STATE OF SOUTH DAKOTA } ss.
MINNEHAHA COUNTY
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office.

DEC 21 2011

Clerk of Courts, Minnehaha County
By M Baar Deputy

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)
COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,) No. 10-5456745
Plaintiff)
)
v.)
)
Haider Abdul Razzak)
Defendant)

RECEIVED
DEC 22 2011
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Central Records

BENCH ORDER
JUDGMENT OF CONVICTION
AND PENITENTIARY SENTENCE

Prosecutor: R. Saye Defense: M. Hanson

Date of Offense: 29Dec2009 Crime: Child Porn Felony Class 4

Date of Conviction: JUN-30JUN2011 SDCL cite: 22-24A-3

Date of Sentence: 20Dec2011 Habitual Offender: 22-7-_____

Crime Qualifier: (check if applicable)
__ accessory 22-3-5 __ aiding or abetting 22-3-3 __ attempt 22-4-1
__ conspiracy 22-3-8 __ solicitation 22-4A-1

It is hereby ORDERED that the Defendant is sentenced to serve:

21 years _____ months _____ days in the SD State Penitentiary

with 13 suspended and 180 days credit for jail time

Check if penitentiary term is a condition of: Total = 8

__ suspended imposition of sentence or
__ suspended execution of sentence

__ concurrent or __ consecutive with _____

This BENCH ORDER JUDGMENT OF CONVICTION AND SENTENCE may be followed by an Amended Judgment of Conviction and Sentence with more details.

Dated 20Dec 2011.

BY THE COURT:

ATTEST:

ANGELIA M. GRIES
CLERK OF COURTS
By: M Baar

CIRCUIT JUDGE

(MAG 2008)

FILED
DEC 21 2011
Minnehaha County, S.D.

APPENDIX
A

111-21-540
111-jail
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STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
: SS		
COUNTY OF MINNEHAHA)		SECOND JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, Plaintiff,	+	SHR 200911733
		CR. 49C10005422 A0
vs.	+	JUDGMENT & SENTENCE
HAIDER SALAH ABDULRAZZAK, Defendant.	+	

An Indictment was returned by the Minnehaha County Grand Jury on September 9, 2010, charging the defendant with the crimes of Count I Possess, Manufacture or Distribute Child Pornography on or about December 29, 2009; Count II Possess, Manufacture or Distribute Child Pornography on or about December 29, 2009; Count III Possess, Manufacture or Distribute Child Pornography on or about December 29, 2009; Count IV Possess, Manufacture or Distribute Child Pornography on or about December 29, 2009; Count V Possess, Manufacture or Distribute Child Pornography on or about December 29, 2009; Count VI Possess, Manufacture or Distribute Child Pornography on or about December 29, 2009; Count VII Possess, Manufacture or Distribute Child Pornography on or about December 29, 2009; Count VIII Possess, Manufacture or Distribute Child Pornography on or about December 29, 2009; Count IX Possess, Manufacture or Distribute Child Pornography on or about December 29, 2009; Count X Possess, Manufacture or Distribute Child Pornography on or about December 29, 2009; Count XI Possess, Manufacture or Distribute Child Pornography on or about December 29, 2009; Count XII Possess, Manufacture or Distribute Child Pornography on or about December 29, 2009; Count XIII Possess, Manufacture or Distribute Child Pornography on or about December 29, 2009; Count XIV Possess, Manufacture or Distribute Child Pornography on or about December 29, 2009. The defendant was arraigned upon the Indictment on September 15, 2010, Ryan Kolbeck appeared as counsel for Defendant; and, at the arraignment the defendant entered his plea of not guilty of the charges in the Indictment. The case was regularly brought on for trial, Ryan Sage, Deputy State's Attorney appeared for the prosecution and, Mike Hanson, appeared as counsel for the defendant. A Jury was impaneled and sworn on June 28, 2011 to try the case. The Jury, after having heard the evidence produced on behalf of the State of South Dakota and on behalf of the defendant on June 30, 2011 returned into open court in the presence of the defendant, returned its verdict: "We the Jury, find the defendant, HAIDER SALAH ABDULRAZZAK, guilty as charged as to Count I Possess, Manufacture or Distribute Child Pornography (SDCL 22-24A-3); guilty as charged as to Count II Possess, Manufacture or Distribute Child Pornography (SDCL 22-24A-3); guilty as charged as to Count III Possess, Manufacture or Distribute Child Pornography (SDCL 22-24A-3); guilty as charged as to Count IV Possess, Manufacture or Distribute Child Pornography (SDCL 22-24A-3); guilty as charged as to Count V Possess, Manufacture or Distribute Child Pornography (SDCL 22-24A-3); guilty as charged as to Count VI Possess, Manufacture or Distribute Child Pornography (SDCL 22-24A-3); guilty as charged as to Count VII Possess, Manufacture or Distribute Child Pornography (SDCL 22-24A-3); guilty as charged as to Count VIII Possess, Manufacture or Distribute Child Pornography (SDCL 22-24A-3); guilty as charged as to Count IX Possess, Manufacture or Distribute Child Pornography (SDCL 22-24A-3); guilty

as charged as to Count X Possess, Manufacture or Distribute Child Pornography (SDCL 22-24A-3); guilty as charged as to Count XI Possess, Manufacture or Distribute Child Pornography (SDCL 22-24A-3); guilty as charged as to Count XII Possess, Manufacture or Distribute Child Pornography (SDCL 22-24A-3); guilty as charged as to Count XIII Possess, Manufacture or Distribute Child Pornography (SDCL 22-24A-3); guilty as charged as to Count XIV Possess, Manufacture or Distribute Child Pornography (SDCL 22-24A-3)." The Sentence was continued to December 20, 2011, after completion of a presentence report.

Thereupon on December 20, 2011, the defendant was asked by the Court whether he had any legal cause why Judgment should not be pronounced against him. There being no cause, the Court pronounced the following Judgment and

SENTENCE

AS TO COUNT I POSSESS, MANUFACTURE OR DISTRIBUTE CHILD PORNOGRAPHY : HAIDER SALAH ABDULRAZZAK shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for three (3) years with credit for one hundred eighty (180) days previously served and with two (2) years of the sentence suspended on the condition that the defendant not be in the presence of anyone under the age of fifteen (15) without another adult (21 years or older) present for a period of ten (10) years after released from custody.

AS TO COUNT II POSSESS, MANUFACTURE OR DISTRIBUTE CHILD PORNOGRAPHY : HAIDER SALAH ABDULRAZZAK shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for three (3) years with two (2) years of the sentence suspended on the condition that the defendant not be in the presence of anyone under the age of fifteen (15) without another adult (21 years or older) present for a period of ten (10) years after released from custody.

AS TO COUNT III POSSESS, MANUFACTURE OR DISTRIBUTE CHILD PORNOGRAPHY : HAIDER SALAH ABDULRAZZAK shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for three (3) years with two (2) years of the sentence suspended on the condition that the defendant not be in the presence of anyone under the age of fifteen (15) without another adult (21 years or older) present for a period of ten (10) years after released from custody.

AS TO COUNT IV POSSESS, MANUFACTURE OR DISTRIBUTE CHILD PORNOGRAPHY : HAIDER SALAH ABDULRAZZAK shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for three (3) years with two (2) years of the sentence suspended on the condition that the defendant not be in the presence of anyone under the age of fifteen (15) without another adult (21 years or older) present for a period of ten (10) years after released from custody.

AS TO COUNT V POSSESS, MANUFACTURE OR DISTRIBUTE CHILD PORNOGRAPHY : HAIDER SALAH ABDULRAZZAK shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for three (3) years with two (2) years of the sentence suspended on the condition that the defendant not be in the presence of anyone under the age of

fifteen (15) without another adult (21 years or older) present for a period of ten (10) years after released from custody.

AS TO COUNT VI POSSESS, MANUFACTURE OR DISTRIBUTE CHILD PORNOGRAPHY : HAIDER SALAH ABDULRAZZAK shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for three (3) years with two (2) years of the sentence suspended on the condition that the defendant not be in the presence of anyone under the age of fifteen (15) without another adult (21 years or older) present for a period of ten (10) years after released from custody.

AS TO COUNT VII POSSESS, MANUFACTURE OR DISTRIBUTE CHILD PORNOGRAPHY : HAIDER SALAH ABDULRAZZAK shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for three (3) years with one (1) year of the sentence suspended on the condition that the defendant not be in the presence of anyone under the age of fifteen (15) without another adult (21 years or older) present for a period of ten (10) years after released from custody.

AS TO COUNT VIII THROUGH COUNT XIV : the Court pronounced no official sentence.

It is ordered that these Counts are to run consecutively to each other.

The Court finds that each Count for which the defendant is convicted consist of separate transactions.

The defendant shall be returned to the Minnehaha County Jail following court on the date hereof, to then be transported to the Penitentiary; there to be kept, fed and clothed according to the rules and discipline governing the South Dakota State Penitentiary.

Dated at Sioux Falls, Minnehaha County, South Dakota, this 20 day of January, 2011.

FILED
JAN 20 2012
Minnehaha County, S.D.
Clerk Circuit Court

ATTEST:
ANGELIA M. GRIES, Clerk
By _____ Deputy

BY THE COURT:

_____
JUDGE PETER H. LIEBERMAN
Circuit Court Judge

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED
JAN 14 2013
Clerk

STATE OF SOUTH DAKOTA, Plaintiff and Appellee, vs. HAIDER SALAH ABDULRAZZAK, Defendant and Appellant.	ORDER DIRECTING ISSUANCE OF JUDGMENT OF AFFIRMANCE #26274

The Court considered all of the briefs filed in the above-entitled matter, together with the appeal record, and concluded pursuant to SDCL 15-26A-87.1(A), that it is manifest on the face of the briefs and the record that the appeal is without merit on the following grounds: 1. that the issues on appeal are clearly controlled by settled South Dakota law or federal law binding upon the states, 2. that the issues on appeal are factual and there clearly is sufficient evidence to support the jury verdict, and 3. that the issues on appeal are ones of judicial discretion and there clearly was not an abuse of discretion (SDCL 15-26A-87.1(A)(1),(2) and (3)), now, therefore, it is

ORDERED that a judgment affirming the Judgment of the circuit court be entered forthwith.

DATED at Pierre, South Dakota, this 14th day of January, 2013.

BY THE COURT:

David Gilbertson, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

APPENDIX
B

PARTICIPATING: Chief Justice David Gilbertson, Justices John K. Konenkamp, Steven L. Zinter, Glen A. Severson and Lori S. Wilbur.

CIRCUIT COURT OF SOUTH DAKOTA
SECOND JUDICIAL CIRCUIT

425 N. Dakota Avenue
Sioux Falls, South Dakota 57104
Telephone (605) 367-5920
Fax Number (605) 367-5979

JUDGE JOSEPH NEILES

March 17, 2017

Julie Hofer
Office of the Public Advocate
415 N. Dakota Ave.
Sioux Falls, SD 57104

Judith Ziegler Wehrkamp
Deputy States Attorney
415 N. Dakota Ave.
Sioux Falls, SD 57104

Re: Haider Salah Abdul-Razzak vs. Robert Dooley, Warden of the Mike Durfee State Penitentiary, Respondent. CIV 13-2004 (Habeas)

Dear Counsel:

This is a Habeas Corpus proceeding. The petitioner is an inmate in the South Dakota State Penitentiary, apparently currently housed at the facility in Springfield, SD. He was sentenced to the Penitentiary in Minnehaha County Cr. 10-5422 as a result of his convictions in front of a jury for 14 counts of Possession, Manufacturing or Distribution of Child Pornography, in violation of SDCL 22-24A-3. He was represented in the case at trial by attorney Mike Hanson, an attorney in private practice here in Sioux Falls, retained by the defendant. Then Circuit Judge Peter Lieberman (now retired) sentenced the petitioner to three years in the Penitentiary with two years suspended on each of the first six counts of the Indictment, imposed three years in the penitentiary with one year suspended on count seven and imposed no sentence on counts eight through fourteen. The defendant received credit for 180 days in jail already served up until that point. Judge Lieberman ordered the sentences to be consecutive, in effect causing the defendant to be facing a sentence of eight years in the penitentiary, with an additional 13 years suspended.

This judgment and sentence was appealed to the South Dakota Supreme Court, (the petitioner was represented by the Public Defender for the appeal) and the Court did summarily affirm the judgment in an order signed by the Chief Justice on January 14, 2013. It is claimed by present counsel for the petitioner that the issues in this direct appeal related to (1) sufficiency of the evidence; and (2) a claim that the sentence imposed was excessive.

It would appear that the petitioner at some point was granted parole, and then was charged with some parole violation, as the file reflects that attorney Aaron Salberg was

APPENDIX
C

appointed by the Circuit Court to represent the for a parole violation in late 2016. No order appointing counsel appears in the file but the file does reflect that Circuit Judge Larry Long was contacted by the Parole Board to appoint a lawyer for that proceeding, and Judge Long apparently scrawled Salberg's name across the top of the application form. It is unknown why Judge Long would have appointed Salberg when the Public Advocate was already representing the petitioner in this matter. There is no evidence in this record regarding whether the petitioner was granted parole or when he might have been granted parole, or whether his parole was revoked at some earlier proceeding, or whether his suspended sentence was ever imposed. The Warden here has not raised the issue of whether this Habeas proceeding would have been moot because the petitioner had been released on parole, and I assume that had the petitioner been not in custody, this petition would have been subject to dismissal. See Bostick v. Weber, 2005 SD 12, 692 N.W.2d 517.

Petitioner initially submitted his petition "pro se" and asked for court-appointed counsel. The pro se petition raised 75 different points which he described as issues. Many related to complaints about the work his lawyer did or did not do in representing him at the trial.[1] However, eventually in April of 2014 Ms. Hofer, representing the petitioner here, filed an Amended Application for a Writ of Habeas Corpus. I consider this Amended Petition to "preempt" the original petition, in effect setting those initial claims aside and raising only the issues spelled out in the new Petition. This Amended Petition raised the following issues:

(1) Trial counsel was ineffective for his failure to file a motion to suppress the statements made by the petitioner while being interrogated by the officers, claiming that he was subjected to a custodial interrogation without the Miranda warnings.
(2) Trial counsel was ineffective for not file a motion to suppress the statements made during the interview because the petitioner did not understand the language line interpreter's interpretation of the officer's questions.
(3) Petitioner did not understand the interpreter used during the trial, as he was Egyptian and petitioner was Iraqi, and they speak with different Arabic dialects. He claims he told his lawyer of this problem but trial counsel did not address it.
(4) Trial counsel failed to provide effective assistance of counsel by his failure to investigate a potential alibi claim regarding the dates and times that the child pornography was being accessed, downloaded and viewed.
(5) Petitioner was denied effective assistance of counsel by his lawyer's failure to make a motion for disclosure of other acts evidence, and failed to object to "other acts evidence" offered during the trial by the state.
(6) Petitioner was denied effective assistance of counsel by his trial counsel's failure to object to the prosecutor improperly vouching for his witness by stating that the

[1] Many of the issues raised by petitioner in this initial petition are totally without merit, as they clearly relate to trial tactics that a lawyer might decide to pursue, or they are raising issues that have no legal validity, or they do not rise to the level of a constitutional violation, and therefore are not cognizable through a Habeas Writ.

Detective was "honest". He further asked the jury who had a motive to lie, and stated that the detective had no motive to lie.

(7) Petitioner was denied effective assistance of counsel by his trial counsel's failure to have the hard drive reviewed by an expert. She claims this failure to have it reviewed by an expert resulted in two more images that were not charged out being shown to the jury.

As a result of this Amended Petition, Circuit Judge Patricia Riepel issued a provisional Writ of Habeas Corpus in April of 2014

After service of the Writ, the Warden through the Minnehaha County States Attorney's Office filed a return to the Writ. Among other claims, counsel asserted that some if not all of these claims could have been raised in direct appeal, and since they were not, they were waived. Also, the Warden asserts that some of the issues were not preserved because no objection was raised at trial. Otherwise, the Warden generally denies the claims of the petitioner. I consider claims of ineffective assistance of counsel to generally not waived by a defendant in his direct appeal, as the Supreme Court has clearly indicated that a direct appeal is a poor vehicle for such claims absent some gross violation, and generally filing those claims as part of a Habeas proceeding allows trial counsel to testify and answer questions about why they did what they did. And pretty much by definition, "ineffective assistance of counsel" means that trial counsel did not object at trial to the evidence, and so I don't consider that a valid objection to the petition here.

At the hearing on the petition, which started on September 20, 2016 before this court, attorney Michael Hanson was called to testify. He said he was retained by the petitioner after he was initially appointed the Public Defender. He said the case had been delayed several times by the PDO. He noted that the PDO had retained a computer expert to assist them in looking at the computer, and Hanson spoke with the lawyers from the PDO that had been representing the petitioner, and reviewed the expert's findings, and also talked to the expert personally. He said the case involved two computers plus an external hard drive. The expert said that Lime Wire had been installed on the computer and then deleted. He said that all of the images in the computer had been deleted, and were only found in the hard drive. He was able to determine when the computer was used. He said that Law Enforcement had not been able to access all of this because of the Arabic coding involved. It was his opinion that it appeared that as soon as the Petitioner arrived in the United States that the computer was used to access pornography sites, in New York and again in Chicago, and then in Sioux Falls. He told Hanson that he had found deleted images and other child pornography that law enforcement had not found. He did not prepare a formal report as to his findings because then he would have had to disclose all of these findings in the report (and presumably that information would have been harmful to the petitioner's case). Hanson testified that it was his judgment call not to produce this expert during the trial for fear that some of this harmful evidence would have been disclosed.

Hanson said that it was his understanding from talking to petitioner that he had bought the computer in Syria as well as the hard drive. He said there were no laws against visiting porn sites in Syria. The defendant said that the computer had LimeWire when it was purchased, and he used it one time and then deleted it. He also told Hanson that there were times that friends came to his apartment that might have had access to his computer. The roommate testified at the trial that the night in question they had a party and other Iraqis were present, and the computer was not password protected.

He said during the trial that it came to light there were a huge number of images that had not been disclosed to the defense, and so he asked the trial judge for time to review this information, and Judge Lieberman gave him two hours. His secretary said this was a massive download of images to the hard drive. He noted among the images downloaded was an application for heating assistance and a resume.

As far as the statements taken from the petitioner, he said he reviewed them at the time and thought there might be an issue of voluntariness. It was his understanding that the petitioner and his roommate may have been handcuffed at some point during the police interview, and certainly had been told they were not free to leave. He said also the issue of the use of Language Line as an interpreter was discussed.

He also testified that he met with the state's computer expert and the prosecutor came along. The prosecutor told him there were many other images, although some were questionable as to whether it was child pornography. Hanson noted that he never had any trouble communicating with the petitioner during the time he was involved in the case. He never had to use an interpreter. He acknowledged that Petitioner did tell him that the interpreter provided was Egyptian, not Iraqi. But he put in context of not "trusting" the Egyptian, not that he could not understand him. The judge held a hearing on this issue and asked the interpreter if there were different dialects of Arabic, and the interpreter said that there were not. He concluded that the petitioner fully understood everything that was being said, even if he did not fully understand the intricacies of the American Legal System.

He acknowledged that he filed no motions on behalf of the petitioner. He subpoenaed three witnesses for the petitioner for the trial. The roommate was actually called as a witness by the prosecution. Hanson said he had subpoenaed a person from LSS, but LSS raised a stink about that. The witness did appear, but did not have much to say that would have been helpful and was not called, I think.

Hanson claimed he did not want to make a motion to discover specific items on the computer that it might open the door to additional criminal charges. He said he did not make a motion to keep out those other images at the trial, and admitted in hindsight that it would have been good to keep those images from the jury. He did not make a motion regarding other acts evidence because he thought if the state

intended to introduce such evidence they would have to give him notice regarding that intent.

Basically, Hanson said it was a judgment call by him as to how he was going to treat the evidence. There defense was that his client was not aware of these images on his computer. He was concerned throughout that additional evidence his computer expert had found might come out that would have harmed their case further, and so was stepping lightly on some of these issues.

Petitioner also testified at the hearing. He testified that he arrived in the United States in June of 2009 after fleeing from Iraq on February 24, 2008, and was first visited by the detectives in December of 2009, at his residence here in Sioux Falls. He became aware of the police investigation when his roommate got a phone call, but apparently they did not understand what was going on so they called another individual who spoke both English and Arabic, and learned that the police were at their home and they needed to go home. Petitioner said that he called his case worker from LSS and met him at their apartment.

Once at their apartment they discovered the police were already inside, and the LSS case worker was there waiting for them. They asked the case worker to translate for them, but the police officers would not let the case worker enter. They (petitioner and his roommate) entered the apartment and the detectives were questioning them. At the time, petitioner was in the process of studying English and was seeking a GED. He acknowledged he knew some English words but did not fully understand the meaning of all of the words being said. The officers directed them where to sit. He noted there were 4-5 people in the apartment including one person he believed to be an Immigration agent for the Federal government. After a short while the roommate was directed to move to sit next to petitioner on their couch. The police officers obtained an interpreter, but petitioner claims he had a hard time understanding the dialect used by that interpreter. He claimed that Arabic varies from country to country, and a particular word may have a different meaning depending upon the country.

He believed that he was told he was not under arrest, and believes he was told he did not have to speak to the detectives, but in his home country of Iraq refusing to speak to the officers would be problematic. He mentioned the corruption there of the officers. Despite what he had been told by the officers, he did not feel he had the freedom to get up and leave the apartment at that time. Petitioner represented he told Mr. Hanson all of this plus told him that he was not comfortable with the use of the Egyptian interpreter, as he could not fully understand him.

In addition, he testified to some of his other issues that he had with the case. He talked about the circumstances of purchasing the computer and having the computer with him on the border with Syria. He said some of the images do not have a time stamp, and when they were uploaded or viewed was mere speculation by the

prosecution. He believed that the 287 thumbnails were copied from another computer into the external hard drive. He said he removed the Lime Wire from his computer in October, 2009.

He also complained that the prosecutor tried to use his religion against him, but the judge ruled in petitioner's favor, but the jury was not properly instructed to disregard these comments.

He also expressed concern that Mike Hanson never talked to his roommate before the trial, and claims he gave Hanson the names of 10 people that had been in his apartment and might have had access to the laptop, although he could no longer remember their names at the time of his testimony, noting he suffered from PTSD. Overall, he claims that he was framed for this offense.

The hearing was recessed to allow attorney Michelle Thomas to testify on behalf of the Warden. She has worked for the Minnehaha County Public Defender's Office since January of 2004, and so at the time she was initially appointed to represent the petitioner she had about 6 years of experience in criminal defense work. She testified that she first met with the petitioner on 1/6/11, and then appeared with him on 1/19/11 and asked for a further delay in the hearing to consult with a computer expert (Dan Meinke). On 3/1/11 she met with Meinke and noted that the information she had was that the petitioner had arrived in the United States of 6/29/09, and the first file in the computer was created on 6/30/09, which meant that this computer was being used to download child pornography right after entry into the United States. She also noted that it was her understanding that the deleted images in the hard drive indicated about 500 files were recovered containing apparent child pornography.

She said that petitioner joined her in a meeting with Meinke, and it was noted that there was a lot of child porn that had been downloaded into the computer over several months. In exhibit #9, her notes from her representation, she noted that petitioner had a roommate, but that roommate had his own computer and would not use petitioner's computer. She also testified that had she used an interpreter in her conversations and meetings with interpreter, she would have made a note about that in her personal notes. She did not file any suppression motion regarding any of the state's evidence, admitting that had she seen any legitimate issues to raise she would have filed such a motion.

In cross-examination, she noted that she had taken over the case from Bryan Hall, another Public Defender lawyer who was leaving the office. She acknowledged that her notes do not reflect any discussion with petitioner regarding his interview with law enforcement. She did have notes reflecting that she did receive a CD that was represented to be petitioner's interview with law enforcement, but it turned out to be another individual on the CD, not the petitioner. In response she had emailed the prosecutor requesting the correct CD, but did not note whether she ever received one.

And then Mike Hanson took over the case in early March of 2011 and her involvement ended.

In cross-examination by the court she acknowledged that over time she has had from time to time issues with defendants who are Arabic speaking but do not understand the dialect of the interpreter being used by the court.

After this testimony I listened to the arguments of counsel, and also allowed the petitioner to again address the court about his separate issues, but I was primarily concerned about his complaints about his representation by counsel, and his view on that. As noted above, when the Amended Petition was filed, any issues not raised there were considered to be waived.

LAW, ANALYSIS AND DECISION

The petitioner has raised a large number of issues concerning this case and his representation by counsel. All of the issues, one way or another, come down to a claim of ineffective assistance of counsel. I would, for purposes of discussion here, regroup the issues into four main categories:

First, complaints about counsel's failure to move to suppress statements made by the defendant to law enforcement officers, based upon 1) failure to comply with Miranda; 2) failure to provide an appropriate interpreter for the petitioner.

Second, complaints about counsel's failure to explore an alibi claim.

Third, complaints about counsel's failure to discover and move to suppress "other acts" evidence, that is, the other images on the computer not charged out in the indictment but shown to the jury during the trial.

Fourth, complaints about counsel's failure to object to the prosecutor's vouching for the credibility of the detective during argument.

Some of these issues are relatively easy to resolve. It appears to me from the petitioner's own testimony that he was told by the officers at the scene that he was not under arrest and did not have to speak to them. Apparently petitioner, because of his background in living in Iraq, did not believe the officers and was intimidated by them. That is not, in my view, sufficient to cause me to conclude that this was a custodial interrogation. I believe the test is whether a reasonable person would have concluded that they were under arrest or otherwise being detained, and under that subjective test I would conclude that petitioner was not "in custody" and so therefore no Miranda was necessary.

The second part of that issue, regarding the issue of the interpreter, is defeated by the testimony of Mr. Hanson. I would certainly conclude from the testimony that

there are potential differences from country to country in the Arabic world regarding the use and definitions of certain words, and the meanings can be confusing. That is certainly true in the English speaking world (As an example, in England what we describe as an elevator is called a "lift"). But a general statement about some confusion about a few words use is not sufficient to cause me to throw out these convictions. Petitioner would have needed to be much more specific, pointing to words that he said and how those words were misinterpreted by the interpreter. In addition, he should have presented expert testimony that an Arabic speaker from Egypt would use a particular word one way, and an Arabic speaker from Iraq would use it a different way, and then point out how that affected this case. There is simply not enough evidence on this point to cause this court to conclude that this issue rises to a constitutional level.

The second major claim, in my view, is that petitioner claims ineffective assistance because his lawyer did not fully explore an alibi claim. The problem with this claim is pointed out by Ms. Thomas testimony. The examination of the computer by the defense expert showed that child porn was being downloaded into this computer within 24 hours of the petitioner arriving in the United States, and continued apparently from time to time over the next six months or so. This possible defense was going to go nowhere, and may have actually resulted in the prosecution discovering additional damaging information about this case, perhaps resulting in additional criminal charges.

The third area of concern relates to the other acts evidence. Apparently trial counsel did not seek to have the prosecution disclose "other acts" evidence ahead of time and did not seek to exclude or suppress that evidence. Mr. Hanson thought that the prosecution would have to give advance notice of intent to use such evidence. I would agree that this was error on the part of Mr. Hanson. He should have moved the court ahead of time for an order directing the state to disclose such evidence if they intended to use any, and once disclosed, he should have moved to keep such evidence out. However, it is uncertain whether the trial judge would have granted that request, or perhaps only granted it partially. The trial judge would have had to balance the risk of "unfair prejudice" under Rule 403 with the permitted uses under 404 (b)(2), such as to show knowledge, absence of mistake or lack of accident, and intent and preparation and plan, perhaps. It might be that the trial judge would have permitted the use of some of this evidence, but not all.

The fourth area of concern would be the improper "vouching" for the credibility of the states' witness by the prosecutor. The transcript shows that Deputy States' Attorney Sage did on several occasions vouch for the credibility of his witness and his evidence, and express disbelief at the claims of the defendant, accusing him of being less than truthful.

During the closing argument, Mr. Sage visited this area several times. On page 64, lines 9-20 he said the defendant was arguing that other people had access to his

computer and could have downloaded these images, and then a moment later in his argument points to evidence which he thinks is inconsistent with that claim. I agree he was attacking the defendant's credibility, but I don't find anything at this point seriously wrong with this particular point in the argument.

He continued to attack the credibility of the defendant on page 71, lines 18-24. Again, while he is attacking the credibility of the defendant, I find no error here, as he is basically arguing that the jury will find the defendant to be not believable when they analyze the evidence as he suggests. He then again attacked the defendant more directly, arguing he was not telling the truth during his testimony, in the arguments made on page 74. On line 10, Mr. Sage said: "He lied to you". That was improper. It came across as Mr. Sage's opinion on the credibility of the defendant, and this is an area where the prosecutor must not go. There was no objection from defense counsel, however.

On page 76, Mr. Sage began to talk about the law enforcement officers, talking about how they entered and tried to document everything and they are not on a witch hunt (lines 6-9). And then, on line 13, in talking about Det. Kuchenreuther, he states "He is honest". This is clearly improper argument, but again, there was no objection from defense counsel. Mr. Sage then asks the question "Who has a motive to lie here?" (lines 14-15) I think this question to be borderline improper, mostly because he is not expressing his opinion about it directly, but rather asking the jury to answer that question. But it was troublesome when it followed the other, earlier statements mentioned above. And again, there was no objection to this statement either.

In State v. Goodroad, 455 N.W.2d 591 (SD 1990) the defendant was being prosecuted on drug charges in Hughes County. Another individual, Feeney was arrested and was prosecuted for a felony marijuana possession charge, and as part of his plea bargain he was to name the persons with whom he had trafficked drugs. Goodroad was identified as his main source.

At Goodroad's trial, a law enforcement officer was allowed to testify that Feeney had promised to testify truthfully as part of the plea bargain, and if he lied about anything he could be prosecuted further. This was all before Feeney himself had testified. Feeney also made more or less the same claim in his testimony as well. Then, during closing arguments the prosecutor argued that Feeney had staked his freedom on telling the jury the truth. The South Dakota Supreme Court noted that the Ninth Circuit Court of Appeals had held this type of testimony to be improper, citing a United States Supreme Court decision from 1958.

Clearly, here, the prosecutor went too far in at least some of his argument. But, that is not the issue before the court. This Habeas Court only can consider this trial error if it rises to the level of "ineffective assistance of counsel" thereby making it a constitutional error.

The test to then be applied is spelled out in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984): "the defendant must show that ...counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment (to the United States Constitution) and that 'counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." This test was long ago adopted in South Dakota, and has been reaffirmed many times. In order to meet this burden, a petitioner must show that his lawyer's performance was not objectively reasonable under prevailing professional standards, and, that absent the deficient performance, there is a reasonable probability that the result of the proceeding would have been different." Applying these standards to the present case, while I acknowledge that errors were made by counsel, I don't believe even if counsel had handled properly the issue of the "other acts" evidence, and even if counsel had handled properly the issues surrounding the improper vouching of witnesses by the prosecutor, that these changes would have made any difference in the outcome of the case. A defendant is entitled to a fair trial, not a perfect trial.

In the high-profile murder trial of Daphne Wright, held here in Minnehaha County in 2007, (State v. Wright, 2009 SD 51, 768 N.W.2d 512) the defendant was deaf, and required an interpreter throughout all court proceedings. She was ultimately convicted, and among her issues in the appeal was her claim that she should have been provided with a certified deaf interpreter (CDI) as well as consecutive interpretation. Prior to trial, a psychologist conducted an evaluation of Wright and noted that while her non-verbal IQ was 114 to 117, there was the possibility of brain damage given her low ability to read. He said she had a good grasp of American Sign Language (ASL) but there were many legal terms for which there were no signs. He thought it would be difficult to communicate many legal concepts to her. He recommended the court have the testimony interpreted to Wright consecutively rather than simultaneously. He thought using "real time" captioning where she could read the testimony as the court reporter typed it would be of little use because of her limited comprehension levels. After the trial court denied consecutive interpretation, Wright moved the court to use a CDI, which is an interpreter who is deaf or hard of hearing. Using this method, the interpretation would pass from a hearing person to a hearing interpreter, and then to a deaf interpreter, who in turn interprets for the defendant. In support of their request for this specialized interpretation, counsel for the defense presented testimony from a Professor from the University of Wisconsin Law School that Wright did very well with ASL in casual conversation, but when they tried to talk about the case it was like hitting a brick wall.

Despite all of this the trial judge denied the consecutive interpretation and denied the CDI for the courtroom testimony. The trial court allowed the CDI to be used outside the courtroom, and provided five Level Five certified ASL interpreters to both interpret and assist in helping Wright to understand, plus real time captioning. The trial was also videotaped, capturing the ASL interpreting for Wright. In addition, daily DVD's were provided for Wright's review every evening. Then, in the morning

before the trial started up again, defense counsel and Wright could bring to the attention of the court any problems arising through these efforts. Finally, Wright was permitted to ask for a break during the trial if she was having trouble understanding the proceedings.

On appeal, the Supreme Court affirmed, essentially holding that the trial court may reasonable accommodations because of Wright's disability, and ruling that any inadequacy in the accommodations made did not make the trial "fundamentally unfair".

Here, the many extra images that were apparently displayed certainly were intended to influence the jury, and to help convince them that these images actually charged out were not accidentally on the computer, but rather placed there intentionally, as part of an overall intent on the part of the defendant. Certainly there was an argument that counsel could have made that the risk of unfair prejudice outweighed the probative effect of the evidence, but he did not make that argument, and I am not convinced it would have been successful even if he would have objected. And while the arguments made by the prosecutor should have been objected to, again, I am not convinced that if those statements been objected to and stricken from the record, and had the jury been told to disregard that evidence, that the verdicts of the jury would have been different. The evidence of guilt was strong, and the trial the defendant received was fundamentally fair.

I have reviewed the other claims made by the petitioner in his pro se petition and in his testimony and find them to be without merit. It was not a perfect trial, but overall it was a fair trial.

Therefore I conclude under the guidance of the Strickland test that the defendant/petitioner was not provided ineffective assistance of counsel, and the Writ ought to be quashed. I direct the States Attorney to prepare the appropriate Findings of Fact and Conclusions of Law and Order for the Court's signature.

Sincerely,

Joseph Neiles
Circuit Court Judge

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT

HAIDER ABDULRAZZAK, Petitioner, vs. ROBERT DOOLEY, Warden of the Mike Durfee State Penitentiary, Respondent.	CIV. 13-2004 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-entitled matter came on for hearing before the Honorable Joseph Neiles. The Court, having reviewed the record, the evidence and counsels' arguments made at the hearing now makes the following:

FINDINGS OF FACT

1. This is a Habeas Corpus proceeding.

2. The petitioner is an inmate in the South Dakota State Penitentiary, apparently currently housed at the facility in Springfield, SD.

3. He was sentenced to the Penitentiary in Minnehaha County Cr. 10-5422 as a result of his convictions in front of a jury for 14 counts of Possession, Manufacturing or Distribution of Child Pornography, in violation of SDCL 22-24A-3.

4. He was represented in the case at trial by attorney Mike Hanson, an attorney in private practice here in Sioux Falls, retained by the defendant.

5. Then Circuit Judge Peter Lieberman (now retired) sentenced the petitioner to three years in the Penitentiary with two years suspended on each of the first six counts of the Indictment, imposed three years in the penitentiary with one year suspended on count seven and imposed no sentence on counts eight through fourteen.

6. The defendant received credit for 180 days in jail already served up until that point.

7. Judge Lieberman ordered the sentences to be consecutive, in effect causing the defendant to be facing a sentence of eight years in the penitentiary, with an additional 13 years suspended.

APPENDIX D

8. This judgment and sentence was appealed to the South Dakota Supreme Court, (the petitioner was represented by the Public Defender for the appeal) and the Court did summarily affirm the judgment in an order signed by the Chief Justice on January 14, 2013.

9. It is claimed by present counsel for the petitioner that the issues in this direct appeal related to (1) sufficiency of the evidence; and (2) a claim that the sentence imposed was excessive.

10. It would appear that the petitioner at some point was granted parole, and then was charged with some parole violation, as the file reflects that attorney Aaron Salberg was appointed by the Circuit Court to represent the for a parole violation in late 2016.

11. No order appointing counsel appears in the file but the file does reflect that Circuit Judge Larry Long was contacted by the Parole Board to appoint a lawyer for that proceeding, and Judge Long apparently scrawled Salberg's name across the top of the application form.

12. It is unknown why Judge Long would have appointed Salberg when the Public Advocate was already representing the petitioner in this matter.

13. There is no evidence in this record regarding whether the petitioner was granted parole or when he might have been granted parole, or whether his parole was revoked at some earlier proceeding, or whether his suspended sentence was ever imposed.

14. The Warden here has not raised the issue of whether this Habeas proceeding would have been moot because the petitioner had been released on parole, and I assume that had the petitioner been not in custody, this petition would have been subject to dismissal. *See Bostick v. Weber*, 2005 SD 12, 692 N.W.2d 517.

15. Petitioner initially submitted his petition pro se and asked for court-appointed counsel.

16. The pro se petition raised 75 different points which he described as issues.

17. Many related to complaints about the work his lawyer did or did not do in representing him at the trial.[1]

[1] Many of the issues raised by petitioner in this initial petition are totally without merit, as they clearly relate to trial tactics that a lawyer might decide to pursue, or they are raising issues that have no legal validity, or they do not rise to the level of a constitutional violation, and therefore are not cognizable through a Habeas Writ.

18. However, eventually in April of 2014 Ms. Hofer, representing the petitioner here, filed an Amended Application for a Writ of Habeas Corpus.

19. I consider this Amended Petition to preempt the original petition, in effect setting those initial claims aside and raising only the issues spelled out in the new Petition.

20. This Amended Petition raised the following issues:

(1) Trial counsel was ineffective for his failure to file a motion to suppress the statements made by the petitioner while being interrogated by the officers, claiming that he was subjected to a custodial interrogation without the Miranda warnings.

(2) Trial counsel was ineffective for not file a motion to suppress the statements made during the interview because the petitioner did not understand the language line interpreter's interpretation of the officer's questions.

(3) Petitioner did not understand the interpreter used during the trial, as he was Egyptian and petitioner was Iraqi, and they speak with different Arabic dialects. He claims he told his lawyer of this problem but trial counsel did not address it.

(4) Trial counsel failed to provide effective assistance of counsel by his failure to investigate a potential alibi claim regarding the dates and times that the child pornography was being accessed, downloaded and viewed.

(5) Petitioner was denied effective assistance of counsel by his lawyer's failure to make a motion for disclosure of other acts evidence, and failed to object to "other acts evidence offered during the trial by the state.

(6) Petitioner was denied effective assistance of counsel by his trial counsel's failure to object to the prosecutor improperly vouching for his witness by stating that the Detective was "honest." He further asked the jury who had a motive to lie, and stated that the detective had no motive to lie.

(7) Petitioner was denied effective assistance of counsel by his trial counsel s failure to have the hard drive reviewed by an expert. She claims this failure to have it reviewed by an expert resulted in two more images that were not charged out being shown to the jury.

21. As a result of this Amended Petition, Circuit Judge Patricia Riepel issued a Provisional Writ of Habeas Corpus in April of 2014

22. After service of the Writ, the Warden through the Minnehaha County States Attorney s Office filed a return to the Writ.

23. Among other claims, counsel asserted that some if not all of these claims could have been raised in direct appeal, and since they were not, they were waived.

24. Also, the Warden asserts that some of the issues were not preserved because no objection was raised at trial.

25. Otherwise, the Warden generally denies the claims of the petitioner.

26. I consider claims of ineffective assistance of counsel to generally not be waived by a defendant in his direct appeal, as the Supreme Court has clearly indicated that a direct appeal is a poor vehicle for such claims absent some gross violation, and generally filing those claims as part of a Habeas proceeding allows trial counsel to testify and answer questions about why they did what they did.

27. And pretty much by definition, ineffective assistance of counsel means that trial counsel did not object at trial to the evidence, and so the Court does not consider that a valid objection to the petition here.

28. At the hearing on the petition, which started on September 20, 2016 before this court, attorney Michael Hanson was called to testify.

29. He said he was retained by the petitioner after he was initially appointed the Public Defender.

30. He said the case had been delayed several times by the PDO.

31. He noted that the PDO had retained a computer expert to assist them in looking at the computer, and Hanson spoke with the lawyers from the PDO that had been representing the petitioner, and reviewed the expert's findings, and also talked to the expert personally.

32. He said the case involved two computers plus an external hard drive.

33. The expert said that Lime Wire had been installed on the computer and then deleted.

34. He said that all of the images in the computer had been deleted, and were only found in the hard drive.

35. He was able to determine when the computer was used.

36. He said that Law Enforcement had not been able to access all of this because of the Arabic coding involved.

37. It was his opinion that it appeared that as soon as the Petitioner arrived in the United States that the computer was used to access pornography sites, in New York and again in Chicago, and then in Sioux Falls.

38. He told Hanson that he had found deleted images and other child pornography that law enforcement had not found.

39. He did not prepare a formal report as to his findings because then he would have had to disclose all of these findings in the report (and presumably that information would have been harmful to the petitioner's case).

40. Hanson testified that it was his judgment call not to produce this expert during the trial for fear that some of this harmful evidence would have been disclosed.

41. Hanson said that it was his understanding from talking to petitioner that he had bought the computer in Syria as well as the hard drive.

42. He said there were no laws against visiting pom sites in Syria.

43. The defendant said that the computer had LimeWire when it was purchased, and he used it one time and then deleted it.

44. He also told Hanson that there were times that friends came to his apartment that might have had access to his computer.

45. The roommate testified at the trial that the night in question they had a party and other Iraqis were present, and the computer was not password protected.

46. He said during the trial that it came to light there were a huge number of images that had not been disclosed to the defense, and so he asked the trial judge for time to review this information, and Judge Lieberman gave him two hours.

47. His secretary said this was a massive download of images to the hard drive.

48. He noted among the images downloaded was an application for heating assistance and a resume.

49. As far as the statements taken from the petitioner, he said he reviewed them at the time and thought there might be an issue of voluntariness.

50. It was his understanding that the petitioner and his roommate may have been handcuffed at some point during the police interview, and certainly had been told they were not free to leave.

51. He said also the issue of the use of Language Line as an interpreter was discussed.

52. He also testified that he met with the state's computer expert and the prosecutor came along.

53. The prosecutor told him there were many other images, although some were questionable as to whether it was child pornography.

54. Hanson noted that he never had any trouble communicating with the petitioner during the time he was involved in the case.

55. He never had to use an interpreter.

56. He acknowledged that Petitioner did tell him that the interpreter provided was Egyptian, not Iraqi.

57. But he put in context of not trusting the Egyptian, not that he could not understand him.

58. The judge held a hearing on this issue and asked the interpreter if there were different dialects of Arabic, and the interpreter said that there were not.

59. He concluded that the petitioner fully understood everything that was being said, even if he did not fully understand the intricacies of the American Legal System.

60. He acknowledged that he filed no motions on behalf of the petitioner.

61. He subpoenaed three witnesses for the petitioner for the trial.

62. The roommate was actually called as a witness by the prosecution.

63. Hanson said he had subpoenaed a person from LSS, but LSS raised a stink about that.

64. The witness did appear, but did not have much to say that would have been helpful and was not called, I think.

65. Hanson claimed he did not want to make a motion to discover specific items on the computer that it might open the door to additional criminal charges.

66. He said he did not make a motion to keep out those other images at the trial, and admitted in hindsight that it would have been good to keep those images from the jury.

67. He did not make a motion regarding other acts evidence because he thought if the state intended to introduce such evidence they would have to give him notice regarding that intent.

68. Basically, Hanson said it was a judgment call by him as to how he was going to treat the evidence.

69. Their defense was that his client was not aware of these images on his computer.

70. He was concerned throughout that additional evidence his computer expert had found might come out that would have harmed their case further, and so was stepping lightly on some of these issues.

71. Petitioner also testified at the hearing.

72. He testified that he arrived in the United States in June of 2009 after fleeing from Iraq on February 24, 2008, and was first visited by the detectives in December of 2009, at his residence here in Sioux Falls.

73. He became aware of the police investigation when his roommate got a phone call, but apparently they did not understand what was going on so they called another individual who spoke both English and Arabic, and learned that the police were at their home and they needed to go home.

74. Petitioner said that he called his case worker from LSS and met him at their apartment.

75. Once at their apartment they discovered the police were already inside, and the LSS case worker was there waiting for them.

76. They asked the case worker to translate for them, but the police officers would not let the case worker enter.

77. They (petitioner and his roommate) entered the apartment and the detectives were questioning them.

78. At the time, petitioner was in the process of studying English and was seeking a GED.

79. He acknowledged he knew some English words but did not fully understand the meaning of all of the words being said.

80. The officers directed them where to sit.

81. He noted there were 4-5 people in the apartment including one person he believed to be an Immigration agent for the Federal government.

82. After a short while the roommate was directed to move to sit next to petitioner on their couch.

83. The police officers obtained an interpreter, but petitioner claims he had a hard time understanding the dialect used by that interpreter.

84. He claimed that Arabic varies from country to country, and a particular word may have a different meaning depending upon the country.

85. He believed that he was told he was not under arrest, and believes he was told he did not have to speak to the detectives, but in his home country of Iraq refusing to speak to the officers would be problematic.

86. He mentioned the corruption there of the officers.

87. Despite what he had been told by the officers, he did not feel he had the freedom to get up and leave the apartment at that time.

88. Petitioner represented he told Mr. Hanson all of this plus told him that he was not comfortable with the use of the Egyptian interpreter, as he could not fully understand him.

89. In addition, he testified to some of his other issues that he had with the case.

90. He talked about the circumstances of purchasing the computer and having the computer with him on the border with Syria.

91. He said some of the images do not have a time stamp, and when they were uploaded or viewed was mere speculation by the prosecution.

92. He believed that the 287 thumbnails were copied from another computer into the external hard drive.

93. He said he removed the Lime Wire from his computer in October, 2009.

94. He also complained that the prosecutor tried to use his religion against him, but the judge ruled in petitioner's favor, but the jury was not properly instructed to

disregard these comments.

95. Petitioner also expressed concern that Mike Hanson never talked to his roommate before the trial, and claims he gave Hanson the names of 10 people that had been in his apartment and might have had access to the laptop, although he could no longer remember their names at the time of his testimony, noting he suffered from PTSD.

96. Overall, he claims that he was framed for this offense.

97. The hearing was recessed to allow attorney Michelle Thomas to testify on behalf of the Warden.

98. She has worked for the Minnehaha County Public Defender's Office since January of 2004, and so at the time she was initially appointed to represent the petitioner she had about 6 years of experience in criminal defense work.

99. She testified that she first met with the petitioner on 1/6/11, and then appeared with him on 1/19/11 and asked for a further delay in the hearing to consult with a computer expert (Dan Meinke).

100. On 3/1/11 she met with Meinke and noted that the information she had was that the petitioner had arrived in the United States of 6/29/09, and the first file in the computer was created on 6/30/09, which meant that this computer was being used to download child pornography right after entry into the United States.

101. She also noted that it was her understanding that the deleted images in the hard drive indicated about 500 files were recovered containing apparent child pornography.

102. She said that petitioner joined her in a meeting with Meinke, and it was noted that there was a lot of child porn that had been downloaded into the computer over several months.

103. In exhibit #9, her notes from her representation, she noted that petitioner had a roommate, but that roommate had his own computer and would not use petitioner's computer.

104. She also testified that had she used an interpreter in her conversations and meetings with interpreter, she would have made a note about that in her personal notes.

105. She did not file any suppression motion regarding any of the state's evidence, admitting that had she seen any legitimate issues to raise she would have filed such a motion.

106. In cross-examination, she noted that she had taken over the case from Bryan Hall, another Public Defender lawyer who was leaving the office.

107. She acknowledged that her notes do not reflect any discussion with petitioner regarding his interview with law enforcement.

108. She did have notes reflecting that she did receive a CD that was represented to be petitioner's interview with law enforcement, but it turned out to be another individual on the CD, not the petitioner.

109. In response she had emailed the prosecutor requesting the correct CD, but did not note whether she ever received one.

110. And then Mike Hanson took over the case in early March of 2011 and her involvement ended.

111. In cross-examination by the Court she acknowledged that over time she has had from time to time issues with defendants who are Arabic speaking but do not understand the dialect of the interpreter being used by the Court.

112. After this testimony the Court heard the arguments of counsel, and also allowed the petitioner to again address the Court about his separate issues, but I was primarily concerned about his complaints about his representation by counsel, and his view on that.

113. As noted above, when the Amended Petition was filed, any issues not raised there were considered to be waived.

CONCLUSIONS OF LAW

1. Any Finding of Fact more appropriately found to be a Conclusion of Law shall be deemed so, and any Conclusion of Law more appropriately found to be a Finding of Fact shall be deemed so.

2. The Finding of Fact and Conclusions of Law stated in the decision letter dated March 17, 2017, are hereby adopted in their entirety and to the extent that any written finding of Fact and Conclusions of Law herein conflicts with the decision letter, the decision letter dated March 17, 2017, shall control.

3. The petitioner has raised a large number of issues concerning this case and his representation by counsel.

4. All of the issues, one way or another, come down to a claim of ineffective assistance of counsel.

5. The Court would, for purposes of discussion here, regroup the issues into four main categories:

First, complaints about counsel's failure to move to suppress statements made by the defendant to law enforcement officers, based upon 1) failure to comply with Miranda; 2) failure to provide an appropriate interpreter for the petitioner.

Second, complaints about counsel's failure to explore an alibi claim.

Third, complaints about counsel's failure to discover and move to suppress other acts evidence, that is, the other images on the computer not charged out in the indictment but shown to the jury during the trial.

Fourth, complaints about counsel's failure to object to the prosecutor's vouching for the credibility of the detective during argument.

6. Some of these issues are relatively easy to resolve.

7. It appears to the Court from the petitioner's own testimony that he was told by the officers at the scene that he was not under arrest and did not have to speak to them.

8. Apparently petitioner, because of his background in living in Iraq, did not believe the officers and was intimidated by them.

9. That is not, in the Court's view, sufficient to cause the Court to conclude that this was a custodial interrogation.

10. The Court believes the test is whether a reasonable person would have concluded that they were under arrest or otherwise being detained, and under that subjective test the Court would conclude that petitioner was not in custody and so therefore no *Miranda* was necessary.

11. The second part of that issue, regarding the issue of the interpreter, is defeated by the testimony of Mr. Hanson.

12. The Court would certainly conclude from the testimony that there are potential differences from country to country in the Arabic world regarding the use and definitions of certain words, and the meanings can be confusing.

13. That is certainly true in the English speaking world (As an example, in England what we describe as an elevator is called a lift).

14. But a general statement about some confusion about a few words use is not sufficient to cause me to throw out these convictions.

15. Petitioner would have needed to be much more specific, pointing to words that he said and how those words were misinterpreted by the interpreter.

16. In addition, he should have presented expert testimony that an Arabic speaker from Egypt would use a particular word one way, and an Arabic speaker from Iraq would use it a different way, and then point out how that affected this case.

17. There is simply not enough evidence on this point to cause this court to conclude that this issue rises to a constitutional level.

18. The second major claim, in my view, is that petitioner claims ineffective assistance because his lawyer did not fully explore an alibi claim.

19. The problem with this claim is pointed out by Ms. Thomas' testimony.

20. The examination of the computer by the defense expert showed that child porn was being downloaded into this computer within 24 hours of the petitioner arriving in the United States, and continued apparently from time to time over the next six months or so.

21. This possible defense was going to go nowhere, and may have actually resulted in the prosecution discovering additional damaging information about this case, perhaps resulting in additional criminal charges.

22. The third area of concern relates to the other acts evidence.

23. Apparently trial counsel did not seek to have the prosecution disclose "other acts" evidence ahead of time and did not seek to exclude or suppress that evidence.

24. Mr. Hanson thought that the prosecution would have to give advance notice of intent to use such evidence.

25. I would agree that this was error on the part of Mr. Hanson.

26. He should have moved the court ahead of time for an order directing the state to disclose such evidence if they intended to use any, and once disclosed, he should have moved to keep such evidence out.

27. However, it is uncertain whether the trial judge would have granted that request, or perhaps only granted it partially.

28. The trial judge would have had to balance the risk of "unfair prejudice" under Rule 403 with the permitted uses under 404 (b)(2), such as to show knowledge, absence of mistake or lack of accident, and intent and preparation and plan, perhaps.

29. It might be that the trial judge would have permitted the use of some of this evidence, but not all.

30. The fourth area of concern would be the improper "vouching" for the credibility of the state's witness by the prosecutor.

31. The transcript shows that Deputy State's Attorney Sage did on several occasions vouch for the credibility of his witness and his evidence, and express disbelief at the claims of the defendant, accusing him of being less than truthful.

32. During the closing argument, Mr. Sage visited this area several times.

33. On page 64, lines 9-20, he said the defendant was arguing that other people had access to his computer and could have downloaded these images, and then a moment later in his argument points to evidence which he thinks is inconsistent with that claim.

34. The Court agrees he was attacking the defendant's credibility, but the Court does not find anything at this point seriously wrong with this particular point in the argument.

35. He continued to attack the credibility of the defendant on page 71, lines 18-24.

36. Again, while he is attacking the credibility of the defendant, the Court finds no error here, as he is basically arguing that the jury will find the defendant to be not believable when they analyze the evidence as he suggests.

37. He then again attacked the defendant more directly, arguing he was not telling the truth during his testimony, in the arguments made on page 74.

38. On line 10, Mr. Sage said: "He lied to you."

39. That was improper.

40. It came across as Mr. Sage's opinion on the credibility of the defendant, and this is an area where the prosecutor must not go.

41. There was no objection from defense counsel, however.

42. On page 76, Mr. Sage began to talk about the law enforcement officers, talking about how they entered and tried to document everything and they are not on a witch hunt (lines 6-9).

43. And then, on line 13, in talking about Detective Kuchenreuther, he states "He is honest."

44. This is clearly improper argument, but again, there was no objection from defense counsel.

45. Mr. Sage then asks the question "Who has the motive to lie here?" (lines 14-15)

46. The Court thinks this question to be borderline improper, mostly because he is not expressing his opinion about it directly, but rather asking the jury to answer that question.

47. But it was troublesome when it followed the other, earlier statements mentioned above.

48. And again, there was no objection to this statement either.

49. In *State v. Goodroad*, 455 N.W.2d 591 (SD 1990), the defendant was being prosecuted on drug charges in Hughes County.

50. Another individual, Feeney was arrested and was prosecuted for a felony marijuana possession charge, and as part of his plea bargain he was to name the persons with whom he had trafficked drugs.

51. Goodroad was identified as his main source.

52. At Goodroad's trial, a law enforcement officer was allowed to testify that Feeney had promised to testify truthfully as part of the plea bargain, and if he lied about anything he could be prosecuted further.

53. This was all before Feeney himself had testified.

54. Feeney also made more or less the same claim in his testimony as well.

55. Then, during closing arguments the prosecutor argued that Feeney had staked his freedom on telling the jury the truth.

56. The South Dakota Supreme Court noted that the Ninth Circuit Court of Appeals had held this type of testimony to be improper, citing a United States Supreme Court decision from 1958.

57. Clearly, here, the prosecutor went too far in at least some of his argument.

58. But, that is not the issue before the court.

59. This Habeas Court only can consider this trial error if it rises to the level of ineffective assistance of counsel thereby making it a constitutional error.

60. The test to then be applied is spelled out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984): the defendant must show that ...counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment (to the United States Constitution) and that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

61. This test was long ago adopted in South Dakota, and has been reaffirmed many times.

62. In order to meet this burden, a petitioner must show that his lawyer's performance was not objectively reasonable under prevailing professional standards, and, that absent the deficient performance, there is a reasonable probability that the result of the proceeding would have been different.

63. Applying these standards to the present case, while the Court acknowledges that errors were made by counsel, the Court does not believe even if counsel had handled properly the issue of the other acts evidence, and even if counsel had handled properly the issues surrounding the improper vouching of witnesses by the prosecutor, that these changes would have made any difference in the outcome of the case.

64. A defendant is entitled to a fair trial, not a perfect trial.

65. In the high-profile murder trial of Daphne Wright, held here in Minnehaha County in 2007, (*State v. Wright*, 2009 SD 51, 768 N.W.2d 512) the defendant was deaf, and required an interpreter throughout all court proceedings.

66. She was ultimately convicted, and among her issues in the appeal was her claim that she should have been provided with a certified deaf interpreter (CDI) as well as consecutive interpretation.

67. Prior to trial, a psychologist conducted an evaluation of Wright and noted that while her non-verbal IQ was 114 to 117, there was the possibility of brain damage given her low ability to read.

68. He said she had a good grasp of American Sign Language (ASL) but there were many legal terms for which there were no signs.

69. He thought it would be difficult to communicate many legal concepts to her.

70. He recommended the court have the testimony interpreted to Wright consecutively rather than simultaneously.

71. He thought using real time captioning where she could read the testimony as the court reporter typed it would be of little use because of her limited comprehension levels.

72. After the trial court denied consecutive interpretation, Wright moved the court to use a CDI, which is an interpreter who is deaf or hard-of-hearing.

73. Using this method, the interpretation would pass from a hearing person to a hearing interpreter, and then to a deaf interpreter, who in turn interprets for the defendant.

74. In support of their request for this specialized interpretation, counsel for the defense presented testimony from a Professor from the University of Wisconsin Law School that Wright did very well with ASL in casual conversation, but when they tried to talk about the case it was like hitting a brick wall.

75. Despite all of this the trial judge denied the consecutive interpretation and denied the CDI for the courtroom testimony.

76. The trial court allowed the CDI to be used outside the courtroom, and provided five Level Five certified ASL interpreters to both interpret and assist in helping Wright to understand, plus real time captioning.

77. The trial was also videotaped, capturing the ASL interpreting for Wright.

78. In addition, daily DVD's were provided for Wright's review every evening.

79. Then, in the morning before the trial started up again, defense counsel and Wright could bring to the attention of the court any problems arising through these efforts.

80. Finally, Wright was permitted to ask for a break during the trial if she was having trouble understanding the proceedings.

81. On appeal, the Supreme Court affirmed, essentially holding that the trial court made reasonable accommodations because of Wright s disability, and ruling that any inadequacy in the accommodations made did not make the trial fundamentally unfair.

82. Here, the many extra images that were apparently displayed certainly were intended to influence the jury, and to help convince them that these images actually charged out were not accidentally on the computer, but rather placed there intentionally, as part of an overall intent on the part of the defendant.

83. Certainly there was an argument that counsel could have made that the risk of unfair prejudice outweighed the probative effect of the evidence, but he did not make

that argument, and the Court is not convinced it would have been successful even if he would have objected.

84. And while the arguments made by the prosecutor should have been objected to, again, the Court is not convinced that if those statements been objected to and stricken from the record, and had the jury been told to disregard that evidence, that the verdicts of the jury would have been different.

85. The evidence of guilt was strong, and the trial the defendant received was fundamentally fair.

86. The Court has reviewed the other claims made by the petitioner in his pro se petition and in his testimony and find them to be without merit.

87. It was not a perfect trial, but overall it was a fair trial.

88. Therefore I conclude under the guidance of the *Strickland* test that the defendant/petitioner was not provided ineffective assistance of counsel, and the Writ ought to be quashed.

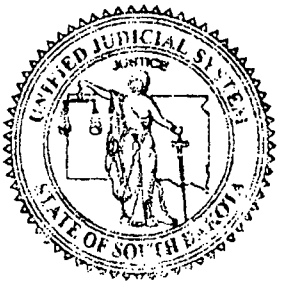
Dated this 23 day of May, 2017.

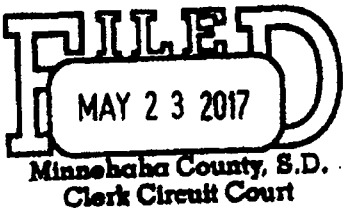
BY: _____

The Honorable Joseph Neiles
CIRCUIT COURT JUDGE

ATTEST:
Angelia M. Gries, Clerk

By: _____ Deputy





STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)		IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
HAIDER ABDULRAZZAK, Petitioner, vs. ROBERT DOOLEY, Warden of the Mike Durfee State Penitentiary, Respondent.		CIV. 13-2004 ORDER

This Court having entered Findings of Fact and Conclusions of Law denying Habeas Corpus relief to Petitioner, it is hereby

ORDERED that Petitioner's Amended Application for Writ of Habeas Corpus is DENIED in its entirety, and it is further

ORDERED that this Court's Provisional Writ of Habeas Corpus, dated April 21, 2014, is QUASHED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 23 day of May, 2017, at Sioux Falls, Minnehaha County, South Dakota.

BY THE COURT:

JOSEPH NEILES
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES, Clerk of Courts

By: _____
Deputy

FILED
MAY 24 2017
Minnehaha County, S.D.
Clerk Circuit Court

APPENDIX
E

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS
COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

* *

HAIDER ABDULRAZZAK, *

Applicant, * CIV. 13-2004

vs. * CERTIFICATE OF PROBABLE CAUSE

BOB DOOLEY, Warden, *
Mike Durfee State Penitentiary,
Respondent. *

* *

The Court having received and reviewed Petitioner's Motion of Certificate of Probable Cause, and good cause appearing, it is hereby,

ORDERED that the Petitioner's Certificate of Probable Cause is: _____ GRANTED, so the Petitioner may appeal the following issue to the South Dakota Supreme Court:

_____

_____

_____

_____

_____ DENIED, for the following reasons:

_____

_____

_____

_____

_____

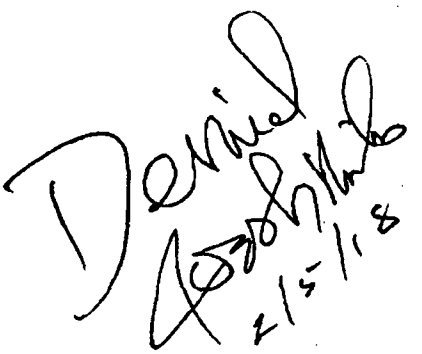
APPENDIX
F

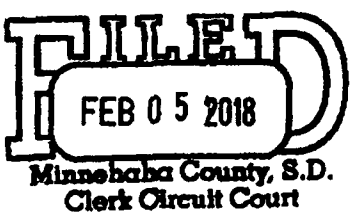
Dated this _____ day of June, 2017.

Judge Joseph Neiles
Circuit Court Judge

ATTEST:
Angelia M. Gries, Clerk

BY: _____
Deputy





STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
HAIDER ABDULRAZZAK, Petitioner, vs. **BOB DOOLEY, Warden, Mike Durfee State Penitentiary,** Respondent.	CIV 13-2004 **ORDER VACATING PRIOR ORDER DENYING CERTIFICATE OF PROBABLE CAUSE**

Counsel for Petitioner filed a Motion for Certificate of Probable Cause pursuant to SDCL 21-27-18.1 on June 19, 2017. The Honorable Joseph Neiles denied the motion for certificate of probable cause on February 5, 2018. However, counsel for Petitioner did not receive notice or service of that order until after the 20 day period to request a certificate of probable cause from the South Dakota Supreme Court had expired. Petitioner's counsel was unaware of the denial of the certificate of probable cause and was unable to comply with the time requirements of SDCL 21-27-18.1.

Pursuant to Hafner v. Leapley, 520 N.W.2d 252 (S.D. 1994) and Christensen v. Weber, 2007 SD 102, 740 N.W.2d 622, the denial of certificate of probable cause filed February 5, 2018 is hereby VACATED.

Dated at Sioux Falls, South Dakota this 21 day of June, 2018.

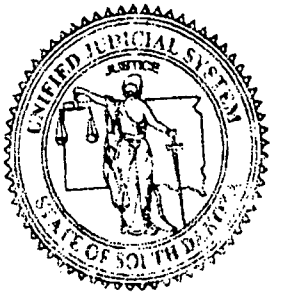
BY THE COURT:

Douglas E. Hoffman
Circuit Court Judge

APPENDIX G

ATTEST:
Angelia M. Gries, Clerk of Court

By _____ Deputy



FILED
JUN 27 2018
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
HAIDER ABDULRAZZAK, Petitioner, vs. **BOB DOOLEY, Warden, Mike Durfee State Penitentiary,** Respondent.	CIV 13-2004 **ORDER DENYING MOTION FOR CERTIFICATE OF PROBABLE CAUSE**

Upon review of Petitioner's Motion for Certificate of Probable Cause, the Motion is DENIED.

Relying on upon the findings of fact and conclusions of law entered by the Honorable Joseph Neiles on May 23, 2017 and the Order entered May 24, 2017 denying habeas relief, there is no reason to change any of the prior rulings. These rulings are consistent with well-established legal principles and there exists no reason to issue a Certificate of Probable Cause.

Dated at Sioux Falls, South Dakota this 21 day of June, 2018.

BY THE COURT:

Douglas E. Hoffman
Circuit Court Judge

ATTEST:
Angelia M. Gries, Clerk of Court

By _____, Deputy

FILED
JUN 27 2018
Minnehaha County, S.D.
Clerk Circuit Court

APPENDIX
H

January 23, 2019

Haider Abdulrazzak #4373
c/o Mike Durfee State Prison
1412 Wood St
Springfield, SD 57062

Dear Haider:

I am sorry to inform you that the Supreme Court has denied your application for a certificate of probable cause. I have enclosed a copy of the Order for your records. This means that at this point, all of your appeals have been exhausted in state court. Any further relief would have to come through a federal habeas action. As such, your file will be closed within this office.

I wish you luck and hope that things go well for you in the future.

Sincerely,

Julie Hofer
Attorney

JAH

APPENDIX
I

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

HAIDER ABDULRAZZAK, **Petitioner,**	**ORDER DENYING MOTION FOR CERTIFICATE OF PROBABLE CAUSE**
vs.	**#28656**
ROBERT DOOLEY, Warden, **Mike Durfee State Prison,** **Respondent.**	

Petitioner having served and filed a motion for a certificate of probable cause to appeal from a final order entered by the trial court in the above-entitled habeas corpus proceeding on July 6, 2018, and respondent having served and filed a response thereto, and the Court having considered the motion and response and having determined that probable cause that an appealable issue exists has not been demonstrated, now, therefore, it is

ORDERED that the motion for a certificate of probable cause be and it is hereby denied.

DATED at Pierre, South Dakota, this 18th day of January, 2019.

BY THE COURT:

David Gilbertson, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

PARTICIPATING: Chief Justice David Gilbertson and Justices Janine M. Kern, Steven R. Jensen and Mark E. Salter.

PETITIONER'S APPENDIX FOR EXHIBITS' SUBMISSION

- Exhibit 1: Claims for reliefs raised and argued by Petitioner's appointed attorney Julie Hofer. (7 Pages)

- Exhibit 2: Claims for reliefs raised by Petitioner at which Petitioner alleging he did not recieve effective assistance of Counsel at the initial habeas trial and argued by Petitioner himself in his own words. (29 Pages)

- Exhibit 3: Claimes for relief raised by Petitioner at the initial filing for habeas Corpus in state Court. (16 Pages)

- Exhibit 4: Claims for reliefs raised and argued by Petitioners direct appeal from convictions to the State Supreme Court, submitt by his appointed Public Defender at time 'Nicole J. Laughlin'. (16 Pages)

** (IMPORTANT) Petitioners Exhibits 1, 2, 3 & 4 constitute Petitioners complete grounds for relief in this Petition and should be all consider in Paragraph 12, Page 6 as ground for relief contenuance.

- Exhibit 5: State Supreme Court "Judgment of Affirmance" of convictions on direct appeal from conviction. (one Page)

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- Exhibit 6: Minnehaha Second Judicial Circuit Court of South Dakota denying Petitioner Habeas relief (11 Pages)

- Exhibit 7: Minnehaha Circuit Court order quashing Petitioner's Habeas relief (1 Page)

- Exhibit 8: Minnehaha County Circuit Court denying Petitioners application for certificate of probable cause (5 pages)

- Exhibit 9: Petitioners attorney letter informing him that all appeals have been exhausted in State Court and a copy of the State Supreme Court decision. (2 Pages)

- Exhibit 10: Judgment of Circuit Court of Minnehaha County, Sioux Falls and sentence (4 Pages)

Respectfully submitted.

Dated this 31 day of January, 2019

Petitioner / Pro Se
Haider Salah Abdulrazzak, # 9373
Mike Durfee State Prison
1412 Wood Street
Springfield, SD 57062

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

HAIDER SALAH ABDULRAZZAK, Petitioner, vs. BRENT FLUKE, ATTORNEY GENERAL FOR THE STATE OF SOUTH DAKOTA, Respondents.	4:19-CV-04025-RAL ORDER REQUIRING RESPONSE

On February 4, 2019, Petitioner Haider Salah Abdulrazzak filed a Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody. Doc. 1. Abdulrazzak moves for leave to proceed in forma pauperis but paid the five-dollar filing fee for an action under 28 U.S.C. § 2254. Doc. 4.

This Court is to screen § 2254 petitions and dismiss when it "plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court" under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Court. From a reading of the petition, this Court cannot determine with confidence that it "plainly appears" that Abdulrazzak is not entitled to any relief here, although ultimately that may be the case.

Therefore, it is hereby

ORDERED that the Clerk of Court serve a copy of all pleadings of record and this Order on Warden Brent Fluke and the Attorney General of the State of South Dakota. It is further

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K

ORDERED that the Respondents file an answer, and if they so choose, a motion to dismiss and memorandum, within thirty days of service of the pleadings. It is further

ORDERED that Abdulrazzak's motion to proceed in forma pauperis, Doc. 4, is granted.

DATED April 18th, 2019.

BY THE COURT:

ROBERTO A. LANGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

HAIDER SALAH ABDULRAZZAK, Plaintiff, vs. BRENT FLUKE, WARDEN AT MIKE DURFEE STATE PRISON, and ATTORNEY GENERAL FOR THE STATE OF SOUTH DAKOTA, Defendants.	4:19-CV-04025-RAL 4:19-CV-04075-RAL OPINION AND ORDER GRANTING MOTIONS TO DISMISS

I. Claims and Procedural History

In 19-CV-4025, Petitioner Haider Salah Abdulrazzak (Abdulrazzak) filed a Petition under 28 U.S.C. § 2254, challenging his conviction after a jury trial in state court of 14 counts of possession of child pornography and his sentence thereon. 19-CV-4025, Doc. 1. Specifically, Abdulrazzak contends in grounds one and two of his petition that his trial counsel provided ineffective assistance of counsel in not filing a motion to suppress statements Abdulrazzak made, particularly because Abdulrazzak's native language is Iraqi Arabic and not English. Id. In ground three, Abdulrazzak contends that he did not understand the Egyptian Arabic language translator at trial and thereby was deprived of his Sixth Amendment rights. Id. Ground four of the petition contends that Abdulrazzak's trial counsel failed to investigate potential alibi evidence of Abdulrazzak not being near his computer when at least two of the pornographic images were

APPENDIX L

downloaded. Id. Abdulrazzak had appealed his conviction and sentence, which were summarily affirmed by the Supreme Court of South Dakota. 19-CV-4025, Doc. 1-6.

Abdulrazzak previously had filed a state court habeas corpus petition and amended petition; the amended petition filed in his prior state court habeas corpus action raised as its first four grounds the same grounds listed in his federal § 2254 petition in 19-CV-4025, Doc. 1. See 19-CV-4025, Doc. 1-7. State Circuit Court Judge Joseph Neiles denied Abdulrazzak habeas corpus relief after an evidentiary hearing and declined to issue a certificate of appealability. Id. at Doc. 1-7, 1-9.

Upon Abdulrazzak's filing of his federal habeas action in 19-CV-4025, this Court screened the petition and required a response. Id. at Doc. 7. Defendants filed a Motion to Dismiss the Application for Writ of Habeas Corpus, Doc. 8; attached documents thereto, Docs. 9-1 through 9-10; and arranged for filing of the state trial court records including transcripts and certain exhibits. This Court granted Abdulrazzak additional time to reply. Id. at Doc. 13. Abdulrazzak filed a lengthy response raising many assertions and arguments not framed by his federal § 2254 petition. Id. at Doc. 14. Abdulrazzak also filed a Motion for Evidentiary Hearing, in which Abdulrazzak requests both an evidentiary hearing and appointment of counsel. Id. at Doc. 15.

Abdulrazzak's second case in this Court, 19-CV-4075, involves a second separate petition under 28 U.S.C. § 2254 challenging a decision of the South Dakota Board of Pardons and Paroles revoking his parole. 19-CV-4075, Doc. 1. In ground one, Abdulrazzak contends a violation of his Fifth and Fourteenth Amendment rights related to his refusal to admit matters related to a treatment program. Id. In ground two, he contends that a basis for revoking parole was not supported by records or evidence. In ground three, he contends that the board arbitrarily and capriciously modified his conditions to make them harsher. Id.

This Court screened the petition in 19-CV-4075 and required an answer. Id. at Doc. 5. Abdulrazzak failed to file a timely notice of appeal to state circuit court from the Board's decision, so he has filed a Motion to Excuse/Waive of Exhaustion contending that state court exhaustion of his claims would be futile, id. at Doc. 4, as well as a Motion to Supplement Record, id. at Doc. 6. Defendants filed a Motion to Dismiss, id. at Doc. 7, and a supporting memorandum, id. at Doc. 8. Abdulrazzak opposes the motion to dismiss, id. at Doc. 12, and has filed a Motion for Evidentiary Hearing, id. at Doc. 13. Abdulrazzak very recently filed a Motion for Injunctive Order, id. at Doc. 14, seeking to be transferred to a "work release unit pending the outcome of the petition," id. at Doc. 14 at 1. For the reasons explained herein, this Court dismisses both cases, 19-CV-4025 and 19-CV-4075.

II. Facts

In September of 2010, a grand jury in Minnehaha County, South Dakota, indicted Abdulrazzak on 14 counts of possession of child pornography in violation of SDCL § 22-24A-3. Abdulrazzak pleaded not guilty, and his case was tried to a jury in June of 2011.

Abdulrazzak's computer activity had triggered an investigation by Minnehaha County Sheriff's Department Detective Derek Kuchenreuther. Detective Kuchenreuther was assigned to the Internet Crimes Against Children division in the Minnehaha County Sheriff's Office. JT1 at 99.[1] As part of his duties to investigate child pornography on the internet, Detective Kuchenreuther uses investigatory software designed to search for internet protocol (IP) addresses that accessed child pornography. JT1 at 113. Upon finding an IP address identified as one downloading illegal content, Detective Kuchenreuther downloads files from that suspect IP address. Upon confirming

[1] This Court is using the citation method of "JT1" referring to volume one of the jury trial transcript which was provided to this Court with the respondent's answer in 19-CV-4025.

those files contain illegal content, Detective Kuchenreuther can use the IP address to determine the physical location of that computer. JT1 at 107.

On December 8, 2009, Detective Kuchenreuther identified an IP address offering a list of files containing terms consistent with child pornography. JT1 at 113–14. The terms included PTHC (which stands for preteen hard-core), Lolita (a common search term for child pornography), young little girls, eight yo, ten yo, and twelve yo (with "yo" standing for years old). The files from the IP address at issue produced pornographic images of young girls. JT1 at 116. Detective Kuchenreuther determined that the IP address at question was registered to Abdulrazzak and obtained a search warrant. JT1 at 107, 117–21.

Some weeks later, Detective Kuchenreuther went with other law enforcement officers to Abdulrazzak's apartment residence. JT1 at 121. After knocking on the door and receiving no answer, Detective Kuchenreuther entered the apartment through an unlocked balcony door. JT1 at 122. Eventually, Detective Kuchenreuther and law enforcement made contact with two residents of the apartment—Abdulrazzak and his roommate Akeel Abed. JT1 at 122. Law enforcement found a computer in each of the occupants' separate bedrooms. JT1 at 123. In Abdulrazzak's bedroom, law enforcement found an external hard drive, CDs, DVDs, and thumb drives as well. JT1 at 123. As a part of the execution of the search warrant, Detective Kuchenreuther operated equipment and software that allowed him to make an exact duplicate of the hard drive of Abdulrazzak's computer. JT1 at 108.

Detective Kuchenreuther conducted a forensic examination of both Abdulrazzak's and Abed's computers. That forensic examination generated information regarding the images, videos, dates, and time files created, as well as their location on the hard drives. JT1 at 110–11, 133. The examination of Abed's computer found no child pornography on it. JT1 at 123. The examination

of Abdulrazzak's laptop and external hard drive revealed that at some point in time that laptop contained a program called LimeWire. JT1 at 124. LimeWire is a free software available to the public and used to download and share files such as music, videos, and photographs. JT1 at 111–12.

Law enforcement interviewed Abdulrazzak in his apartment living room. JT1 at 126. Law enforcement explained that Abdulrazzak was not under arrest and did not have to speak with the officers. Doc. 1-7 at 5.[2] After being told why law enforcement was investigating child pornography downloaded from his IP address, Abdulrazzak admitted to using LimeWire to download pornography. JT1 at 129. Upon being asked what search terms he used, Abdulrazzak responded that he downloaded pornography by using "young movies" as a search term. JT1 at 129.

The forensic examination uncovered 34 images in unallocated space on the hard drive of Abdulrazzak's computer. JT1 at 132. Detective Kuchenreuther believed that the 34 images displayed prepubescent females based on the fact that the females depicted had "no breast development, no pubic hair, just small in stature." JT1 at 132. Abdulrazzak's external hard drive contained 299 images and 8 videos which had not been deleted. JT1 at 136. Detective Kuchenreuther believed that almost all of the images and videos contained child pornography. JT1 at 136.

Detective Kuchenreuther then met with prosecutors to discuss which images to charge Abdulrazzak as having in his possession. JT1 at 146–47. The prosecutor decided that Abdulrazzak

[2] Document 1-7 in this Court's CM/ECF record contains the factual findings of Judge Joseph Neiles, who conducted an evidentiary hearing on issues, such as voluntariness of Abdulrazzak's statements to law enforcement in his apartment.

would be charged with 14 counts of possession of child pornography. JT1 at 147. Five of those counts were based on images obtained from the unallocated space on the laptop.

Notwithstanding his statements to investigators, Abdulrazzak testified at trial that he never used a computer to view child pornography. JT2 at 64, 68. Abdulrazzak told the jury that his computer was not password protected. JT2 at 67. He testified that he had many visitors to his apartment and that he allowed them to use his computer. JT2 at 65–66. During the rebuttal case, however, a computer expert called by the prosecution testified that Abdulrazzak's computer was password protected. JT3 at 8. Moreover, the evidence established that Abdulrazzak was not a novice when it came to computers, with his own resume showing that he had "four years of computer programming experience." JT3 at 11–12.

The jury found Abdulrazzak guilty on all 14 counts of possession of child pornography. JT3 at 103–04. At sentencing, the Honorable Peter Lieberman observed "needless to say, these are images that are the most disturbing kind of images that I have dealt with in my professional capacity as a judge . . . . [I]n most of the images we have depictions, either videos or photographs, of very young children being raped. Orally raped, anally raped, vaginally raped." ST at 27.[3]

As stated above, Abdulrazzak appealed his conviction to the Supreme Court of South Dakota, which affirmed summarily. State v. Abdulrazzak, 828 N.W.2d 547 (S.D. 2013) (unpublished tabled decision). Abdulrazzak filed a state habeas corpus action raising the same four claims in his petition in 19-CV-4025, plus additional claims about alleged trial counsel deficiency such as failing to have a computer expert review the evidence. The assigned judge, Joseph Neiles, conducted an evidentiary hearing in September of 2016, and issued a written memorandum decision in March of 2017, with extensive findings of fact based on the evidentiary

[3] ST refers to the sentencing transcript that was provided to this Court.

hearing. Judge Neiles ultimately declined to issue a certification of probable cause to appeal from the denial of the state petition for writ of habeas corpus, and the Supreme Court of South Dakota likewise denied to take the appeal.

Abdulrazzak's sentence was a three-year state penitentiary sentence with two years suspended for 7 of the 14 counts of conviction, with those sentences to run consecutively. The sentencing judge, Judge Lieberman, did not pronounce sentence on the remaining seven counts. The State of South Dakota has a parole system and released Abdulrazzak on parole supervision on June 25, 2014. 19-CV-4075 at Doc. 8-2. Abdulrazzak apparently was on an Immigration and Customs Enforcement hold between his prison release on June 25, 2014, and until April of 2016. Id. at Doc. 8-2. A parole violation report dated October 27, 2016, described Abdulrazzak as "noncompliant in regards to his sex offender programming, [being] terminated from community-based sex offender programming," noting that Abdulrazzak "was in individual sex offender programming for 5 months and continued to deny his offense." Doc. 8-2. Abdulrazzak appeared to be under supervision on parole only from April of 2016 through October of 2016. On March 13, 2017, the Board of Pardons and Parole entered findings and conclusions determining that Abdulrazzak had violated his parole conditions. Id. at Doc. 8-3.

Abdulrazzak initiated an administrative appeal under SDCL § 1-26 to circuit court, asserting that the decision of the Board of Pardons and Parole was not supported by the record and that his due process rights had been violated. Id. at Doc. 8-5. Abdulrazzak served the Board of Pardons and Parole with notice of appeal on May 10, but did not file his notice of appeal with the state court until May 25, 2017. Id. at Docs. 8-6, 8-7. Because the notice of appeal was more than 30 days after service of the Board's final order, the Board moved to dismiss the appeal as jurisdictionally barred under SDCL § 1-26-31. The circuit court dismissed the appeal on that basis.

Id. at Doc. 8-8. Abdulrazzak then appealed to the Supreme Court of South Dakota. Id. at Doc. 8-9. The Supreme Court of South Dakota has not yet issued its ruling.

A. Exhaustion Requirement

Section 2254 of Title 28 allows a state inmate to file a federal court action to collaterally attack his conviction and sentence as contrary to the United States Constitution, but the inmate first must have exhausted through available state courts his Constitution-based claims for relief. Under § 2254, a federal court cannot grant a writ of habeas corpus to a "person in custody pursuant to the judgment of a State court," unless the "applicant has exhausted the remedies available in the courts of the State," or unless "there is an absence of available State corrective process" or "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1). "[T]he state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999). "Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies." Picard v. Connor, 404 U.S. 270, 276 (1971). The exhaustion requirement protects the state courts' role in enforcing federal law, allows state courts the opportunity first to correct possible constitutional defects in state court convictions, and prevents the potentially "unseemly" disruption of state judicial proceedings through premature federal court intervention. Rose v. Lundy, 455 U.S. 509, 518 (1982) (quoting Darr v. Burford, 339 U.S. 200, 204 (1950)). Under the framework established in Lundy, a federal district court may not issue the writ of habeas corpus in response to a "mixed" petition containing some exhausted claims and some unexhausted ones. Id. at 520.

To determine if a claim has been exhausted, a federal court must determine whether the petitioner fairly presented the issue to the state courts in a federal constitutional context. Satter v. Leapley, 977 F.2d 1259, 1262 (8th Cir. 1992). "To satisfy exhaustion requirements, a habeas petitioner who has, on direct appeal, raised a claim that is decided on its merits need not raise it again in a state post-conviction proceeding." Id. "A claim is considered exhausted when the petitioner has afforded the highest state court a fair opportunity to rule on the factual and theoretical substance of his claim." Ashker v. Leapley, 5 F.3d 1178, 1179 (8th Cir. 1993).

Fairly presenting a federal claim requires more than simply going through the state courts:

> The rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts. Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts.

Picard, 404 U.S. at 276. It is also not enough for the petitioner merely to assert facts necessary to support a federal claim or to assert a similar state-law claim. Ashker, 5 F.3d at 1179. The petitioner must present both the factual and legal premises of the federal claims to the state court. Smittie v. Lockhart, 843 F.2d 295, 297 (8th Cir. 1988). "The petitioner must refer to a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue." Ashker, 5 F.3d at 1179 (citation omitted). This does not, however, require a petitioner to cite "book and verse on the federal constitution." Picard, 404 U.S. at 278. The petitioner must simply make apparent to the state court the constitutional substance of the constitutional claim. Satter, 977 F.2d at 1262.

Thus, this Court must first determine whether Abdulrazzak has exhausted the claims he raises in both 19-CV-4025 and 19-CV-4075. Abdulrazzak in fact raised the same four claims in state court that he now presses in his petition in 19-CV-4025; the amended petition filed in his

prior state court habeas corpus action raised as its first four grounds the same arguments contained in his federal § 2254 petition in 19-CV-4025, Doc. 1. See 19-CV-4025, Docs. 1, 1-7. Thus, Abdulrazzak has properly exhausted his claims in 19-CV-4025.

The same cannot be said regarding the claims in Abdulrazzak's § 2254 petition in 19-CV-4075, contesting his parole revocations proceedings. Abdulrazzak did not timely file a notice of appeal and still has pending to the Supreme Court of South Dakota a request for that court to consider the appeal. Abdulrazzak's failure to timely file a notice of appeal of the Board decision in state court is a procedural default that may bar a subsequent § 2254 petition under Coleman v. Thompson, 501 U.S. 722, 750 (1991) ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred . . . ."). Alternatively, the Supreme Court of South Dakota may consider the appeal or remand the matter to the circuit court for it to consider the appeal. In that case, there plainly is not exhaustion of state court proceedings regarding Abdulrazzak's claim of impropriety with the revocation of his parole. Either way, Abdulrazzak has not exhausted the claims that he seeks to make in 19-CV-4075, and those claims must be dismissed by this Court.

B. Merits of § 2254 Claims in 19-CV-4025

When a claim has been adjudicated on the merits in a state court as has Abdulrazzak's claims in 19-CV-4025, a petition for writ of habeas corpus under § 2254 cannot be granted unless the state court adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). To show that a state court made an unreasonable determination of the facts, a petitioner must present clear and convincing evidence that "the state court's presumptively correct factual finding lacks evidentiary support." Trussell v. Bowersox, 447 F.3d 588, 591 (8th Cir. 2006).

The "contrary to" and "unreasonable application" clauses of § 2254(d)(1) present distinct questions. Bell v. Cone, 535 U.S. 685, 694 (2002) (citing Williams v. Taylor, 529 U.S. 362, 404–05 (2000)). A state court's legal determination is contrary to federal law if it reaches the opposite conclusion on a settled question of constitutional law, or if, when confronting materially indistinguishable facts as a case decided by settled federal case law, it reaches a different conclusion. Williams, 529 U.S. at 405. If a state court correctly identifies the controlling legal principle, but applies it to the facts of a case in an unreasonable manner, then the decision runs afoul of the "unreasonable application" clause of § 2254(d)(1). Id. at 407–08. "[A]n *unreasonable* application of federal law is different from an incorrect application of federal law." Harrington v. Richter, 562 U.S. 86, 101 (2011) (quoting Williams, 529 U.S. at 410). This is a "highly deferential standard" that is "difficult to meet." Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (citations omitted). Evaluation of a state court's application of federal law focuses on "what a state court knew and did . . . measured against [the Supreme] Court's precedents as of 'the time the state court rendere[ed] its decision.'" Id. at 182 (quoting Lockyer v. Andrade, 538 U.S. 63, 71–72 (2003)). "If a claim has been adjudicated on the merits by a state court," a federal habeas petitioner must show the state court's legal determination was deficient "on the record that was before the state court." Id. at 185.

Abdulrazzak's claims in his § 2254 petition in 19-CV-4025 center around alleged ineffective assistance of counsel and inability to understand an interpreter. The Supreme Court of

the United States in Strickland v. Washington, 466 U.S. 668 (1984), set forth a two-part test for a petitioner to show ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. Both prongs of the Strickland test must be satisfied for a claim to succeed, and if a petitioner fails to make a sufficient showing under one prong, the court need not address the other. Id. at 697; Fields v. United States, 201 F.3d 1025, 1027 (8th Cir. 2000). The United States Court of Appeals for the Eighth Circuit has noted that federal review of ineffective assistance claims in § 2254 petitions is to be particularly deferential. In Nooner v. Norris, 402 F.3d 801 (8th Cir. 2005), the Eighth Circuit stated: "[O]ur review under 28 U.S.C. § 2254 of a state court's application of Strickland is twice deferential: we apply a highly deferential review to the state court decision; the state court, in turn, is highly deferential to the judgments of trial counsel." Id. at 808. In applying the Strickland standard, a court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Indeed, to establish that counsel's performance was objectively unreasonable, a petitioner must overcome the presumption that a challenged action of counsel might be considered "sound trial strategy." Mansfield v. Dormire, 202 F.3d 1018, 1022 (8th Cir. 2000) (quoting Strickland, 466 U.S. at 689). In short, under the Strickland standard, counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Cullen, 563 U.S. at 189 (citation omitted). Defense counsel of course cannot be said to be ineffective simply for failing to perform acts which appear to be futile or fruitless at the time the

decision must be made. Holloway v. United States, 960 F.2d 1348, 1356 (8th Cir. 1992); Dyer v. United States, 23 F.3d 1424, 1426 (8th Cir. 1994).

In order to establish prejudice under the Strickland standard, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Williams, 529 U.S. at 391 (citation omitted). That standard "requires a 'substantial,' not just 'conceivable' likelihood of a different result." Cullen, 563 U.S. at 189 (quoting Richter, 562 U.S. at 112).

All four of the grounds raised in Abdulrazzak's § 2254 petition in 19-CV-4025 have some element of ineffective assistance of counsel claimed. Grounds one and two of the petition allege ineffective assistance of counsel in not filing a motion to suppress statements Abdulrazzak made. Ground three contends that he did not understand his Arabic language translator at trial. Ground four alleges ineffective assistance in failing to investigate potential alibi evidence of Abdulrazzak not being near his computer when at least two pornographic images were downloaded. 19-CV-4025, Doc. 1. The claim of an inability to understand the translator at trial of course goes beyond ineffective assistance of counsel and implicates Sixth Amendment rights.

Judge Neiles conducted an evidentiary hearing and entered extensive findings of fact on Abdulrazzak's claims. There is nothing in the record to suggest that this Court should not defer to Judge Neiles's findings of fact. Indeed, the evidence before Judge Neiles was that, in Abdulrazzak's apartment, police officers told him that he was not under arrest and did not have to speak to the officers. Doc. 9-6. Abdulrazzak himself believed that he was told of not being under arrest and did not need to speak to the officers. Id. Abdulrazzak explained that he still spoke to the officers because refusing to speak to law enforcement in his home country of Iraq "would be

problematic." Id. Abdulrazzak explained that, even though he was told that he did not need to speak with law enforcement and was not under arrest, Abdulrazzak did not feel that he possessed that freedom. Id.

Counsel failing to file a motion to suppress Abdulrazzak's statement within his apartment is not ineffective assistance of counsel under the circumstances. The warning established in Miranda v. Arizona, 384 U.S. 436 (1966), only applies when a person is taken into custody for questioning. United States v. Griffin, 922 F.2d 1343, 1347 (8th Cir. 1990); United States v. Flores-Sandoval, 474 F.3d 1142, 1146 (8th Cir. 2007). A suspect is in custody when formally arrested or when that suspect experiences a deprivation of his freedom in a significant way. Griffin, 922 F.2d at 1347. Whether a suspect is in custody hinges upon whether a "reasonable person in the suspect's position would have understood his situation" to be one of custody; that is, the standard is an objective one. Id. Abdulrazzak was told and recalls that he was told that he was not under arrest and did not have to speak with the officers. Doc. 9-6. Judge Nieles concluded that Abdulrazzak did not experience a custodial interrogation and was not in custody. Under the deferential review of factual findings, this Court cannot conclude otherwise on this record. Under the Strickland standard, neither prong is met with regard to counsel's failure to file a motion to suppress. The motion to suppress would have been denied anyway, and the failure to file the motion does not indicate such a deficiency in the performance of counsel that he was not functioning as the counsel guaranteed by the Sixth Amendment. See Strickland, 466 U.S. at 687.

Abdulrazzak's claims about communication difficulty before and during trial do not find support in the record. Abdulrazzak's trial counsel testified in front of Judge Neiles that he did not experience issues communicating with Abdulrazzak in English and indeed did not need an interpreter in communicating with Abdulrazzak. Doc. 9-6. Abdulrazzak told his trial counsel

during trial that the interpreter was Egyptian, but counsel understood that Abdulrazzak mistrusted the interpreter based on his national origin, not that Abdulrazzak could not understand the translation into Arabic. Doc. 9-6. Judge Neiles concluded that Abdulrazzak failed to show that any misinterpretation between an interpreter and Abdulrazzak caused a constitutional error to arise. Doc. 9-6. Abdulrazzak has failed to show that his counsel was ineffective by not requesting a different interpreter. United States v. Dozal-Alvarez, 2011 WL 2670089, at *4 (D. Kan. July 7, 2011).

The final claim that Abdulrazzak makes of ineffective assistance of counsel relates to an alleged failure to investigate a potential alibi claim regarding the dates and times when certain child pornography was being accessed, downloaded, and viewed. In Abdulrazzak's state habeas corpus proceeding, Abdulrazzak made additional claims about ineffective assistance of counsel in failing to consult a computer expert. During the evidentiary proceeding in state court, it came out that Abdulrazzak's attorney had in fact consulted a computer expert who had examined Abdulrazzak's computer. Doc. 9-6. That expert determined that Abdulrazzak's computer was used to access pornography immediately upon Abdulrazzak's arrival to the United States. Id. The expert also found additional images of child pornography on Abdulrazzak's computer that law enforcement had overlooked. Id. Understandably, trial counsel made a tactical decision not to call that computer expert at trial. It is difficult to imagine introducing testimony that Abdulrazzak was not near his computer when certain images were downloaded without the use of such a computer expert. Counsel, of course, is afforded "wide latitude" in making tactical decisions. Cullen, 563 U.S. at 195 (citation omitted). Moreover, "[t]he decision not to call a witness is a virtually unchallengeable decision of trial strategy." United States v. Staples, 410 F.3d 484, 488 (8th Cir. 2005) (citation omitted). Abdulrazzak cannot show that it was ineffective assistance of

counsel to choose not to attempt to establish through use of a computer expert or otherwise that Abdulrazzak could have been away from his computer when some of the child pornography was downloaded. Therefore, none of the grounds raised in Abdulrazzak's § 2254 petition in 19-CV-4025 are viable on their merits. Accordingly, the motion to dismiss should be granted.

III. Conclusion and Order

For the reasons explained above, it is hereby

ORDERED, ADJUGED AND DECREED that the Motion to Dismiss, Doc. 8, in 19-CV-4025 is granted. It is further

ORDERED that the Motion to Dismiss, Doc. 7, in 19-CV-4075 is granted as Abdulrazzak's claims in that case are not exhausted. It is further

ORDERED that Abdulrazzak's motions for evidentiary hearing, Doc. 13 in 19-CV-4075, Doc. 15 in 19-CV-4025, are denied. It is further

ORDERED that Abdulrazzak's motion to excuse/waive exhaustion, Doc. 4 in 19-CV-4075, is denied. It is further

ORDERED that Abdulrazzak's motion to supplement the records, Doc. 6 in 19-CV-4075, is granted to the extent that materials that Abdulrazzak has filed in the record are made part of this Court's CM/ECF record. It is finally

ORDERED that Abdulrazzak's Motion for Injunctive Order, Doc. 14 in 19-CV-4075, is denied.

DATED this 13th day of November, 2019.

BY THE COURT:

ROBERTO A. LANGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

HAIDER SALAH ABDULRAZZAK, Plaintiff, vs. BRENT FLUKE, ATTORNEY GENERAL FOR THE STATE OF SOUTH DAKOTA, Defendants.	4:19-CV-04075-RAL JUDGMENT OF DISMISSAL

Based on the Opinion and Order Granting Motions to Dismiss and the reasons contained therein, it is hereby

ORDERED, ADJUDGED AND DECREED that this case is dismissed on its merits under Rules 54 and 58 of the Rules of Civil Procedure with judgment against Plaintiff and for the Defendants hereby entering. It is further

ORDERED that no certificate of appealability issues.

DATED this 13th day of November, 2019.

BY THE COURT:

ROBERTO A. LANGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

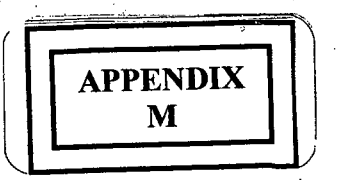
HAIDER SALAH ABDULRAZZAK, Petitioner, vs. BRENT FLUKE, WARDEN AT MIKE DURFEE STATE PRISON, AND ATTORNEY GENERAL FOR THE STATE OF SOUTH DAKOTA, Respondents.	4:19-CV-04025-RAL 4:19-CV-04075-RAL OPINION AND ORDER DENYING PETITIONER'S MOTIONS FOR RECONSIDERATION AND GRANTING PETITIONER'S MOTIONS TO APPEAL WITHOUT REPAYMENT OF FEES

Petitioner, Haider Salah Abdulrazzak, (Abdulrazzak) filed petitions under 28 U.S.C. § 2254 in two separate cases. 19-CV-4025, Doc. 1; 19-CV-4075, Doc. 1. This Court granted the respondents' motions to dismiss and entered judgments in favor of the respondents. 19-CV-4025, Docs. 17 and 18; 19-CV-4075, Docs. 16 and 17. Abdulrazzak now has filed motions for reconsideration, notices of appeal, and motions to appeal without repayment of fees in both cases. 19-CV-4025, Docs. 19, 20, 21; 19-CV-4075, Docs. 18, 19, 20.

I. Motions for Reconsideration[1]

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

[1] This Court does not construe Abdulrazzak's motions for reconsideration under Fed. R. Civ. P 60(b) as successive habeas petitions.



newly discovered evidence." Id. at 414. The Federal Rules provide the following regarding grounds for relief from an order:

> On motion and just terms, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). In his motions, Abdulrazzak asks for reconsideration because this Court addressed his two separate habeas claims in one opinion and order. 19-CV-4025, Doc. 19 at 1; 19-CV-4075, Doc. 18 at 1. Abdulrazzak makes no argument that fits any of the grounds for relief from an order under Fed. R. Civ. P. 60(b). Id. Rather, Abdulrazzak claims that the "two cases required tow [sic] different standard[s] of review and could prejudice Petitioner." Id. at 2. This Court analyzed Abdulrazzak's habeas petitions in 19-CV-04025 and 19-CV-04075 separately in its opinion and order. 19-CV-4025, Doc. 17; 19-CV-4075, Doc. 16.

This Court concluded that Abdulrazzak's claims in 19-CV-4075 were not exhausted and that his claims in 19-CV-4025 failed on the merits. This Court chose to address the motions to dismiss in a single opinion and order to have one comprehensive decision. Of course, the facts in Abdulrazzak's cases overlapped, as did the legal standards. For instance, exhaustion in state court is required for all habeas petitions. See 28 U.S.C. § 2254(b)(1); O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999) (State court must be given the first opportunity to hear a claim.). Abdulrazzak has not shown sufficient grounds for relief regarding this Court's opinion and order addressing his two cases in one decision.

Next, Abdulrazzak argues that he did not obtain the full records or transcripts. 19-CV-4025, Doc. 19 at 2-3; 19-CV-4075, Doc. 19 at 2-3. He cites 28 U.S.C. §§ 2247 and 2249 claiming that he did not receive the habeas transcripts and thus "could not submit a brief on the contrary to clearly establish federal law[.]" Id. Section 2247 makes "transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous application by or in behalf of the same petitioner" admissible as evidence. Further, 28 U.S.C. § 2249 requires that certified copies of the indictment, plea and judgment be filed with the court. These transcripts and copies were provided to Abdulrazzak. See 19-CV-4025, Docs. 1 and 9; 19-CV-4075, Docs. 1 and 8. Additionally, on May 20, 2019, this Court received the state trial court records from the Minnehaha County Clerk of Courts. This Court also received transcripts for the bond hearing, pretrial conference, jury trial, and sentencing on May 23, 2019. These transcripts were used and cited to in this Court's opinion and order addressing the merits of Abdulrazzak's claims in 19-CV-4025 and in discussing the lack of exhaustion of claims in 19-CV-4075. 19-CV-4025, Doc. 17; 19-CV-4075, Doc. 18. Abdulrazzak has not shown sufficient grounds for relief on this matter.

Abdulrazzak's final argument in his motion filed in 19-CV-4025 asserts that this Court ruled on his claims without transcripts and did not read his petitions. 19-CV-4025, Doc. 19 at 5. Specifically, he alludes to over 90 grounds for relief requested in exhibits to his petition in his first filed case. See 19-CV-4025, Doc. 1. This Court did not address these claims because Abdulrazzak had only exhausted the first four claims in his state habeas petition. 19-CV-4025, Doc. 17 at 10. State exhaustion is required, thus, only the four exhausted claims were analyzed. O' Sullivan, 526 U.S. at 842; 19-CV-4025, Doc. 17. Abdulrazzak's motions for reconsideration

are unsupported by the record and he has not established grounds for relief under Fed. R. Civ. P. 60(b). Thus, Abdulrazzak's motions for reconsideration are denied.

II. Motions to Appeal without Prepayment of Fees

Abdulrazzak has filed notices of appeal and motions to appeal without prepayment of fees, with his prisoner trust account. 19-CV-4025, Docs. 20, 21 and 22; 19-CV-4075, Docs. 19, 20, and 21. The Eighth Circuit historically has looked to district courts to rule on in forma pauperis motions for appeal and has held that the filing-fee provisions of the PLRA do not apply to habeas corpus actions. Malave v. Hedrick, 271 F.3d 1139, 1140 (8th Cir. 2001). To determine whether a habeas petitioner qualifies for in forma pauperis status, the court need only assess (1) whether the petitioner can afford to pay the full filing fee, and (2) whether the petitioner's appeal is taken in "good faith." 28 U.S.C. § 1915(a)(1), (3).

Abdulrazzak's prisoner trust account report indicates that he has average monthly deposits to his prisoner trust account of $77.42 and an average monthly balance of $59.13. 19-CV-4025, Docket 22. Abdulrazzak's appeals, though arguably misguided, appear to be taken in good faith. Abdulrazzak has insufficient funds to pay the $505.00 appellate filing fees, so his motions for leave to proceed in forma pauperis on appeal are granted.

III. Order

Accordingly, it is

ORDERED that Abdulrazzak's motions for reconsideration--19-CV-4025, Doc. 19; and 19-CV-4075, Doc. 18--are denied. It is further

ORDERED that Abdulrazzak's motions to appeal without repayment of fees--19-CV-4025, Doc. 21; and 19-CV-4075, Doc. 20--are granted. The appellate filing fees are waived.

DATED this 12th day of December, 2019.

BY THE COURT:

ROBERTO A. LANGE
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-3601

Haider Salah Abdulrazzak

Plaintiff - Appellant

v.

Brent Fluke, Warden at Mike Durfee State Prison; Attorney General for the State of South Dakota

Defendants - Appellees

No: 19-3678

Haider Salah Abdulrazzak

Plaintiff - Appellant

v.

Brent Fluke, Warden at Mike Durfee State Prison; Attorney General for the State of South Dakota

Defendants - Appellees

Appeal from U.S. District Court for the District of South Dakota - Sioux Falls
(4:19-cv-04075-RAL)

JUDGMENT

Before BENTON, WOLLMAN, and ERICKSON, Circuit Judges.

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

APPENDIX
N

application for a certificate of appealability is denied. The appeal is dismissed. In case number 19-3601, the pending motion for injunction is denied as moot.

April 27, 2020

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

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-3601

Haider Salah Abdulrazzak

Appellant

v.

Brent Fluke, Warden at Mike Durfee State Prison and Attorney General for the State of South Dakota

Appellees

No: 19-3678

Haider Salah Abdulrazzak

Appellant

v.

Brent Fluke, Warden at Mike Durfee State Prison and Attorney General for the State of South Dakota

Appellees

Appeal from U.S. District Court for the District of South Dakota - Sioux Falls
(4:19-cv-04075-RAL)

ORDER

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

June 19, 2020

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

/s/ Michael E. Gans

APPENDIX
O

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-3678

Haider Salah Abdulrazzak

Appellant

v.

Brent Fluke, Warden at Mike Durfee State Prison and Attorney General for the State of South Dakota

Appellees

Appeal from U.S. District Court for the District of South Dakota - Sioux Falls
(4:19-cv-04025-RAL)

ORDER

Appellant's motion to compel production of records is denied as this court in not in possession of the requested transcripts.

August 13, 2020

Order Entered Under Rule 27A(a):
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX
P

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

HAIDER SALAH ABDULRAZZAK, Plaintiff, vs. BRENT FLUKE, WARDEN AT MIKE DURFEE STATE PRISON; and ATTORNEY GENERAL FOR THE STATE OF SOUTH DAKOTA, Defendants.	4:19-CV-04075-RAL 4:19-CV-04025-RAL ORDER DENYING PENDING MOTIONS

On August 13, 2019, this Court filed an Opinion and Order dismissing these cases and entered Judgments. Abdulrazzak filed notices of appeal, but the United States Court of Appeals for the Eighth Circuit denied certificates of appealability and rehearing en banc and issued its mandate. Those cases are concluded.

However, on August 20, 2020, in 19-CV-4025, Doc. 31, Abdulrazzak filed Petitioner's Motion to Compel the District Court to Produce It's [sic] Judicial Records. This motion appears to relate to certain state court records reflected on the CM/ECF system as received by the Clerk of Court on May 20 and 23, 2019. Abdulrazzak also has filed in 19-CV-4075, Doc. 27, a motion to reinstate his § 2254 action asserting that it is now exhausted.

Both of Abdulrazzak's cases are dismissed and closed, so this Court can readily deny both motions. Abdulrazzak may file a new action under 28 U.S.C. § 2254, if in fact his claims are exhausted and otherwise jurisdictionally proper, but it is improper for this Court to reopen a final

APPENDIX Q

decision and dismissal after an appeal to the Eighth Circuit. As for Abdulrazzak's request for his state court records from this Court at this time, his proper inquiry is to the Clerk of Court on whether those records have been returned to state court or if Abdulrazzak can make arrangements to have the records copied and sent to him. This Court's filings are all public in the CM/ECF system. This Court sees no good reason to compel itself to produce judicial records. Therefore, it is hereby

ORDERED that Abdulrazzak's motion in 19-CV-4025, Doc. 31, is denied without prejudice to Abdulrazzak arranging with the Clerk of Court for the District of South Dakota on whether and how certain state court records, if still in the Clerk of Court's possession, may be copied and sent to Abdulrazzak. It is further

ORDERED that Abdulrazzak's motion to reinstate § 2254 action in 19-CV-4075, Doc. 27, is denied without prejudice to refiling another such petition if claims have been exhausted and are otherwise jurisdictionally proper.

DATED this 25th day of August, 2020.

BY THE COURT:

ROBERTO A. LANGE
CHIEF JUDGE

HABEAS,CLOSED,PROSE

U.S. District Court
District of South Dakota (Southern Division)
CIVIL DOCKET FOR CASE #: 4:19-cv-04025-RAL
Internal Use Only

Abdulrazzak v. Fluke et al
Assigned to: U.S. District Judge Roberto A. Lange
Case in other court: 8th Circuit, 19-03678
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 02/04/2019
Date Terminated: 11/13/2019
Jury Demand: None
Nature of Suit: 530 Prisoner Petitions: Habeas Corpus - General
Jurisdiction: Federal Question

Petitioner

Haider Salah Abdulrazzak

represented by **Haider Salah Abdulrazzak**
#04373
MIKE DURFEE STATE PRISON
1412 Wood Street
Springfield, SD 57062
PRO SE

V.

Respondent

Brent Fluke

represented by **Quincy R. Kjerstad**
Attorney General of South Dakota
1302 E. Highway 14
Suite 1
Pierre, SD 57501-8501
(605) 773-3215
Fax: (605) 773-4106
Email: quincy.kjerstad@state.sd.us
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Respondent

Attorney General for the State of South Dakota

represented by **Quincy R. Kjerstad**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
02/04/2019	1	**PETITION for Writ of Habeas Corpus pursuant to 28:2254 filed by Haider Salah Abdulrazzak (Attachments: # 1 Appendix of Exhibits, # 2 Ex 1 - Minnehaha County Amended Application for Writ**

APPENDIX R

		4/18/2014, # 3 Ex 2 - Petitioner's Claims for Relief, # 4 Ex 3 - Petitioner's Grounds, # 5 Ex 4 - Appellant's Supreme Court Brief 9/27/2012, # 6 Ex 5 - Supreme Court Judgment of Affirmance, # 7 Ex 6 - 3/17/17 Minnehaha Co. denial of habeas relief # 8 Ex 7 - 5/23/17 Minnehaha Co. Order denying Petitioner's habeas relief # 9 Ex 8 - Minnehaha County denial of petitioner's application for certificate of probable cause, # 10 Ex 9 - Ltr from Julie Hofer to Petitioner 1/23/19, # 11 Ex 10 - Minnehaha County Bench Order Judgment of Conviction and Penitentiary Sentence 12/20/11) (DJP) Modified on 2/4/2019 (DJP). (Entered: 02/04/2019)
02/04/2019	2	MOTION to Appoint Counsel by Haider Salah Abdulrazzak. (DJP) (Entered: 02/04/2019)
02/04/2019	3	New Case LETTER with enclosed docket sheet sent by Clerk's Office to Petitioner. (DJP) (Entered: 02/04/2019)
02/04/2019		Filing Fee Received from Haider Salah Abdulrazzak. Fee Amount: $5, Receipt No.: #SDX400049200. (DJP) (Entered: 02/05/2019)
02/12/2019	4	MOTION for Leave to Proceed in forma pauperis by Haider Salah Abdulrazzak. (DJP) (Entered: 02/12/2019)
02/12/2019	5	PRISONER Trust Account Report. (DJP) (Entered: 02/12/2019)
04/15/2019	6	(FILED IN ERROR-TO BE FILED IN 19-4075) MOTION to Excuse/Waive of Exhaustion by Haider Salah Abdulrazzak. (Attachments: # 1 Cover letter) (DJP) Modified on 4/25/2019 (DJP). (Entered: 04/15/2019)
04/18/2019	7	ORDER Requiring Response. Signed by U.S. District Judge Roberto A. Lange on 4/18/19. (JLS) (Entered: 04/18/2019)
04/18/2019		(Court only) DELIVERING 7 Order to Haider Salah Abdulrazzak via US Postal Service and docs 1, 2, 4, 6-7 to 2254 MDSP Email Group via email. (JLS) (Entered: 04/18/2019)
04/25/2019		NOTICE of Filing Error: 6 Motion for Miscellaneous Relief was filed in error and should be disregarded. Per telephone conversation with Petitioner, this document should be filed in 19-4075. (DJP) (Entered: 04/25/2019)
05/16/2019	8	**MOTION to DISMISS by Attorney General for the State of South Dakota, Brent Fluke. (Kjerstad, Quincy) (Entered: 05/16/2019)**
05/16/2019	9	**Respondents' ANSWER re 1 PETITION for Writ of Habeas Corpus pursuant to 28:2254 filed by Attorney General for the State of South Dakota, Brent Fluke. (Attachments: # 1 Exhibit 1 - Judgment & Sentence, # 2 Exhibit 2 - Order of Affirmance, # 3 Exhibit 3 - Amended Application for Writ of Habeas Corpus, # 4 Exhibit 4 - Provisional Writ of Habeas Corpus, # 5 Exhibit 5 - Judge Neiles Letter, # 6 Exhibit 6 - Findings & Conclusions, # 7 Exhibit 7 - Order Quashing Amended Application & Provisional Writ, # 8 Exhibit 8 - Order Vacating Prior Order Denying Cert of Probable Cause, # 9**

		Exhibit 9 - Order Denying Motion for Certificate of Probable Cause, # 10 Exhibit 10 - Order Denying Motion for Certificate) (Kjerstad, Quincy) Modified text and link on 6/20/2019 (JLS). (Entered: 05/16/2019)
05/20/2019		RECEIVEDState trial court records from Minnehaha County Clerk of Courts CRI10-5422 and Civ 13-2004. (Not exhibits or transcripts) The records are located on Clerk of Court N Drive (MWT) (Entered: 05/20/2019)
05/23/2019	10	MOTION to waive making copies by Haider Salah Abdulrazzak. (DJP) (Main Document 10 replaced on 5/23/2019) (DJP). (Entered: 05/23/2019)
05/23/2019		RECEIVED following transcripts from Attorney General's Office re CR10-5422 State of SD v. Haider Salah Abdul-Razzak: (1) Bond Hearing 9/15/2010; (2) Pretrial Conference 6/21/2011; (3) Jury Trial Volumes I-III 6/28/2011; (4) Sentencing 12/20/2011. Placed in Sioux Falls Clerks' vault. (DJP) (Entered: 05/23/2019)
05/28/2019	11	ORDER granting 10 Motion. Signed by U.S. District Judge Roberto A. Lange on 05/28/2019. (LH) Mailed to Petitioner. Modified on 5/28/2019 (SRA). (Entered: 05/28/2019)
05/29/2019	12	MOTION to Extend Deadline by Haider Salah Abdulrazzak. (DJP) (Entered: 05/29/2019)
05/30/2019	13	ORDER granting 12 Motion to Extend Deadlines. Signed by U.S. District Judge Roberto A. Lange on 05/30/2019. (LH) Mailed to Abdulrazzak on 5/30/2019 (SLW). (Entered: 05/30/2019)
06/20/2019	14	RESPONSE to 9 Answer filed by Haider Salah Abdulrazzak. (Attachments: # 1 Ex 11 - state court case jury instructions) (DJP) (Entered: 06/20/2019)
06/20/2019	15	MOTION for Evidentiary Hearing by Haider Salah Abdulrazzak. (DJP) (Entered: 06/20/2019)
08/29/2019	16	LETTER sent by Clerk's Office to Minnehaha County Clerk of Courts returning state court records on flash drive (DJP) (Entered: 08/29/2019)
11/08/2019		(Court only) ***Staff Note: Transcripts from Attorney General's Office re CR10-5422 State of SD v. Haider Salah Abdul-Razzak: (1) Bond Hearing 9/15/2010; (2) Pretrial Conference 6/21/2011; (3) Jury Trial Volumes I-III 6/28/2011; (4) Sentencing 12/20/2011. Checked out to RAL chambers. (JLS) (Entered: 11/08/2019)
11/13/2019	17	OPINION AND ORDER granting 8 Motion to Dismiss; denying 15 Motion for Hearing. Signed by U.S. District Judge Roberto A. Lange on 11/13/2019. (SLT) Modified on 11/13/2019 delivered to Haider Salah Abdulrazzak via USPS (SLT). (Entered: 11/13/2019)
11/13/2019	18	JUDGMENT OF DISMISSAL in favor of Attorney General for the State of South Dakota, Brent Fluke against Haider Salah Abdulrazzak. Signed

		by U.S. District Judge Roberto A. Lange on 11/13/2019. (SLT) Modified on 11/13/2019 delivered to Haider Salah Abdulrazzak via USPS with Post Conviction Appeal Packet(SLT). (Entered: 11/13/2019)
11/13/2019		(Court only) ***Staff Note: Transcripts from Attorney General's Office re CR10-5422 State of SD v. Haider Salah Abdul-Razzak: (1) Bond Hearing 9/15/2010; (2) Pretrial Conference 6/21/2011; (3) Jury Trial Volumes I-III 6/28/2011; (4) Sentencing 12/20/2011. Checked in from RAL chambers. (JLS) (Entered: 11/15/2019)
12/09/2019	19	MOTION for Reconsideration re 18 Judgment by Haider Salah Abdulrazzak. (SLT) (Entered: 12/09/2019)
12/09/2019	20	NOTICE OF APPEAL as to 18 Judgment by Haider Salah Abdulrazzak.. (SLT) (Entered: 12/09/2019)
12/09/2019	21	MOTION to Appeal without Prepayment of Fees and Declaration by Haider Salah Abdulrazzak. (SLT) (Entered: 12/09/2019)
12/09/2019	 22	PRISONER Trust Account Report. (SLT) (Entered: 12/09/2019)
12/09/2019	 23	TRANSMITTAL of Notice of Appeal to 8th Circuit Court of Appeals re 20 Notice of Appeal. (SLT) (Entered: 12/09/2019)
12/12/2019	24	OPINION and ORDER denying 19 Motion for Reconsideration ; granting 21 Motion for Leave to Proceed in forma pauperis. Signed by U.S. District Judge Roberto A. Lange on 12/12/2019. (SLT) Modified on 12/12/2019 delivered to Haider Salah Abdulrazzak via USPS(SLT). (Entered: 12/12/2019)
12/12/2019		TRANSMITTAL of Subsequent Filing to 8th Circuit Court of Appeals re 24 Order on Motion for Reconsideration,, Order on Motion for Leave to Proceed in forma pauperis. (SLT) (Entered: 12/12/2019)
12/13/2019	25	USCA Case Number for 20 Notice of Appeal filed by Haider Salah Abdulrazzak. USCA Case Number: 19-3678. (TAL) (Entered: 12/13/2019)
12/13/2019	26	ORDER of USCA directing Clerk of the District Court to forward portions of the original record not available in an electronic format through PACER to USCA within 10 days re 20 Notice of Appeal filed by Haider Salah Abdulrazzak.. (TAL) (Entered: 12/13/2019)
12/17/2019	27	Appeal Record Sent with enclosed State Court Transcripts from CR10-5422 State of SD v. Haider Salah Abdulrazzak: Bond Hearing 9/15/2010, Pretrial Conference 6/21/2011, Jury Trial Volumes I-III 6/28/2011, Sentencing 12/20/2011; and a CD containing electronic version of State Civil Case and State Criminal Case sent by Clerk's Office to Scott Lewandoski. (JLS) (Entered: 12/17/2019)
04/27/2020	28	JUDGMENT of USCA denying application for certificate of appealability as to 20 Notice of Appeal filed by Haider Salah Abdulrazzak. (TAL) Modified text on 8/13/2020 (TAL). (Entered: 08/13/2020)

06/19/2020	29	ORDER of USCA denying petitions for rehearing enbanc and by panel as to 20 Notice of Appeal filed by Haider Salah Abdulrazzak. (TAL) (Entered: 08/13/2020)
06/26/2020	30	MANDATE from 8th Circuit COA issued in accordance with COA Judgment as to 20 Notice of Appeal filed by Haider Salah Abdulrazzak. (TAL) (Entered: 08/13/2020)
08/20/2020	31	MOTION to Compel the District Court to Produce Judicial Records by Haider Salah Abdulrazzak. (SLT) (Entered: 08/20/2020)
08/25/2020	32	ORDER DENYING PENDING MOTIONS denying 31 Motion to Compel District Court to Produce Judicial Records. Signed by Chief Judge Roberto A. Lange on 08/25/2020. (LH) (Entered: 08/25/2020)
08/25/2020		(Court only) DELIVERING 32 Order Denying Pending Motions to Haider Salah Abdulrazzak via US Postal Service. (DLC) (Entered: 08/25/2020)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

HAIDER SALAH ABDULRAZZAK *Petitioner & Appellant,* vs. BRENT FLUKE, Warden at Mike Durfee State Prison, JASON R. RAVNSBORG, South Dakota Attorney General, Respondents & Appellees,	Case#: 19-3678 Case#: 19-3601 PETITIONER & APPELLANT AFFIDAVIT IN SUPPORT OF PETITION FOR REHEARING.

I hereby certify and sworn under the penalties of perjury that the following are true and submitted in according to my best knowledge that:

1. My name is Haider Salah Abdulrazzak and I am currently incarcerated at Mike Durfee State Prison.

A) Case#: 19-3678

2. That I filed my direct appeal timely to the State Supreme in connect with my original conviction (Exhibit #4) raising two claims; insufficient evidence to support the conviction and unusual punishment and the State Supreme Court ruled on its merits.

3. That I submitted to the state District Court a true and correct copy of the brief submitted on my behalf to the State Supreme Court as Exhibit# 4 and The

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State Supreme Court judgment on the merits entered on January 14, 2013, as exhibit # 5.

4. That on May, 30, 2013, I mailed my original Petition of Habeas Corpus to the state circuit court in connects with my conviction and that petition was stamped filed on June 18, 2013.

5. That Exhibit #3 submitted within this Petition contained all my 75 grounds for relief submitted to the state circuit court.

6. That upon appointment of Attorney (Julie Hofer/ Minnehaha County Public Advocate Office; South Dakota), my attorney submitted an amended petition to the state circuit court, contained 7 claims for relief on April 18, 2013, and filed with the state court on April 21, 2014. These grounds submitted to the district court as exhibit #1.

7. That I was paroled out on June 25, 2014.

8. That while I was in immigration custody I start working on my Pro Se claims for habeas relief and it contained 11 claims for relief submitted to the district court as Exhibit #2.

9. That after my release from immigration custody and due to interference from my parole officer (Dusti Werner) and complete denial to the prison law library, I could not properly finish these claims.

10. That I received no assistance from my appointed attorney in preparing these pro se claims.

11. That the state court held evidentiary hearings on September 20, 2016 and December 13, 2016, within which I testified under oath, in connect with my state habeas proceeding, and it was stenographed by the court reporter.

12. That at no time I ever received a copy of the transcripts in connects with both September 20, 2016, and December 13, 2016.

13. That my appointed attorney submitted a timely certificate for probable cause on May 16, 2017 arguing the exact 7 claims for relief submitted in Exhibit #12 to the district court. (Compare Exhibit #1 with #12).

14. That on June 27, 2018, an official judgment by the state circuit court denying the application for the Certificate and a copy of that denial submitted to the district court as Exhibit #8.

15. That on July 6, 2018, petitioner's appointed attorney submitted timely Certificate of Appealbility to the State Supreme Court, arguing the exact 7 claims for relief submitted in Exhibit #1; #12.

16. That on July 16, 2018, I mailed a letter to the State Supreme Court asking the Court to consider together my 11 pro se claims for relief submitted in Exhibit #2 with the claims submitted by my appointed attorney.

17. That I never received back the letter as unfilled incomplete or for whatsoever reason.

18. That my appointed attorney informed me in a letter dated January 23, 2019, that the State Supreme Court has denied my Application for Certificate of Appealbility.

19. That a copy of that letter and the State Supreme Court judgment were submitted to the district court as exhibit #9.

20. That upon receive the letter from my attorney together with the State Supreme Court judgment, I mailed another letter to the State Supreme Court asking about any updates about my letter mailed to them on July 16, 2018, but never received response back.

21. That on January 31, 2019, I mailed my Petition for habeas corpus filed under §2254 to the District court which docketed as Case #: 4:19-cv-04025-RAL.

B) Case #: 19-3601

22. That I was re-incarcerated on the allegation of parole violation on October 27, 2016, and a copy was submitted to the district court as Exhibit #1.

23. That I received a final parole revocation hearing in front of South Dakota Board of Pardons & Paroles (the "Board") on March 13m 2017, at which the Board revoked my Parole.

8, 2009, rather than other friends. It is therefore, this fact is not supported by the records and no testimony submitted to support that *Fact* determination.

Abdulrazzak would submit that he was entitled that the district court to consider that facts as referred to in his Motion in response to Respondents answer. See *Burden v. Zant*, 498 U.S. 433, 437 (1991) (per curiam) (Court of appeal's failure to explain why it ignored state court fact-finding favorable to petitioner requires reversal of denial of writ and remand).

Abdulrazzak further would submit that it was unreasonable for the district court to determine he did not exhaust only the first *four* claims. This determination is not supported by the facts or records. Petitioner submitted Exhibit #1, *which included all the seven claims argued by his appointed attorney all the way to the State Supreme Court; a fact cannot be denied by Respondents*, and now submitted under the penalty of perjury this fact. (Affidavit # 6, #13, and #15)

Petitioner also submitted his pro se claims as Exhibit #2, which he argued part during the state habeas hearing and other parts the state judge informed petitioner he will read them. Petitioner submitted a letter to the State Supreme Court asking the Court to take in consideration these claims (Affidavit #16, #17). That letter never came back as unfilled and Petitioner has nothing in his records that may suggest the State highest Court never took a look at it.

24. That on April 21, 2017, the Board amended its judgment to include a missed transaction and a copy was submitted to the district court as Exhibit #2.

25. That I did not receive the Board new opinion until May 2, 2017.

26. That I delivered the complete Notice to Appeal the Board judgment to my unit staff member to be mailed out to the court on May 10, 2017. (Exhibit #3)

27. That I submitted to the state court notarized affidavit under the penalty of the perjury declaring the same as (paragraph 26), signed on June 9, 2017, and submitted with my motion in opposing the Board motion to dismiss as (Exhibit A) on June 15, 2017.

28. That at no time the state court ever sends me back my notice to appeal for whatsoever reason or ever received a correspondence from the court telling me that my notice to appeal was defective for what so ever reason.

Respectfully Submitted.

Dated this May 22, 2020.

Haider Salah Abdulrazzak, # 04373
Petitioner & Appellant/ Pro Se

Subscribed and sworn to before me this 22nd of May, 2020.

(Seal) LAURA STRATMAN NOTARY PUBLIC SOUTH DAKOTA SEAL SEAL

Laura Stratman
Notary Public

My commission expires:

My Commission Expires June 10, 2025