, KIM LIPINCOTT, J.C. SMITH, DUSTI WERNER, DAKOTA PSYCHOLIGICAL SERVICES LLC., JOSHUA J. KAUFMAN, JOSEPH SIEMONSMA, ROBERT BERTHELSON, GREG ERLANDSON, MARON RAU
(Full Name of Each Defendant)
Defendants.

Case No. (4:17-CV-04058-KES)
(To be supplied by the Clerk)

CIVIL RIGHTS COMPLAINT BY A PRISONER

☐ Original Complaint
☐ First Amended Complaint
☒ Second Amended Complaint

Jury Trial Demanded

A. JURISDICTION

1. This Court has jurisdiction over this action pursuant to:
   a. ☒ 28 U.S.C. § 1343(a)(3); 42 U.S.C. § 1983
   b. ☐ 28 U.S.C. § 1331; *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).
   c. ☐ Other: (Please specify.) _____

2. Name of Plaintiff: *HAIDER SALAH ABDULRAZZAK*
   Present mailing address: *1412 WOOD STREET, SPRINGFIELD, SD 57062*

(Failure to notify the Court of any change of address may result in dismissal of this action.)

Institution/city where violation occurred: *ALBERT LEA, MN; CHASKA, MN; SIOUX FALLS SD*

3. Name of first Defendant: DENNIS KAEMINGK . The first Defendant is employed as:
SECRETARY OF CORRECTIONS at SD. DEP'T OF CORRECTIONS.
(Position and Title) (Institution)
This Defendant is sued in his/her: ☒ individual capacity ☒ official capacity
(check one or both)
Explain how this Defendant was acting under color of law:
state employee.

4. Name of second Defendant: AARON MILLER . The second Defendant is employed as:
Policy Maker at SD. DEP'T OF CORRECTIONS .
(Position and Title) (Institution)
This Defendant is sued in his/her: ☒ individual capacity ☒ official capacity
(check one or both)
Explain how this Defendant was acting under color of law:
State employee.

5. Name of third Defendant: SD. BD. of Pardons and paroles. The third Defendant is employed as:
Parole services provider at SD. DEP'T OF CORRECTIONS.
(Position and Title) (Institution)
This Defendant is sued in his/her: ☒ individual capacity ☒ official capacity
(check one or both)
Explain how this Defendant was acting under color of law:
SD. DEP'T OF CORRECTIONS AGENCY.

6. Name of fourth Defendant: DOUG CLARK . The fourth Defendant is employed as:
SD. BD. OF PAROLES DIRECTOR at SD. DEP'T OF CORRECTIONS.
(Position and Title) (Institution)
This Defendant is sued in his/her: ☒ individual capacity ☒ official capacity
(check one or both)
Explain how this Defendant was acting under color of law:
State employee.

(If you name more than four Defendants, answer the questions listed above for each additional Defendant using the separate PDF document called 1983 ADDITIONAL DEFENDANTS.)

B. PREVIOUS LAWSUITS

1. Have you filed any other lawsuits while you were a prisoner? ☐Yes ☒No

2. If your answer is "yes," how many lawsuits have you filed? ____. Describe the previous lawsuits in the spaces provided below.

3. First prior lawsuit:
   a. Parties to previous lawsuit:
      Plaintiff: _____
      Defendants:

Plaintiff: _____

Defendants:

b Court: (If federal court, identify the district; if state court, identify the county.)

_____

c. Case or docket number: _____

d Claims raised:

e. Disposition: (For example: Was the case dismissed? Was it appealed? Is it still pending?)

_____

f. Approximate date lawsuit was filed: _____

g Approximate date of disposition: _____

4 Second prior lawsuit:

a. Parties to previous lawsuit:

Plaintiff: _____

Defendants:

b Court: (If federal court, identify the district; if state court, identify the county.)

_____

c. Case or docket number: _____

d Claims raised:

e. Disposition: (For example: Was the case dismissed? Was it appealed? Is it still pending?)

_____

f. Approximate date lawsuit was filed: _____

g Approximate date of disposition: _____

5 Third prior lawsuit:

a. Parties to previous lawsuit:

Plaintiff: _____

Defendants:

b Court: (If federal court, identify the district; if state court, identify the county.)

_____

c. Case or docket number: _____

d Claims raised:

e. Disposition: (For example: Was the case dismissed? Was it appealed? Is it still pending?)

_____

f. Approximate date lawsuit was filed: _____

g Approximate date of disposition: _____

(If you filed more than three lawsuits, answer the questions listed above for each additional lawsuit using the separate PDF document called 1983 ADDITIONAL LAWSUITS.)

C. CAUSE OF ACTION

COUNT I

1. The following constitutional or other federal right has been violated by the Defendant(s):
1st, 5th, 8th and 14th Amendments

2. Count I involves: (Check only one; if your claim involves more than one issue, each issued should be stated in a different count)

☐ Disciplinary proceedings	☐ Retaliation	☐ Exercise of religion
☐ Excessive force by an officer	☐ Threat to safety	☐ Mail
☐ Medical care	☐ Access to the court	☐ Property

☒ Other: *Parole Proceedings*

3. **Supporting Facts:** (State as briefly as possible the FACTS supporting Count I. Describe exactly what each Defendant did or did not do to violate your rights. State the facts clearly in your own words without citing legal authority or arguments).

Defendants, South Dakota Secretary of Corrections, SD Department of Corrections Policy Maker (SD DOC Policy Maker), SD Board of Paroles and Pardons (SD Bd. of Pardons and Paroles) and SD Bd. of Parole and Pardons Director (all as municipalities). Also defendants Parole Board *members as to whom all adopted an unconstitutional arbitrary and discriminatory act by Parole officer, where unlike U.S. citizens, she required me to participate in a sex offender treatment and to admit the guilt almost 2 years into my initial parole release on 6/25/2014. That act required me to incriminate myself as parolee without any immunity under the threat or parole revocation and submitting me to all the consequences that may come together with such revocation if I refused to do so since unlike U.S. citizen parolee I don't have that right. In according to that act as well a parole condition modifications and adding more restrictions without due process for a reason not related to commit an act of parole violation rather than just due to my nationality as punishment for temporary settlement with immigration authorities related to my immigration, knowing that I was still fighting my convictions in State Habeas Corpus proceedings and such statements without immunity could hurt my case as well to bring new criminal charges against me (i.e perjury).*

Non of the defendants *did ever discuss such treatment programs while confined in prison walls prior to my initial parole releasing, never inform me that in the future I will have to take that treatment and in part to admit the guilt as they would do to U.S. citizens who convicted under the same circumstances to enable me invoke my 5th Amendment in time which may resulted in countenance for my confinement in state prisons without subjecting me to the circumstances of parole revocation and its consequences.*

South Dakota Department of Corrections (SD DOC) officials would discuss any treatment requirements related to once offense with U.S. citizens almost (Several months before *initial parole date) to enable them to invoke their 5th Amendment if they desired not to incriminate themselves.*

In a preliminary hearing hold on 11/15/2016 related to allegation of parole violation related to invoking my 5th Amendment, it was confirmed that as parolee, I have no right to 5th Amendment and it was reaffirmed on the final parole board decision hold on 3/13/2017.

The damage allegations related to this count is happen between the period of time (6/25/2014 - 11/2/2016) while I was on parole due to the DOC policy related not to inform me at earlier time (i.e. prior to my initial parole release) to enable me invoke my 5th and prevent the consequences of parole revocation.

- Defendants (municipalities) adopted/authorize such custom because it would save SD DOC money on my rehabilitation programing while confined in prison and would agree to hide from me any such requirments so I don't invoke my Fifth Amendment, release me on parole and after settelment with immigration (temporary in my case) they would take me by suprise of undiscussed treatment under the threat of violating of parole (if I refuse to admit the guilt) without immunity. Defendants knew I was fighting my convictions at time (on parole) and would refuse not to use it against me. They would turn blind eye on its employees illegal actions because it would save them money.

- Defendants Parole board members did not find that my Fifth Amendment while on parole and refusal to incriminate myself as an excuse applied to me as parolee when I refused to admit the guilt, making their decision to be in contrary to Federal laws and U.S. Supreme Court without showing any reasons for such disagreement, and violating my Due Process constitutional rights, as will the Equal Protection Clause.

- Defendants are liable as well for any damages happen to me for the period of time 6/25/2014 - 11/2/2016 for adopting a custom/action that they failed to informed me about there requarement of treatments in prison. If defendant's believed that I should not paroled out unless I admit the guilt, they should never parole me out and treat me equally with any U.S. citizen who refuse to admit the guilt in prison.

- Defendants municipalities failed to supervise its employees when they deprived me my labirty intrest in parole without revocation when I invoked my 5th Amendment.

4. **Injury:** (State how you have been injured by the actions or inactions of the Defendant(s)).

Humilation, embarrassment, mental and emotional distress, family hardship, out of pocket money spending. Fall in dept for family, friends and forwarding one of my bills to a bill collection agency.

5. **Administrative Remedies:**

a. Are there any administrative remedies (grievance procedures or administrative appeals) available at your institution? ☐Yes ☒No

b. Did you submit a request for administrative relief on Count I? ☐Yes ☐No

c. Did you appeal your request for relief on Count III to the highest level? ☐Yes ☐No

d. If you did not submit or appeal a request for administrative relief to the highest level, briefly explain why you did not.

No grievance forms available for parole proceedings.

(If you assert more than three Counts, answer the questions listed above for each additional Count using the separate PDF document called 1983 ADDITIONAL COUNTS.)

COUNT II

1. The following constitutional or other federal right has been violated by the Defendant(s):

1st, 5th & 14th Amendments

2. Count II involves: (Check **only one**; if your claim involves more than one issue, each issued should be stated in a different count)

☐ Disciplinary proceedings	☐ Retaliation	☐ Exercise of religion
☐ Excessive force by an officer	☐ Threat to safety	☐ Mail
☐ Medical care	☐ Access to the court	☐ Property
☒ Other: Parole Proceedings		

3. **Supporting Facts:** (State as briefly as possible the FACTS supporting Count II. Describe exactly what each Defendant did or did not do to violate your rights. State the facts clearly in your own words without citing legal authority or arguments).

Defendants (MDSP) warden, MDSP Deputy/Associate warden and MDSP Unit Staff Calli in charge of my IPD "Individial Program Directive. Also defendants SD Bd. of Pardons and Paroles, Parole Board director, Parole officer Supervisor and parole officer, and treatment Providers) who incharge of supervising me. All defendants are part of CSOMP) team know about my treatment programing related to offenses and its requirements (i.e. admit the guilt). Defendants while I was incarcerated in MPSD did never at any time discuss such like treatments or its requirements at any time as they would do with other U.S. citizens who incarcerated under the same circumstances of convictions as mine to enable me invoke my 5th Amendment which would result in contentions to my stay in prison until I flat my time without imposing the extra damages that may applied to me while on parole like parole violation consequences which other U.S. citizens would not face. Defendants also failed to informed me as well that I would have to enroll in treatment related to my offenses and its requirements if I reach to any settlement with immigration authorities. Defendants also provided me with parole agreements conditions that was signed on 6/18/2014 but they failed as well to inform me that my parole conditions would be modified and adding more restrictions and what kind of restrictions will apply to me if I settle my immigration case while on parole without the need of committing parole violations which would apply to regular U.S. citizens on parole to enable me study my options at time prior to my initial parole release on 6/25/2014. Defendants usually would inform U.S. citizens about their treatment requirements almost 6 months prior to their release on their initial parole date.

4. **Injury:** (State how you have been injured by the actions or inactions of the Defendant(s)).

Humilation, embarrassment, mental and emotional distress, family hardship, out of Pocket money spending, fall in dept for family, friends and forwarding one of my bills to a bill collection agency.

5. **Administrative Remedies:**

a. Are there any administrative remedies (grievance procedures or administrative appeals) available at your institution? ☐ Yes ☒ No

b. Did you submit a request for administrative relief on Count II? ☐ Yes ☐ No

c. Did you appeal your request for relief on Count II to the highest level? ☐ Yes ☐ No

d. If you did not submit or appeal a request for administrative relief to the highest level, briefly explain why you did not.

No grievance forms available for parole proceedings.

COUNT III

1. The following constitutional or other federal right has been violated by the Defendant(s):

   1st, 5th, 8th and 14th Amendments

2. Count III involves: (Check **only one**; if your claim involves more than one issue, each issued should be stated in a different count)

   ☐ Disciplinary proceedings ☐ Retaliation ☐ Exercise of religion
   ☐ Excessive force by an officer ☐ Threat to safety ☐ Mail
   ☐ Medical care ☐ Access to the court ☐ Property
   ☒ Other: Parole Proceedings

3. **Supporting Facts:** (State as briefly as possible the FACTS supporting Count III. Describe exactly what each Defendant did or did not do to violate your rights. State the facts clearly in your own words without citing legal authority or arguments).

   I have been on parole since 6/25/2014 without the requirement of admitting the guilt since it was never discussed with me by the MPSD unit staff at any time prior to that date and no treatment requirements ever discussed with me. However, upon temporary settlement with immigration authorities in a civil case while on parole and upon continuance to my parole plan in Unit C as a CTP (Community Transportation Program) parolee on 4/20/2016, my parole officer (Dusti Werner) on 4/29/2016 modified my parole condition by adding more restrictions to my original parole agreement which was signed on 6/18/2014 without a Due Process as punishment to that temporary settlement with immigration authority since I did not commit a parole violation or new offenses the reasons usually applied to U.S citizens parolees. My parole agent as well ordered me to engage in a treatment proceeding and in part to admit the guilt to my original convictions (almost 2 years into my initial parole in 6/25/2014). I informed my agent at time that as parolee I am not going to incriminate myself and give any statements that could be use against me to support a conviction or to be used to bring new criminal charges (i.e perjury) since I had at time my Habeas Corpus evidentially hearing without any kind or express immunity. I did never as well promised my agent that I am going to admit the guilt at any time in the future.

   My parole agent know or should reasonably have know about the DOC policy discussed in Count I should constitute a parole violation, nevertheless, she made me pay ($ 380.00) for my work permission that I borrow in a good faith that I will pay back and my parole would not be violated for the reason of not admit the guilt and that I have liberty interest in be free from committing any parole violation.

   My parole agent (Dusti Werner) kept ordering me to admit the guilt together with the treatment provider in each visit to to the parole office. She knew about my mental disability (PTSD) and purposefully she deprived me access to in community recover program led by trained individuals associated with NAMI Sioux Falls (National Alliance on Mental Illness) at no cost to the DOC conditioning just join by incriminating myself, in violation to my 1st Amendment and Title II of Americans with Disability Act (ADA).

   My parole agent as well deprived me free community hours to do my laundry in summer time exposing me to my bodily waste and wearing my dirty laundry for multiple times knowing that I would ride my bike or walk every time I am outside the unit.

   Even that, she did not file my parole violation report until 11/2/2016 on or about the same week I received my work permission for the reason of refusal to admit the guilt, causing me extra damages in part paying for GPS monitoring ($ 1,190.00) that was forward now to a bill collection agency, and other fees that prisoner would not face while confined in prison walls. My parole agent informed me that "it is not fair that I did not plead guilty to my offenses and walk free in streets and work while there were other parolees who plead guilty to their

offenses and walk free as well on streets. She told me as well that I have no right to be on parole and that she can violate my parole anytime.

My parole agent supervisor (defendant J.C. Smith) agreed with that decision suggesting as well that I would not be considered on parole until I admit the guilt and to pass a polygraph exam to prove I did not commit the original offenses and to pay for any future treatment programs because I received my work permission, knowing that my permission would be expired on October 2017 unless was renewed 90 days prior to that expiration date and pay other ($380.00) fees which most likely I would not find someone to brow from since I did not pay for the first.

d) *Defendants know or should know that the conditions of admitting the guilt was imposed on me 2 years after my initial parole only due to my nationality and no other reasons, and that participation in discriminatory act base on my nationality reasonably violate my rights that was granted to me by the constitution.*

b) Defendant Werner unlawfully imposed sanction on me on 10/19/2016 by ordering me to go back to the unit when I refused to incriminate myself on a polygraph.

c) Defendant Werner personally invistigated all the allegations of my 5th Amendment and refusal to incriminate myself. It took her almost 6 months to finish her invistigation and wrote a violation report recomend that my parole should be violated for doing so in violating to my constitutional rights as parolee

d) Defendant Werner attempt to create problem between me and Immigration authorities when she told me that they don't want to see me any more and will be satisfied by email from her. When I asked Immigration authorities they denial her allegations.

4. **Injury:** (State how you have been injured by the actions or inactions of the Defendant(s)).

Humilation, embarrassment, mental and emotional distress, family hardship, out of pocket money spending. Fall in dept for family, friends and forwarding one of my bills to a bill collection agency.

5. **Administrative Remedies:**

a. Are there any administrative remedies (grievance procedures or administrative appeals) available at your institution? ☐Yes ☒No

b. Did you submit a request for administrative relief on Count III? ☐Yes ☐No

c. Did you appeal your request for relief on Count III to the highest level? ☐Yes ☐No

d. If you did not submit or appeal a request for administrative relief to the highest level, briefly explain why you did not.

No grievance forms available for parole proceedings.

(If you assert more than three Counts, answer the questions listed above for each additional Count using the separate PDF document called 1983 ADDITIONAL COUNTS.)

D. REQUEST FOR RELIEF

State briefly what you want the Court to do for you.

1)To appoint counsel pursuing to 28 U.S.C.§ 1915(e)(1)due to the special circumstances on my case; 2) Allow me to amend once counsel appointed to me and/or to correct any deficiencies in my claims; 3)Declaratory judgment that my constitutional rights had been violated; 4) Declaratory judgment related to non U.S. citizens [paroless right under 5th Amendments and 14th Amendment as well;5) Preliminary and permanent injunctions to prevent any such violations against me and/or other non U.S. citizens parolees; 6) To order nominal, compensatory and punitive damages reliefs for each count, each violation and against each defendant separately; 7)Attorney fees pursuing to 42 U.S.C.§1988 (b); 8) New parole hearing.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 5th of Sept., 2017
DATE

SIGNATURE OF PLAINTIFF

(Name and title or paralegal, legal assistant, or other person who helped prepare this complaint)

(Signature of attorney, if any)

(Attorney's address & telephone number)

ADDITIONAL PAGES

All questions must be answered concisely in the proper space on the form. If needed, you may attach additional pages. The form, however, must be completely filled in to the extent applicable.

ADDITIONAL DEFENDANTS

5. Name of *fifth* Defendant: *ROBERT DOOLEY*. The *fifth* Defendant is employed *Mike Durfee State Prison* (Position and Title) at *SD Dep't of Corrections* (Institution).
This Defendant is sued in his/her: ☒ individual capacity ☒ official capacity (check one or both)
Explain how this Defendant was acting under color of law:
State employee.

6. Name of *sixth* Defendant: *SUSAN JACOBS*. The *sixth* Defendant is employed *Deputy or Associate Warden* (Position and Title) at *SD DOC Mike Durfee State Prison* (Institution).
This Defendant is sued in his/her: ☒ individual capacity ☒ official capacity (check one or both)
Explain how this Defendant was acting under color of law:
State employee.

7. Name of *seventh* Defendant: *KIM LIPPINCOTT*. The *seventh* Defendant is employed *Unit Staff Member* (Position and Title) at *SD DOC Mike Durfee State Prison* (Institution).
This Defendant is sued in his/her: ☒ individual capacity ☒ official capacity (check one or both)
Explain how this Defendant was acting under color of law:
State employee.

8. Name of *eighth* Defendant: *J.C. SMITH*. The *eighth* Defendant is employed *Parole officer supervisor* (Position and Title) at *SD BD. of Pardons and Paroles* (Institution).
This Defendant is sued in his/her: ☒ individual capacity ☒ official capacity (check one or both)
Explain how this Defendant was acting under color of law:
State employee.

ADDITIONAL DEFENDANTS

9. Name of *ninth* Defendant: *DUSTI WERNER*. The *ninth* Defendant is employed *Sr. Parole Officer* (Position and Title) at *SD. BD. of Pardons and Paroles.* (Institution).
This Defendant is sued in his/her: ☒ individual capacity ☒ official capacity (check one or both)
Explain how this Defendant was acting under color of law:
State employee.

10. Name of *tenth* Defendant: Dakota Psychological Services LLC. The *thenth* Defendant is employed *Psychological Services Provider* (Position and Title) at *Dakota Psychological Services LLC* (Institution).
This Defendant is sued in his/her: ☒ individual capacity ☒ official capacity (check one or both)
Explain how this Defendant was acting under color of law:
Contractor with SD DOC and cooperative conductor.

11. Name of *eleventh* Defendant: *JOSHUA J. KAUFMAN*. The *eleventh* Defendant is employed *Licensed psychiatrist* (Position and Title) at *Dakota Psychological Services LLC* (Institution).
This Defendant is sued in his/her: ☒ individual capacity ☒ official capacity (check one or both)
Explain how this Defendant was acting under color of law:
contractor, provide mental treatment to state Parolees/inmates (Sex Offender) through cooperation and conduct fairly attributed to the State of South Dakota.

12. Name of twelfth Defendant: J. SIEMONSMA. The twelfth Defendant is employed Correctional officer (Position and Title) at South Dakota State Penitentiary (Institution).
This Defendant is sued in his/her: ☒ individual capacity ☒ official capacity (check one or both)
Explain how this Defendant was acting under color of law:
State employee at the Dep't of Corrections.

ADDITIONAL DEFENDANTS

13. Name of thirteenth Defendant: R. BERTHELSON. The 13th Defendant is employed Correctional Officer (Position and Title) at South Dakota State Penitentiary (Institution).
This Defendant is sued in his/her: ☒ individual capacity ☒ official capacity (check one or both)
Explain how this Defendant was acting under color of law:
State employee at the Dep't of Corrections.

14. Name of fourteenth Defendant: Greg Erlandson. The fourteenth Defendant is employed SD. Parole Board Member (1) (Position and Title) at SD. Parole Board (Institution).
This Defendant is sued in his/her: ☒ individual capacity ☒ official capacity (check one or both)
Explain how this Defendant was acting under color of law:
State employee at the Dept of Corrections.

15. Name of fifteenth Defendant: Maron Rau. The fifteenth Defendant is employed SD. Parole Board Member (2) (Position and Title) at SD. Parole Board (Institution).
This Defendant is sued in his/her: ☒ individual capacity ☒ official capacity (check one or both)
Explain how this Defendant was acting under color of law:
State employee at the Dep't of Corrections

4. Name of _____ Defendant: _____. The _____ Defendant is employed _____ (Position and Title) at _____ (Institution).
This Defendant is sued in his/her: ☐ individual capacity ☐ official capacity (check one or both)
Explain how this Defendant was acting under color of law:

ADDITIONAL COUNTS

COUNT IV

1. The following constitutional or other federal right has been violated by the Defendant(s):

1st, 5th, 8th and 14th Amendments

2. Count IV involves:

(Check **only one**; if your claim involves more than one issue, each issued should be stated in a different count)

☐ Disciplinary proceedings	☐ Retaliation	☐ Exercise of religion
☐ Excessive force by an officer	☐ Threat to safety	☐ Mail
☐ Medical care	☐ Access to the court	☐ Property
☒ Other: Parole Proceedings		

3. **Supporting Facts:** (State as briefly as possible the FACTS supporting Count IV Describe exactly what each Defendant did or did not do to violate your rights. State the facts clearly in your own words without citing legal authority or arguments).

Defendant Jushua J. Kaufman MA-LPC contracted with SD DOC through municipal Dakota Psychological Service LLC to provide psychological treatment to State parolees/inmate in Sex Offender treatment program either in his clinic or Parole office in Sioux Falls, SD. He know or should know that I was released on parole on 6/25/2014 without the requirements of admitting the guilt since there was no treatment agreement was signed on or prior to that date. Defendant know or should know as well about the important of admission the guilt in any treatment proceeding. Defendant fail as well to make any visit with me while I was confined in Mike Durfee State Prison to discuss any issues related to treatment requirements prior to my initial parole date, rather he stat doing so almost 2 years after my initial parole (after 4/20/2016) and the only reason for that is because of my nationality (Iraq). Even so, I did never promised him that in any time in the future I am going to incriminate myself without immunity that such statement would not be used against me in my pending Habeas Corpus evidentially hearing, not to be used against me in case of granted new trial and not to be used against me to bring new criminal charges. Defendant as well agreed and supported the parole modification that my parole officer did due to my nationality and not because a parole condition was violated. Defendant know as well that my expenses as parolee is much higher than when I was confined in prison walls and reasonably extra fees would apply on me. Nevertheless the treatment provider did not take any steps to terminate me from such like program until 10/19/2016 when he required me to take a polygraph exam related to my offenses where I invoked my 5th Amendment as well (not related to parole condition violation) and until 10/31/2016 for the reason of refusing to incriminate myself and invoking my 5th Amendment.

Defendant together with parole agent (Dusti Werner) target was to get admission to be used against me in a court of law to provide some technical support to the prosecution applying all kinds or coercive method and mental distress to reach to that target before finally terminating me from the treatment program. in doing so in part, he denied me access to any sources that may provide me with a legal assistance while on parole since I was not able to use the prison legal assistance individuals due to my status as parolee and to use the Internet in my search for a legal assistance, he deny me to create email or to use his email when I apply for job under his supervision unless I admit the guilt suggesting to me to find a job in trash fields because I am a sex offender. He kept as well the GPS monitor on me although I passed the 1st and 2nd polygraphs, the conditions usually apply to remove such device and conditioning it in my case to admit the guilt which cause a bill to built up of ($ 1,190.00) that was forward now to a bill collection adding more damages to me.
Defendant is licensed psychological who know the important of recovery programs to

people with mental disability (PTSD) like myself, however he denied me access to a recovery program held by trained individuals associated with (NAMI Sioux Falls "National Alliance on Mental Illness") condition such joint to admit the guilt using my mental disability any depriving for recovery programs as methods to gain such confession causing me more serious mental damages, violating both my 1st Amendment and Title II of American with Disability Act ("ADA") without showing any interference reasonably related by legitimate panel interest.

Defendant as well agreed with parole agent to deprive me community hours to enable me do my laundry making me wearing my dirty laundry multiple times. The damages associate with the treatment provider extend between the time (6/25/2014 - 10/31/2016) making me to relive a trauma related to my PTSD.

My Parole conditions put defendant Kaufman in charge of superving me all along with the Parole officer).
Defendant know (or should have know) that I was ~~relea~~ released on parole on 6/25/14 without discussing any treatment pregraming or any admitting the guilt. Defendant Kaufman should know it was unconstitutional to punish me as parolee for refusing to incriminate myself. Defendant Dakota Psychological Services should not adopt a custom that may punish me for invoking my 5th Amendment as parolee.

4. **Injury:** (State how you have been injured by the actions or inactions of the Defendant(s)).

Humilation, embarrassment, mental and emotional distress, family hardship, out of pocket money spending, fall in dept for family, friends and forwarding one of my bills to a bill collection agency.

5. **Administrative Remedies:**

a. Are there any administrative remedies (grievance procedures or administrative appeals) available at your institution? ☐Yes ☒No

b. Did you submit a request for administrative relief on Count IV ? ☐Yes ☐No

c. Did you appeal your request for relief on Count to the highest level? ☐Yes ☐No

d. If you did not submit or appeal a request for administrative relief to the highest level, briefly explain why you did not.

No grievance forms available for parole proceedings.

ADDITIONAL COUNTS

COUNT V

1. The following constitutional or other federal right has been violated by the Defendant(s):

1st and 14th Amendments

2. Count involves:

(Check **only one**; if your claim involves more than one issue, each issued should be stated in a different count)

☐ Disciplinary proceedings	☐ Retaliation	☐ Exercise of religion
☐ Excessive force by an officer	☐ Threat to safety	☐ Mail
☐ Medical care	☒ Access to the court	☐ Property

☐ Other: _____

3. **Supporting Facts:** (State as briefly as possible the FACTS supporting Count V. Describe exactly what each Defendant did or did not do to violate your rights. State the facts clearly in your own words without citing legal authority or arguments).

Defendant Parole agent Dusti Werner know or should know that I was still working on my immigration case when I came back to Sioux Falls since the unit staff at (SDSP) emailed her. She know about my need to my paper documents and to have access to digital informations stored in CD and they kept away from me as well no access to any stationary materials due to my status as (detainee). That CD contain as well information related to my current pending for evidentially hearing at time Habeas Corpus motion related to my original convictions. My parole officer did nothing to grant me access to those documents to enable me meet the dead line of filing motion with the Board of Immigration Appeals and another appeal with the 8th Cir. Court as well for issues related to granted me the status of Permanent Resident of the United States. She met me first time only on 5/10/2016 just four days before the dead line and I explained to her that she gave me no sufficient time to write my arguments and to file them related to my immigration case and I need as well to be granted access to my digital information and an access to a computer to enable me edit my documents before filing them since English is not my 1st language, my parole officer deny me access to any computers to be included the prison computers or library or even to grant me a free community hours to enable me find a trust worthy place to enable me use their computers claiming at time she do not want me to have any access to any computer with or without interment causing me missing the dead line for filing.

My parole officer as well modified my parole conditions without due process due to my nationality as non-U. S. citizen. I asked my parole agent to grant me free community hours to enable me find legal assistance to challenge those modification and her countenance ordering me to incriminate myself and my 5th Amendment rights as parolee and there are any arbitrary in those modification of Ex Post Facto law . The prison legal assistance would not be able to help me due to my status as parolee and the issues I am challenging is not related to confinement in prison walls. My parole agent claimed that she would give me free time only for treatment or search for work and she would not give me any free time to challenge the issues related to those modifications. I was able one time to talk to one of her supervisor in her present and the treatment provider which he sustain as well my parole officer and the treatment provider to admit the guilt although he know that was only because my citizenship and they would ask so from U.S. citizens prior to there initial parole release. On my last visit to my parole agent office in Sioux Falls, I asked again to meet with her supervisor which she denied claiming it is unnecessary for me to do so and she had no time to do so.

Both my parole officer and the treatment provider denied me as well access to the Internet

while on parole to enable me search for legal materials that may help me in a way or other in my cases or even to have an email under their supervision to search for a job conditioning all those access to incriminate myself as parolee. my parole officer also conditioned any use to a computer to write any of my legal argument to have someone (trust worthy by her to watch what I am writing in office word document (even if the computer was not connected to the interment).

My parole agent and the treatment provider both know or should know that the constitution grant me a meaningful access to courts and that they should not legally hinder my ability to access to the courts and that they should not use such deprivation to harass a parolee to gain involuntarily confessions to provide any kinds of tactical support to prosecutions.

4. **Injury:** (State how you have been injured by the actions or inactions of the Defendant(s)).
Humilation, embarrassment, mental and emotional distress, family hardship, out of pocket money spending, fall in dept for family and friends, forwarding one of my bills to a bill collection agency: missing the deadline to file with immigration courts.

5. **Administrative Remedies:**
   a. Are there any administrative remedies (grievance procedures or administrative appeals) available at your institution? ☐Yes ☒No
   b. Did you submit a request for administrative relief on Count V ? ☐Yes ☐No
   c. Did you appeal your request for relief on Count to the highest level? ☐Yes ☐No
   d. If you did not submit or appeal a request for administrative relief to the highest level, briefly explain why you did not.

No grievance forms available for parole proceedings.

ADDITIONAL COUNTS

COUNT VI

1. The following constitutional or other federal right has been violated by the Defendant(s):

1st, 5th, 8th and 14th Amendments

2. Count involves:

(Check only one; if your claim involves more than one issue, each issued should be stated in a different count)

- ☐ Disciplinary proceedings
- ☐ Excessive force by an officer
- ☐ Medical care
- ☐ Retaliation
- ☐ Threat to safety
- ☐ Access to the court
- ☐ Exercise of religion
- ☐ Mail
- ☐ Property
- ☒ Other: Parole Proceedings

3. **Supporting Facts:** (State as briefly as possible the FACTS supporting Count VI

Describe exactly what each Defendant did or did not do to violate your rights. State the facts clearly in your own words without citing legal authority or arguments).

Defendants Parole officer, Parole officer Supervisor, SD Parole Board, SD Parole Board direcor and treatment Provider, in their attempt to force me to admit the guilt, Violated my Due Process just because I am not a U.S. citizen who was granted temporary relief from immigration, adding more restrictions without any specific reason beside the one listed above. The result was losing liberty interest in privileges/rights granted to me 8th Cir. Court decisions. In part, I lost access to my smart phone which I paid for prior to those modifications when there was no restrictions to operate such kinds of phones causing out of pocket money loss and family hardship since without reason I was deprived video visitation with my elder parents who live by themselves in New York and never able to see me due to doctors recommendations due to there serious medical health and never was able to see them since I flee my country or to communicate with my sister which she still live in my home country (Iraq). I was deprived as well having access to any media in my own language (Arabic-Iraq) making even my mental health more sever while on parole. Defendants also did not allow me to call my niece which she live in Iraq and when I left Iraq (2008) she was almost 3 years old until she turn 18 years old or to incriminate myself by admitting the guilt without immunity as parolee causing more family hardships in violation to my rights. Defendants knew or reasonably have knew that my court records indicated my conviction was related to Pocess of child pornography and nothing else, and such like disciplinary restrictions constitute greater deprivation to my 1st Amendment that otherwise granted to others.

4. **Injury:** (State how you have been injured by the actions or inactions of the Defendant(s)).

Humilation, embarrassment, mental and emotional distress, family hardship, out of pocket money spending, fall in dept for family, friends and forwardly one of my bills to a bill collection agency.

5. **Administrative Remedies:**

a. Are there any administrative remedies (grievance procedures or administrative appeals) available at your institution? ☐ Yes ☒ No

b. Did you submit a request for administrative relief on Count VI ? ☐ Yes ☐ No

c. Did you appeal your request for relief on Count to the highest level? ☐ Yes ☐ No

d. If you did not submit or appeal a request for administrative relief to the highest level, briefly explain why you did not.

No grievance forms available for parole proceedings.

ADDITIONAL COUNTS

COUNT VII

1. The following constitutional or other federal right has been violated by the Defendant(s):

1st, 4th, 6th and 14th Amendments

2. Count involves:

(Check **only one**; if your claim involves more than one issue, each issued should be stated in a different count)

☐ Disciplinary proceedings	☐ Retaliation	☐ Exercise of religion
☐ Excessive force by an officer	☐ Threat to safety	☐ Mail
☐ Medical care	☒ Access to the court	☐ Property
☐ Other:		

3. **Supporting Facts:** (State as briefly as possible the FACTS supporting Count VII Describe exactly what each Defendant did or did not do to violate your rights. State the facts clearly in your own words without citing legal authority or arguments).

Defendants Correctional Officers in charge of myParolee property inventory at South Dakota State Penitentiary (SDSP, Sioux Falls), both caused my parolee property in the outside locker at Unit C to be lost when Iwas parolee housed there between (4/20/2016 - 11/2/2016) to be included but not limited to (back bag, cellphone , cellphone charger, and a USB memory flash drive).

My parole agent (Dusti Werner) knowssabout that I stored my legal information in that flash memory drive. She offered me onetime (her help when I was detainee to grant her access to all my digital stored legal information to brint them for me in her office), which I refused.
Correctional Officers work for the state and reasonably know or should know about the existense of that flash memory drive in my back bag in my outside locker(and would resonably bluged it into a computer to know what materials stored there), caused intenionally to loss that memory drive to hinder my ability to continue fight my immigration case to enable the government to deport me back to my home country (Iraq) so the state can close my Habeas Corpus petition related to my origenal convictions since it would

cont..

4. **Injury:** (State how you have been injured by the actions or inactions of the Defendant(s)).

Humiliation, embarrassment, mental and emotional distress, loss in apportunity of aceess to any of my legal materials stored in that memory drive to modify for habeas corpus and legal immigration case.

5. **Administrative Remedies:**

a. Are there any administrative remedies (grievance procedures or administrative appeals) available at your institution? ☒ Yes ☐ No

b. Did you submit a request for administrative relief on Count VII ? ☒ Yes ☐ No

c. Did you appeal your request for relief on Count VII to the highest level? ☒ Yes ☐ No

d. If you did not submit or appeal a request for administrative relief to the highest level, briefly explain why you did not.

MOTION TO AMEND § 1983 CIVIL ACTION BY ADDING NEW COUNT AND ADDITIONAL DEFENDANTS

COUNT VII

3. Supporting Facts: (cont.)

uncover a possible unconstitutional actions committed by the State during my trial in June 2011, and to enable the State as well to have access to my *Pro Se* digital stored information inside that flash drive in details and other arguments related to both my immigration and pending Habeas petition as well communications between me any attorneys and other legal service providers.

Unit C officials would impose more restriction standards inside those parolees lockers' room, doing as well routinely inspections for any contrabands and would write disciplinary report against and parolee (or other individuals) who forget to lock their lockers using locks provided by the Unit Staff.

My property stored inside that locker was not purchased through out the commissary provided to regular inmates who sentence to serve rather than it was property I was allowed to possess due to my status as parolee equally to any free citizens in streets. Those lockers were separated from the inside prisoners lockers. At no time, I forget my locker unlocked. The only personals who may have access to my locker were the unit staff using a master key.

Those and other special circumstances surround the loss of my legal materials stored in that USB flash drive, such as my first habeas hearing was hold on 9/20/2016 at which I testified regarding grounds it was agreed with my attorney to proceed with them Pro se and the court have a acknowledge previously about those arguments (not included in my attorney arguments) which I was working hardly on them for more than two years while I was on parole and stored them there. My parole agent filed the allegations of my parole violations on 11/2/2016 which then caused me to be detain again in a Super Maximum prison (Jameson Annex) for thirty days without any access to any of my paper legal materials or to any stationary items(almost six weeks before my second hearing which held on 12/13/2016) noticing that the prison officials although they prepared the inventory on (10/28/2016) they failed to notify me about my property until they resign it on (4/4/2017).

On the first habeas evidentially hearing, the State Attorney was struggled in finding witnesses/evidences for their own defense after my Pro Se testimony in connection with the grounds I prepared myself on the stand. On that day, the State requested a continuance to enable them find or subpoena witnesses (i.e. my second public defender (which I fired her before my trial start). The Court granted a continuance until (10/25/2016) when the State requested for another continuance because their witness was not ready to testify (although she was informed almost a moth earlier). While doing that, the State and my parole agent insisted that I must take the polygraph related to my original offences just one day prior to (10/25/2016) without any prior notification and with parole agent privies knowing that I did not want to take that exam at time very close to my hearing. My parole agent droved me herself to the location of that polygraph, and then shortly to violate me for invoking my Fifth Amendment.

Supporting Facts (Count VII) (Cont.):

It make no sense that my USB flash memory drive would be *accidentally* (lost or stolen) without the staff consent since those officers reasonably would be the only people who would have access to my outside locker, taking in consideration that the lost was selective in nature, there was a brand new bike light set was taking off my back bag before that bag stolen, and there were other more precious items stored in that outside locker that was never stolen or (missed) at anytime, and the allegations of the *missing* of my legal materials happened only after my challenge to the state authority and detaining me for that reason, and no one would be able to use my back bag due to the new policy of only using clear or mesh bag bags.

The state officials caused intently and purposefully the lost of my legal materials that I worked hardly to collect and write for more than 2 years while on parole and without the need of extra assistance from the State to deprived me access to those materials to disable me proceeding any challenges to the state authority after invoking my 5th Amendments and challenging the state illegal practice of deprived me my 5th Amendment and refusal to incriminate myself as parolee as well my Pro Se Habeas Corpus and other motions and communications in connect with my immigration case so I cannot proceed any further in any civil actions cases on my own defense.

Respectfully Submitted..

Haider Salah Abdulrazzak

in RE: CIV 17-4058

United States District Court
District of South Dakota
Southern Division

HAIDER SALAH ABDULRAZZAK Plaintiff, v. J.C. SMITH et al, Defendants	Civ. (4:17-cv-04058-KES) MOTION TO APPEAL

Comes now Plaintiff Abdulrazzak Proceeding Pro Se file the Motion to Pray to this Court to provide any available guide-lines or instructions/available forms (if any) that may help to appeal this Court decision entered on Dec. 12, 2017 concerning the 2nd Amended Complaint.

Plaintiff intention is just to appeal the dismissed claims/and Partial dismissed claims or defendants. Plaintiff don't know about the timing if that decision is Immediate appealable or should wait until everything finished in all the case or wait until decision made in the Motion to reconsider (mailed on Dec. 18, 2017)

Respectfully Submitted

Dated this 21st Dec. 2017

Haider Abdulrazzak
MDSP; ID # 4373
1412 Wood Street
Springfield, SD 57062

Plaintiff/Pro Se

APPENDIX
O