CASE #

IN THE
SUPREME COURTOF THE UNITED STATES

HAIDER S. ABDULRAZZAK
Petitioner,

vs.
JASON RAVNSBORG et., al, the Attorney General of South Dakota.
Respondents.

ON PETITIONER'S APPLICATION PRESENTED TO
JUSTICE BRETT M. KAVANAUGH

Agency Case No. 21-2738

EIGHTH CIRCUIT COURT OF APPEALS

PETITIONER'S APPLICATION TO EXTEND THE TIME TO FILE WRIT OF CERTIORARI

HAIDER S. ABDULRAZZAK
220 North Weber Avenue
Sioux Falls, SD 57103
Email: haider.abdulrazzak1@gmail.com
Tel. (mobile): (605) 585-3275

Petitioner/ Pro se

JASON RAVNSBORG
South Dakota State Attorney General

JONATHAN K. VAN PATTEN
South Dakota Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Email: jonathan.vanpatten@state.sd.us
Tel: (605) 773-3215
Attorney for Respondents

IN THE SUPREME COURT
OF THE UNITED STATES

HAIDER S. ABDULRAZZAK	)	
Petitioner,	)	Eighth Cir. Case No. 21-2738
v.	)	PETITIONER'S MOTION TO
JASON RAVNSBORG et. al	)	EXTEND OF TIME TO FILE
The Attorney General of South Dakota,	)	PETITION OF CERTIORARI
Respondents.	)	

Comes now Petitioner Haider Abdulrazzak "Abdulrazzak" or "Petitioner" proceeding pro se to file this Application presented to Justice "BRETT KAVANAUGH" pursuant to US Supreme Court Rule 22 and Rule 30(4) to extend the time to file his application for Certificate of Certiorari, regarding the Eighth Circuit Court of Appeals denial of his application for Certificate of Appealability (COA) (Appendix C) and rehearing entered on February 23, 2022. (Appendix D).

(A) FACTUAL BACKGROUNDS:

Petitioner Haider S. Abdulrazzak (Abdulrazzak) parole was revoked by the state of South Dakota Board of Pardons and Paroles (the "Board"). Abdulrazzak mailed a notice to appeal the Board decision 14 days prior to the expiration of the deadline to appeal; nonetheless the appeal was dismissed as untimely. Petitioner appealed to the State Supreme court, which affirmed the state circuit court and the United States denied Application for Certificate of Certiorari.

Abdulrazzak also filed a habeas corpus petition under 28 U.S.C. § 2254 in the federal district court of South Dakota, which dismissed without prejudice for failure to exhaust ("The Initial Petition") [Case #4:19-cv-04075-RAL]. See *Abdulrazzak v. Fluke,* 2019 U.S. Dist. LEXIS 196590, 2019 WL 5964974 (D. S.D. Nov. 13, 2019) The Eighth Circuit Court of Appeals denied

the issuance of Certificate of Appealability Court refused to issue a Certificate of Appealability ("COA") [Case# 19-3601]. See *Abdulrazzak* v. *Fluke,* 2020 U.S. App. LEXIS 17909 (8th Cir. S.D., April, 2020), and later on denied rehearing. See *Abdulrazzak v. Fluke,* 2020 U.S. App. LEXIS 19334 (8th Cir. S.D., Jun 19, 2020).

After Abdulrazzak exhausted his state remedies, he filed an amended habeas Petition in South Dakota Federal District Court ("The Amended Petition") [Case #4:20-CV-04154-RAL]. After briefing by both parties, the district court dismissed the habeas petition on procedural grounds. See *Abdulrazzak v. Fluke,* 2021 U.S. Dist. LEXIS 123361, 2021 WL 2711636 (D. S.D. Jul. 1, 2021) (Appendix A).

Abdulrazzak filed a motion for reconsideration, together with this notice to appeal and an application to proceed in forma paupers. The district court while it denied the motion, nonetheless the court granted the motion to proceed in forma paupers. (Appendix B).

Petitioner was released from the Custody of South Dakota Department of Corrections on December 23, 2021, due to the expiration of the terms of his sentence.

The Eighth Circuit Court of Appeals entered order dismissing the application to issue of COA as moot (Case No. 21-2738) on January 3, 2022. (Appendix D) and later denied petition for rehearing on February 23, 2022.

The application to extend the time to file writ of Certiorari presented to Justice BRETT KAVANAUGH is followed.

(B) REASONS TO GRANT THE APPLICATION:

As discussed above, Abdulrazzak was released from the prison on December 23, 2021. Petitioner since then live as a homeless in homeless shelters. Petitioner due to this fact have a limited space to possess his legal documents. Petitioner also is unemployed and cannot obtain an

employment until he receives his work authorization and currently without income, beside what other friends or family may give him from time to time to pay some of his bills. Petitioner also expected to undergo a surgery (hemorrhoids) since the prison don't provide such like care.

Petitioner also do not have a fixed address due to the fact he lives in a homeless shelter as a "guest" at which his residency may terminated due to violation of any rules set by the shelter and therefore may lose some important communications with this Court.

Petitioner also incapable to obtain an attorney, or have proper access (for free) to website that may give him access to the legal authorities or other legal resources. Petitioner also is incapable to pay fees for the copies that he required to make.

Petitioner is also incapable to offer to make the necessary copies as required by this Court Rules (10 copies) together with all the Appendixes to support his writ.

(C) CONCLUSION:

Petitioner and for the good cause shown, therefore pry to Justice BRETT KAVANAUGH to grant his application to extend the time to file his Writ of certiorari for another 90 days, and therefore make the new deadline for filing on or before August 23, 2022.

Respectfully Submitted.

Dated this 11th of May 2022.

Haider S. Abdulrazzak
220 North Weber Avenue
Sioux Falls, SD 57103
Tel. (mobile): (605) 585-3275
Email: haider.abdulrazzak1@gmail.com
Petitioner/ Pro Se

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.	4:20-CV-04154-RAL OPINION AND ORDER GRANTING RESPONDENTS' MOTION TO DISMISS

Petitioner Haider Salah Abdulrazzak filed a petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus. Doc. 1. Pending before this Court is Respondents' motion to dismiss and Petitioner's motions to grant habeas relief, for recusal, for an evidentiary hearing, and to strike. Docs. 12, 18, 20, 21, 25.

I. Motion for Recusal

Abdulrazzak moves for the recusal of the undersigned judge. Doc. 20. He claims that this judge's previous legal orders and opinions are incorrect. See Doc. 20. "A judge must recuse from 'any proceeding in which [the judge's] impartiality might reasonably be questioned.'" United States v. Melton, 738 F.3d 903, 905 (8th Cir. 2013) (alteration in original) (quoting 28 U.S.C. § 455(a)). This standard is objective and questions "whether the judge's impartiality might reasonably be questioned by the average person on the street who knows all the relevant facts of a case." Id. (quoting Moran v. Clarke, 296 F.3d 638, 648 (8th Cir. 2002)). The party that introduces the motion for recusal "carries a heavy burden of proof; a judge is presumed to be impartial and

APPENDIX
A

the party seeking disqualification bears the substantial burden of proving otherwise." Fletcher v. Conoco Pipe Line Co., 323 F.3d 661, 664 (8th Cir. 2003) (internal quotation omitted).

The party must show "that the judge had a disposition so extreme as to display clear inability to render fair judgment." Melton, 738 F.3d at 905 (cleaned up and citation omitted). Abdulrazzak bases his motion on allegations of ignorance of the law. Doc. 20. But "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." Liteky v. United States, 510 U.S. 540, 555 (1994). A judicial ruling "cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal." Id. Here, Abdulrazzak's disagreement with prior rulings may be grounds for an appeal, but he has not shown that the undersigned judge is unable to be impartial or to render a fair judgment. Abdulrazzak has not met his burden. Thus, his motion for recusal, Doc. 20, is denied.

II. Motion to Dismiss

A. Factual Background[1]

In 2011, a state court jury found Abdulrazzak guilty of 14 counts of child pornography in violation of SDCL § 22-24A-3(3). Doc. 13-1. He was sentenced to 21 years in prison with 13 years suspended. Doc. 13-1. The Supreme Court of South Dakota affirmed his convictions. State v. Abdulrazzak, 828 N.W.2d 547 (S.D. 2013). In 2014, Abdulrazzak was released to the United States Immigration and Customs Enforcement. Doc. 13-2 at 2. He returned to South Dakota in 2016 and signed a new parole supervision agreement. Doc. 13-2 at 2.

[1] Abdulrazzak has filed two prior habeas petitions under 28 U.S.C. § 2254 with this Court. See Abdulrazzak v. Fluke, 4:19-CV-04025-RAL, Doc. 1; Abdulrazzak v. Fluke, 4:19-CV-04075-RAL, Doc. 1.

Four months later, Abdulrazzak was accused of violating conditions of his parole, and a hearing was held before the South Dakota Board of Pardons and Paroles (Board) on March 13, 2017. Abdulrazzak v. South Dakota Bd. of Pardons and Paroles, Civ. No. 17-1519, 3–5 (Second Judicial Circuit, Mar. 13, 2017).[2] The Board determined that Abdulrazzak had violated the conditions of his parole so his parole was revoked. Id. The Board's amended order and notice of entry was served on Abdulrazzak on April 21, 2017. Id. at Notice of Entry of Order and Certificate of Service, 6 (Apr. 21, 2017). Abdulrazzak served the Board with his notice of appeal on May 10, 2017. Id. at Certificate of Service, 10 (Filed on May 25, 2017). His notice of appeal was filed with the court on May 25, 2017. Id. at Statement of Issues; Verified Motion and Order to Waive Fees and Costs and to Appoint Counsel, 7–8 (May 25, 2017). Appellee filed a motion to dismiss and asserted that Abdulrazzak's appeal was untimely under SDCL § 1-26-31. Id. at Motion to Dismiss, 16 (June 5, 2017).

Abdulrazzak, through his attorney, argued that he gave prison staff his appeal documents on May 10, 2017, and the prison staff failed "to even get the filing to the clerk . . . Prison staff was able to serve the Board but [w]ere unable to provide the same documents to the clerk of courts." Id. at Brief in Opposition to Motion for Dismissal, 29–31 (June 15, 2017). A hearing was held on June 4, 2018, before the Honorable Lawrence Long, a judge for the Second Judicial Circuit for the State of South Dakota. Id. at Notice of Hearing and Certificate of Service, 47 (Apr. 24, 2018). A transcript of the hearing is not in the record. Abdulrazzak filed a motion for reconsideration, which Judge Long reviewed on June 15, 2018. Id. at Appellant Motion and Brief for Reconsider, 50–53 (June 15, 2018). In his motion for reconsideration, Abdulrazzak asked the state court to re-examine

[2] Abdulrazzak's civil state court file was provided to the Clerk of Court. This Court will hereafter cite to this file as "CIV. No. 17-1519" and refer to the document title, the page number within the file being cited, and the document's date of filing.

the evidence he presented and hold that his appeal was timely mailed, and any late filing was the clerk's error. Id. at 51.

On June 27, 2018, Judge Long granted Appellee's motion to dismiss and held that Abdulrazzak's appeal was untimely under SDCL § 1-26-31, declaring that he had considered the "written and oral arguments of the parties . . . ." Id. at Order Granting Motion to Dismiss, 66 (June 27, 2018). Abdulrazzak filed a notice of appeal to the Supreme Court of South Dakota. Id. at Notice of Appeal, 74 (July 25, 2018). The opinion of the Supreme Court of South Dakota stated in its "Facts and Procedural History" section that "on May 25, the Minnehaha County Court received and filed Abdulrazzak's pro se notice of appeal" and noted that "there is no separate evidentiary record establishing the date as May 10, 2017." Id.; Abdulrazzak v. Board of Pardons and Paroles, 940 N.W.2d 672, 676 n. 2 (S.D. 2020). The Supreme Court of South Dakota accordingly affirmed Judge Long's dismissal of Abdulrazzak's case. CIV. No. 17-1519, Judgment, 123 (Apr. 2, 2020).

Abdulrazzak filed a petition for rehearing/reconsideration to the Supreme Court of South Dakota and claimed that "evidence in[] the record established" the May 10, 2017 notice of appeal filing date and that "it was the circuit court who did not sign it until May 25. 2017." Case No. 28685, [3] Appellant's Petition for Rehearing/Reconsideration, 160 (March 13, 2020). Further, Abdulrazzak asserted in his petition for rehearing that the prison admitted that they received the appeal and mailed it out on May 11, 2017. Id. at 161. "It is unreasonable therefore for this Court to determine in its finding of facts . . . that Abdulrazzak's notice of appeal was received by mail

[3] The Supreme Court of South Dakota's review and documents were also filed with the Clerk of Court. This Court will refer to this document as Case No. 28685.

and filed 'by the clerk of court on May 25, 2017.'" Id. at 164–65. He further argues that the delay in filing his notice was due to the delay and oversight by the clerk of court. Id. at 165.

The Supreme Court of South Dakota denied Abdulrazzak's petition for rehearing and held that there was "no issue or question of law or fact appearing to have been overlooked or misapprehended . . . ." Id. at Order Denying Petition for Rehearing, 175–76 (March 31, 2020). Abdulrazzak filed his present writ for habeas corpus on October 21, 2020. Doc. 1. Respondents move to dismiss and argue that Abdulrazzak procedurally defaulted his claims and cannot show cause and prejudice or a fundamental miscarriage of justice to excuse the procedural default. Doc. 12 at 1.

B. Legal Analysis

Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies. 28 U.S.C. § 2254(b). Exhaustion requires giving the state courts "one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process" before presenting the issues in a federal habeas petition. O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999); see also Weaver v. Bowersox, 438 F.3d 832, 839 (8th Cir. 2006) (a petitioner's claims must be adjudicated on the merits by a state court). "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) (citing Picard v. Connor, 404 U.S. 270, 275–78 (1971)).

A petitioner's failure to properly exhaust state court remedies "in accordance with state procedure results in procedural default of the prisoner's claim." Welch v. Lund, 616 F.3d 756, 758 (8th Cir. 2010) (citing O'Sullivan, 526 U.S. at 848). When a prisoner does not properly exhaust his claims in state court, his claims are procedurally defaulted and the federal court is

generally barred from hearing the claims. See Abdullah v. Groose, 75 F.3d 408, 411 (8th Cir. 1996) (en banc); Wiegers v. Weber, 37 F. App'x 218, 219–20 (8th Cir. 2002) (per curiam). Interests of comity and federalism underlie the procedural default doctrine. Davila v. Davis, 137 S. Ct. 2058, 2064 (2017). A petitioner's procedurally defaulted claims are barred from federal review unless there is a showing of either cause and prejudice or actual innocence. Bousley v. United States, 523 U.S. 614, 622 (1998) (citations omitted).

Respondents argue that Abdulrazzak procedurally defaulted his claims because he did not timely file his appeal under SDCL § 1-26-31. Doc. 12. Abdulrazzak asserts his claims are not procedurally defaulted because the "state rule was not firmly established/regularly followed . . . ." Doc. 19 at 6. State rules like SDCL § 1-26-31 will not bar a habeas claim unless they are "firmly established, regularly followed, and readily ascertainable." White v. Bowersox, 206 F.3d 776, 780 (8th Cir. 2000) (citing Ford v. Georgia, 498 U.S. 411, 423–24 (1991)). "[F]ederal habeas relief will be unavailable when (1) a state court has declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement, and (2) 'the state judgment rests on independent and adequate state procedural grounds.'" Walker v. Martin, 562 U.S. 307, 316 (2011) (cleaned up and citation omitted).

The Supreme Court of South Dakota upheld the Circuit Court's opinion that Abdulrazzak's appeal was untimely under SDCL § 1-26-31. Abdulrazzak, 940 N.W.2d at 677. That Court also held that Abdulrazzak's appeal was untimely even with the three days added to the time under SDCL § 15-6-6(E). Id. at 678 (relying on In re Murphy, 827 N.W.2d 369, 371 (S.D. 2013)). Further, this Court previously concluded that § 1-26-32's requirements were an independent and adequate state law ground that bars federal review. See Brakeall v. Dooley, 4:17-CV-04112-LLP, 2018 WL 3468707, at *9 (D.S.D. Jan. 2, 2018), report and recommendation adopted, 2018 WL

3468226 (D.S.D. July 18, 2018); see also Pratt v. South Dakota, 4:17-CV-04115-LLP, 2017 WL 6812608, at *8 (D.S.D. Oct. 27, 2017), report and recommendation adopted, 2017 WL 6813136 (D.S.D. Nov. 27, 2017)); Kurtenbach v. Dooley, 5:15-CV-05063-JLV, 2016 WL 11407827, at * 10 (D.S.D. July 28, 2016), report and recommendation adopted, 2016 WL 5135915 (D.S.D. Sep. 21, 2016)).

Because SDCL § 1-26-31 is an independent and adequate state law ground to bar federal review and Abdulrazzak's state appeal was untimely, his current claims are procedurally defaulted. See Coleman, 501 U.S. at 735 n.1 (explaining that procedural default exists when the "petitioner failed to exhaust state court remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred."). Procedurally defaulted claims can only proceed if Abdulrazzak shows either actual innocence or that there was cause for the procedural default and actual prejudice to the petitioner. McNeal v. United States, 249 F.3d 747, 749 (8th Cir. 2001) (citing Bousley, 523 U.S. 614 at 622).

1. Cause

A demonstration of "cause" to excuse the procedural default "must be something external to the petitioner" and requires "that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Coleman, 501 U.S. at 753 (quoting Murray, 477 U.S. at 488). Abdulrazzak claims that his appeal was sent to the Minnehaha County Clerk of Court on May 10, 2017, and "[i]t is [] undisputed that the clerk of the court did not stamp the appeal as filed until the circuit court sign [sic] it on May 25, 2017." Doc. 19 at 20.

"Mistakes by courts or the clerk's office may constitute cause to excuse a petitioner's procedural default." Berry v. Fluke, 4:19-CV-04188-RAL, 2020 WL 6445848, at *6 (D.S.D. Nov.

3, 2020) (citing Hartman v. Bagley, 492 F.3d 347, 358 (6th Cir. 2007) (concluding that petitioner established cause for failure to timely appeal the denial of his state habeas petition where docket showed that copy of denial was sent only to petitioner, not his attorney, and where affidavit showed that no legal mail for the petitioner was received by the prison)) and Johnson v. Champion, 288 F.3d 1215, 1227–28 (10th Cir. 2002) (finding cause to excuse a procedural default where the clerk's failure to provide the petitioner with a certified court order made compliance with the state's procedural rules "practically impossible")).

Abdulrazzak now offers an unverified mail log showing that on May 11, 2017, something was sent to the "SD Board of Pardons & Paroles" and the "Court Administrator's Office 2nd Judicial Circuit," Docs. 21-1 at 11. Respondents claim that Abdulrazzak "presented no such proof in the state court proceedings and he has presented no such evidence in his present petition." Doc. 13 at 11. "[A] federal court is bound by the state court's factual findings unless the state court made a 'decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" Cole v. Roper, 783 F.3d 707, 711 (8th Cir. 2015) (quoting 28 U.S.C. § 2254(d)(2)). "Factual determinations made by state courts are presumed correct and petitioner bears the burden of rebutting that presumption by clear and convincing evidence." Id. (citation omitted). "A factual determination is not unreasonable 'merely because the federal habeas court would have reached a different conclusion in the first instance.'" Id. (quoting Wood v. Allen, 558 U.S. 290, 301 (2010)). "The existence of some contrary evidence in the record does not suffice to show that the state court's factual determination was unreasonable." Id. (citing Wood, 558 U.S. at 302–03).

After a review of the state court records, a finding of fact on this matter was made by the Supreme Court of South Dakota when it stated in its opinion that the Minnehaha County Clerk of

Court received and filed Abdulrazzak's notice of appeal on May 25, 2017. Abdulrazzak, 940 N.W.2d at 673. Abdulrazzak has already challenged this finding of fact and asserted it was the Clerk of Court's fault when he filed a petition for rehearing. See Case No. 28685, Appellant's Petition for Rehearing/Reconsideration, 160 (Mar. 13, 2020). The Supreme Court of South Dakota denied Abdulrazzak's petition for rehearing, noting "no issue or question of law or fact appearing to have been overlooked or misapprehended . . . ." Id. at Order Denying Petition for Rehearing, 175–76 (Mar. 31, 2020).

Thus, it is a finding of fact by the Supreme Court of South Dakota that the Minnehaha County Clerk of Court received and filed Abdulrazzak's notice of appeal on May 25, 2020, making his appeal untimely. Abdulrazzak's present claim that the cause of his default was the Clerk of Court's failure to timely file the notice of appeal is a plea for this Court to reconsider a fact found by the Supreme Court of South Dakota. This Court is bound by the state court's factual finding because it was based on a reasonable determination in light of the facts presented to the state court. See Cole, 783 F.3d at 711. Because Abdulrazzak has not established cause for his procedural default, this Court does not need to consider prejudice. Mathenia v. Delo, 99 F.3d 1476, 1481 (8th Cir. 1996).

2. Actual Innocence

Because Abdulrazzak has not shown cause, his procedurally defaulted claims can only proceed if he can show actual innocence. See Bousley, 523 U.S. at 622. Actual innocence is not an independent constitutional claim upon which habeas relief can be granted; instead, it is "a gateway through which a habeas petitioner must pass to have his otherwise [procedurally] barred constitutional claim considered on the merits." Schlup v. Delo, 513 U.S. 298, 315 (1995).

A successful claim of actual innocence requires the petitioner to support his allegations with new reliable evidence. Weeks v. Bowersox, 119 F.3d 1342, 1351 (8th Cir. 1997) (citation omitted). New reliable evidence means evidence not previously presented and "not available at trial and could not have been discovered earlier through the exercise of due diligence." Johnson v. Norris, 170 F.3d 816, 818 (8th Cir. 1999).

Abdulrazzak claims that his new evidence was filed in a civil rights lawsuit and are "personal records written by the parole agent herself" that "have no indication that at anytime petitioner left the unit without permission," thus supporting that he did not violate his parole agreement. Doc. 19 at 43. He also asserts new evidence in the form "sufficient facts of the parole agent and the parole agent supervisor retaliation act for petitioner's invoking his Fifth Amendment" to support this Court allowing his Fifth Amendment claim in a separate case to survive screening. Doc. 19 at 44.

First, Abdulrazzak's reference to this Court's order in a separate case that there were sufficient facts for his Fifth Amendment claim is not evidence but a determination about whether Abdulrazzak's allegations survive screening under 29 U.S.C. § 1915A. Doc. 19 at 43; Abdulrazzak v. Smith et al., 4:17-CV-04058-KES, Doc. 13. Next, the alleged personal records filed by the parole agent were not filed for this Court to review.[4] Even if he had filed this alleged record in this case, it would not be considered "new" evidence because it could have been reasonably discovered at the time his state parole was being revoked. See Johnson, 170 F.3d at 818. Abdulrazzak has not demonstrated that this evidence did not exist at the time his parole was being revoked and could not have been presented at that time.

[4] Abdulrazzak references exhibits in Abdulrazzak v. Smith et al., 4:17-CV-04058-KES. This Court has reviewed that case file and cannot find any such exhibits.

Abdulrazzak bears the burden to show actual innocence. Id. Abdulrazzak has failed to meet this burden. Thus, this Court cannot consider the claims in his petition as they are procedurally defaulted. When a prisoner does not properly exhaust his claims in state court, his claims are procedurally defaulted, and the federal court is generally barred from hearing the claims. See Abdullah, 75 F.3d at 411.

III. Certificate of Appealability

"[A] state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition." Miller-El v. Cockrell, 537 U.S. 322, 335 (2003) (citing 28 U.S.C. § 2253). "Before an appeal may be entertained, a prisoner who was denied habeas relief in the district court must first seek and obtain a COA from a circuit justice or judge." Id. at 335–36. Such a certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A "substantial showing" is one that demonstrates "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Abdulrazzak has failed to make a substantial showing that his constitutional rights were denied because his claims were procedurally defaulted. Thus, a certificate of appealability is not issued. See 28 U.S.C. § 2253(c)(2) ("A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.").

Therefore, it is hereby

ORDERED that Abdulrazzak's motion for recusal, Doc. 20, is denied. It is further

ORDERED that Respondents' motion to dismiss, Doc. 12, is granted. This Court denies issuing Abdulrazzak a certificate of appealability. It is finally

ORDERED that the remaining motions, Docs. 18, 21, 25, are denied as moot.

DATED July 1st, 2021.

BY THE COURT:

ROBERTO A. LANGE
CHIEF 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.	4:20-CV-04154-RAL JUDGMENT OF DISMISSAL

For the reasons contained in the Opinion and Order Granting Respondents' Motion to Dismiss, it is

ORDERED, ADJUDGED, AND DECREED that Petitioner's petition for writ of habeas corpus under 28 U.S.C. § 2254 is dismissed. Judgment is found in favor of Respondents and against Petitioner.

DATED July 1st, 2021.

BY THE COURT:

ROBERTO A. LANGE
CHIEF 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.	4:20-CV-04154-RAL OPINION AND ORDER DENYING PETITIONER'S MISCELLANEOUS MOTIONS AND DENYING A CERTIFICATE OF APPEALABILITY

On October 21, 2020, Haider Salah Abdulrazzak, an inmate at Mike Durfee State Prison, filed a petition for writ of habeas corpus under 28 § U.S.C. 2254. Doc. 1. Respondent filed a motion to dismiss, Doc. 12, which this Court granted on July 1, 2021. Doc. 28. Abdulrazzak now moves for appointment of counsel and for reconsideration of the denial of his petition or, in the alternative, for a certificate of appealability. Docs. 30 and 31. Abdulrazzak also filed a motion asking this Court to clarify whether it would issue a formal opinion on his prior motion for reconsideration. Doc. 40.

I. Motion for Reconsideration

Abdulrazzak moves for reconsideration of the denial of his petition under Federal Rule of Civil Procedure 59(e). Doc. 31. At the same time that he filed this motion, Abdulrazzak also appealed this Court's judgment to the Eighth Circuit Court of Appeals. Doc. 34. Under Federal Rule of Appellate Procedure 4(a)(4)(A), where a party files a timely Rule 59(e) motion to alter or amend a judgment, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion[.]" Fed. R. App. P. 4(a)(4)(A).

APPENDIX
B

> A notice [of appeal] filed before the filing of one of the specified motions or after the filing of a motion but before the disposition of the motion is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the court of appeals.

Fed. R. App. P. 4(a)(4) advisory committee notes for the 1993 Amendment; see also Banister v. Davis, 140 S. Ct. 1698, 1703 (2020) (holding that "[t]he filing of a Rule 59(e) motion within the 28-day period suspends the finality of the original judgment for purposes of an appeal" (internal quotation omitted)). A party intending to raise the same issue laid out in the preemptive notice of appeal need not file a new notice of appeal following the disposition of the Rule 59(e) motion because the preemptive notice becomes effective upon disposition of the Rule 59(e) motion. Fed. R. App. P. 4(a)(4) advisory committee notes for the 1993 Amendment. Should the party intend to also challenge the disposition of the underlying Rule 59(e) motion on appeal, a new notice of appeal must be filed upon the entry of final judgment. See Catherine T. Struve, 16A Federal Practice and Procedure § 3950.4 (5th ed. 2021).

Rule 59(e) does not specify the standards for alteration or amendment. See Fed. R. Civ. P. 59(e). In the Eighth Circuit, a court must find a "manifest error[]" of law or fact in its ruling to alter or amend its judgment under Rule 59(e). See Hagerman v. Yukon Energy Corp., 839 F.2d 407, 414 (8th Cir. 1988) (internal quotation omitted). But Rule 59(e) motions may not be used to introduce evidence, tender new legal theories, or raise arguments that could have been offered or raised prior to the entry of judgment. Id. A party may also move to alter or amend judgment to present newly discovered evidence. Id.

A. Timeliness

Under Rule 59(e), a motion to alter or amend a judgment must be filed no later than 28 days after the entry of judgment. Fed. R. Civ. P. 59(e). In Houston v. Lack, 487 U.S. 266, 276 (1988), the Supreme Court established the "prison mailbox rule," now codified in Federal Rule

of Appellate Procedure 4(c)(1), when it held that a "notice of appeal [is] filed at the time [the] petitioner deliver[s] it to the prison authorities for forwarding to the court clerk." See also Rules Governing § 2254 and 2255 Cases, Rule 4(d) ("A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing."). Federal Rule of Appellate Procedure 4(c)(1)(A) sets out additional rules requiring the inmate to show the date of deposit and proof of prepaid postage. Fed. R. App. P. 4(c)(1)(A). The Eighth Circuit has extended the prison mailbox rule "to a motion which, under [Federal Rule of Appellate Procedure] 4(a)(4), tolls the time for the filing of a notice of appeal." United States v. Duke, 50 F.3d 571, 575 (8th Cir. 1995). A motion to amend or alter a judgment under Rule 59 is such a motion. Fed. R. App. P. 4(a)(4)(A)(iv).

This Court entered judgment against Abdulrazzak on July 1, 2021. Under Rule 59(e) and Duke, Abdulrazzak had until July 29, 2021, to deliver a motion to amend or alter a judgment to the prison authorities for forwarding to the court clerk. Although his motion was not received by this Court until August 2, it is dated July 28, 2021. Doc. 31 at 26. Further, the certificate of service, also dated July 28, 2021, satisfies Rule 4(c)(1)(A) by substantially complying with the requirements of 28 U.S.C. § 1746, noting that first-class postage was prepaid, and setting out the date of deposit. Id. at 28. Thus, Abdulrazzak's motion was timely filed.

B. Cause

This Court found that Abdulrazzak procedurally defaulted on his claims when he failed to timely file his appeal of his parole revocation and that he could not show cause for the default necessary to overcome the procedural default. Doc. 28. Because Abdulrazzak could not establish cause for the default, this Court did not rule on prejudice. Id. at 9. Abdulrazzak argued that he submitted his parole revocation appeal to prison officials to be mailed on May 10, 2017. Id. at 3.

But the South Dakota Supreme Court found that his appeal never reached the Minnehaha County Clerk of Court until May 25, 2017, and was thus untimely. Id. at 4 (citing Abdulrazzak v. Bd. of Pardons and Paroles, 940 N.W.2d 672, 676 n.2 (S.D. 2020)). In dismissing his petition, this Court held that it was "bound by the state court's factual finding because it was based on a reasonable determination in light of the facts presented to the state court." Id. at 9 (citing Cole v. Roper, 783 F.3d 707, 711 (8th Cir. 2015)).

Cause is established when "the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). Cause "must be something *external* to the petitioner, something that cannot fairly be attributed to him[.]" Coleman v. Thompson, 501 U.S. 722, 753 (1991). This Court's ruling was correct in that it is bound by the state court's factual findings: Abdulrazzak's petition arrived at the Minnehaha County Clerk of Court on May 25, 2017, and was thus untimely. But that does not preclude a finding of adequate cause for default. If Abdulrazzak can show that his appeal was untimely because of an external, objective factor that impeded his efforts to comply with the South Dakota procedural rule, he can show cause.

Abdulrazzak claims that he submitted his appeal to prison staff to be mailed on May 10, 2017. Doc. 31 at 2. To support this claim, he includes his notice of appeal, statement of issues, order for transcripts, verified motion and order to waive fees and costs and appoint counsel, application and order for court appointed counsel, application for waiver of fees, and certificate of service, all of which were signed and dated May 10, 2017. 4:19-cv-04075-RAL Doc. 1-1 at 10–20. Additionally, the verified motion and order to waive fees and costs and to appoint counsel, application and order for court appointed counsel, and application for waiver of fees were notarized on May 10, 2017. Id. at 12, 16, 18. He also points to later efforts to file an appeal

by his attorney, who claimed to have mailed these materials to the necessary parties on May 19, 2017, in an affidavit of mailing signed and notarized on May 19, 2017. Id. at 35–36. Last, Abdulrazzak provides an unverified prison mail log showing that he mailed something to the South Dakota Board of Pardons and Paroles (the "Parole Board") and the Second Judicial Circuit Court Administrator's Office on May 11, 2017. Doc. 21-1 at 11.

Abdulrazzak puts forth sufficient evidence to show that he tried to timely file his notice of appeal. Although this Court remains bound by the South Dakota Supreme Court's factual finding that the appeal arrived on May 25, 2017, Abdulrazzak may still show cause by providing evidence of nondelivery. In Ivy v. Caspari, 173 F.3d 1136, 1140–41 (8th Cir. 1999), the Eighth Circuit found cause to overcome procedural default when a prison inmate attempted to mail a properly executed motion on July 5, 1989, which never arrived at its destination, then mailed a second identical motion five days later under the mistaken belief that he had to mail multiple originals. The Eighth Circuit held,

> It is the fact of nondelivery of a prisoner's timely and properly mailed motion, not the reason for that nondelivery, that constitutes cause for the procedural default. Thus, it is enough for [petitioner] to establish, as he has, that the nondelivery of the first petition was not the result of any want of attention on his part to the requirements of the State's filing deadlines.

Id. at 1141. Abdulrazzak has shown that nondelivery of his appeal was not the result of any want of attention on his part. Thus, he can show cause for his procedural default.

C. Prejudice

Abdulrazzak, however, cannot show prejudice to overcome the procedural default. For Abdulrazzak to show prejudice, he must establish that his claim has merit. To show prejudice, the habeas petitioner must show "not merely that the errors . . . created a *possibility* of prejudice,

but that they worked to his *actual* and substantial disadvantage[.]" United States v. Frady, 456 U.S. 152, 170 (1982).

Abdulrazzak raises four grounds for habeas relief in his petition. Doc. 1 at 5–11. First, he alleges that participation in his parole program required him to provide incriminating statements in violation of his Fifth and Fourteenth Amendment rights. Id. at 5–7. Second, he alleges that his parole officer submitted incorrect allegations and that he was not provided sufficient notice of the grounds for his parole revocation in violation of his Fifth and Fourteenth Amendment rights. Id. at 7–8. Third, he alleges that he was not provided sufficient notice that violation of his parole conditions would prompt revocation of his parole. Id. at 8–10. Fourth, he alleges that his parole conditions were improperly modified to add treatment requirements after he was sentenced. Id. at 10–11.

1. Violation of Right to be Free from Self-Incrimination

Abdulrazzak claims that certain conditions of his parole program required him to provide statements that would be self-incriminating. Id. at 5. Specifically, he argues that because he testified at his trial under oath that he did not commit the crimes for which he was convicted, admitting to those crimes in his parole program would subject him to potential perjury charges. Doc. 19 at 27.

Courts have ruled on this issue in a § 1983 context. In McKune v. Lile, 536 U.S. 24, 30–31, 48 (2002), the Supreme Court held that prison officials did not violate an inmate's Fifth Amendment rights when they imposed several punishments, such as reduction of visitation and work opportunities, removal of a personal television from the inmate's cell, and transfer of the petitioner to a maximum-security unit because the inmate refused to admit guilt, claiming potential perjury liability, as part of a Sexual Abuse Training Program (SATP). Importantly, the

Court noted that "respondent's decision not to participate in the Kansas SATP did not extend his term of incarceration. Nor did his decision affect his eligibility for good-time credits or parole." Id. at 38. The Eighth Circuit has considered McKune's applicability to claims of parole revocation in violation of Fifth Amendment rights, stating that such claims "raise[] potentially significant constitutional issues[.]" Bradford v. Mo. Dep't of Corr., 46 F. App'x 857, 858 (8th Cir. 2002) (per curiam).[1]

If revocation of Abdulrazzak's parole were entirely based on his refusal to self-incriminate in violation of his Fifth Amendment rights as part of his parole program, he might have a claim under McKune. But parole revocation resulted from Abdulrazzak failing to comply with several portions of his parole program, some of which did not require self-incrimination. See 4:19-cv-04075-RAL Doc. 1-1 at 55. Abdulrazzak was found to have violated parole conditions SA10 and SA13E.[2] Id. He was asked to complete a list of ten reasons why someone in his situation—convicted of possession of child pornography—might deny his or her offense. Id. at 73. Instead, he came up with five reasons of his own and copied five from the book provided to him. Id. An inspection of a smartphone he had showed that he has been searching for the Sports Illustrated Swimsuit Edition. Id. at 2. He was not supposed to have a smartphone or internet access. Id. He also did not comply with a polygraph test on October 19, 2016, and failed to follow directions for another polygraph test on October 24, 2016. Id. Further, he left his housing unit after being told not to do so following a failed polygraph test. Id. at 55. Thus, he

[1] Bradford is an unpublished opinion. Pursuant to Eighth Circuit Rule 28A, it has no precedential value. It is cited here to show that the Eighth Circuit has contemplated this specific application of McKune.

[2] SA10 reads, "I will comply with all instructions in matters affecting my supervision, and cooperate by promptly and truthfully answering inquiries directed to me by a Parole agent." Doc. 13-2 at 4. SA13E reads, "I will participate, cooperate, and complete any programs as directed." Id. at 5.

cannot show prejudice stemming from his refusal to self-incriminate because refusing to self-incriminate was not the only or even main violation of his parole conditions.

2. Incorrect Allegations and Insufficient Notice of Violations

Abdulrazzak argues that an allegation in his parole revocation report was incorrect and not supported by enough evidence to provide him with sufficient notice to properly defend himself. Doc. 1 at 7. He claims that this lack of notice constitutes a violation of his due process rights. Id. Specifically, he argues that his parole officer was incorrect to claim that he left his unit without permission and that because the parole revocation report did not provide more detail as to what happened, it did not provide him with sufficient notice to defend himself against the allegation that he left without permission. Id.

Abdulrazzak provides no evidence and makes no claims that he did not leave his unit without permission other than to argue that the records do not support this conclusion. Id. He correctly notes that the adult case note summary from his parole officer makes no reference to his leaving the unit without permission. Id.; see 4:19-cv-04075-RAL Doc. 1-1 at 72–73. But the probable cause hearing findings and the violation report, both of which were provided to Abdulrazzak before his revocation hearing, mention his leaving the unit without permission. 4:19-cv-04075-RAL Doc. 1-1 at 55; Doc. 13-2 at 2. Without any evidence provided by Abdulrazzak to the contrary, this Court is in no position to second guess the factual finding of the Parole Board that Abdulrazzak left his unit without permission.

Beyond challenging the facts of his revocation, Abdulrazzak also claims that he was provided with insufficient notice of those facts. Doc. 1 at 7. He argues that he was provided no information as to his leaving the unit without permission and explains that he only learned the date this occurred over a year after his revocation hearing. Id. The Supreme Court set out the

standard for required notice in a parole revocation in Morrisey v. Brewer, 408 U.S. 471, 489 (1972):

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

"For notice to be effective, it need only assure that the defendant understands the nature of the alleged violation." United States v. Sistrunk, 612 F.3d 988, 992 (8th Cir. 2010). Respondent contends that, under Morrisey, "[p]arole revocation proceedings are subject only to 'minimum requirements of due process.'" Doc. 13 at 13–14 (quoting Morrisey, 408 U.S. at 489). Morrisey did not declare the amount of due process afforded to parole revocations to be a minimum; rather, it determined the minimum requirements *of* due process for parole revocations, so Respondent misstates the rule in Morrisey. See Morrisey, 408 at 488–89 ("Our task is limited to deciding the minimum requirements of due process."). The standard is the six-part test in Morrisey.

Abdulrazzak fails to claim that any element of the six-part Morrisey test was not met. He alleges that he did not receive enough information, essentially arguing that the evidence against him was not disclosed or that he did not receive a written statement by the factfinders as to the evidence relied on. See Doc. 1 at 7. But the probable cause hearing findings laid out that he "left Unit C/CTP after receiving a verbal directive not to leave Unit C/CTP by Agent Werner following a failed polygraph." 4:19-cv-04075-RAL Doc. 1-1 at 55. While this may not have provided Abdulrazzak with an exact date, it provided him with enough information to "understand[] the nature of the alleged violation." Sistrunk, 612 F.3d at 992. Further, his parole

agent explained that he had undergone four polygraphs at the time revocation was recommended, significantly narrowing the possible dates referred to by the allegation. See Doc. 13-2 at 3. Thus, Abdulrazzak was provided with sufficient notice to properly defend himself.

3. Insufficient Notice of Consequences of Violations of Parole and Improper Revocation of Suspended Sentence

Abdulrazzak argues that he was not properly informed that violation of his parole conditions would result in a reimposed sentence. Doc. 1 at 8. He also argues that the Parole Board imposed conditions not authorized by the sentencing court and that it lacked the authority to do so. Id.

Both arguments are without merit. Although Abdulrazzak correctly notes that Box F, reading "[t]he inmate was given notice of the conditions of suspended sentence prior to violating the same[,]" was not initialed on the revocation hearing findings of fact, 4:19-cv-04075-RAL Doc. 1-1 at 8, condition SA15 of the parole standard supervision agreement, signed by Abdulrazzak, reads in part, "I understand and agree that any parole agent has the authority to place me in custody any time and begin revocation proceedings if I am alleged to be in violation of any conditions of this agreement, and that my supervision may be revoked." Doc. 13-2 at 5. This is sufficient notice of the consequences of violating parole conditions.

Abdulrazzak next cites Kelley v. S.D. Bd. of Pardons and Paroles, 869 N.W.2d 447 (S.D. 2015), believing it to support his argument that the Parole Board could not impose conditions beyond those imposed at his initial sentencing. Doc. 19 at 36-37. But in Kelley, the Supreme Court of South Dakota stated the opposite:

> However, absent limitations imposed by the sentencing court, "[w]e have recognized that the Board of Pardons and Paroles may impose conditions on a defendant's suspended sentence in addition to those imposed by the sentencing court so long as the additional conditions are reasonable and *not inconsistent* with those mandated by the court."

Kelley, 869 N.W. at 449 (alterations in original) (quoting Mann v. S.D. Bd. of Pardons and Paroles, 861 N.W.2d 511, 515 (S.D. 2015)). Abdulrazzak argues that the Parole Board's authority to revoke his parole and reimpose his suspended sentence stems from SDCL § 23A-27-19 and that this statute was amended on July 1, 2016. Doc. 19 at 37. According to Abdulrazzak, the Parole Board was bound to follow the sentencing court's conditions prior to the July 1, 2016, amendment, and thus allowing the Parole Board to enforce conditions of parole not included in his 2011 sentence is a violation of the ex post facto clause of the constitution. Id. But Kelley was decided before the July 1, 2016, amendment and explained that the Parole Board had the authority to enforce conditions of parole not included in the original sentence so long as the additional conditions were reasonable and not inconsistent with the sentence imposed by the court. Kelley, 869 N.W. at 449.

Abdulrazzak claims that parole condition SA13E, which required him to "participate, cooperate, and complete any programs as directed," was unreasonable because it was unconstitutionally vague. Doc. 19 at 39. He argues that the condition "did not plainly put [him] on notice that he will participate in the STOP treatment and he would undergo pre-release psychosexual evaluation." Id. In Austad v. S.D. Bd. of Pardons and Paroles, 719 N.W.2d 760, 768–69 (S.D. 2006), the South Dakota Supreme Court ruled on the reasonableness of two challenged parole conditions. In Austad, one of the challenged parole conditions read, "I understand that violation of any institutional rule before my actual release from the institution may be considered a violation of my supervision agreement." 719 N.W.2d at 768. The court ruled that the condition, which imposed the larger set of institutional rules of the South Dakota Department of Corrections, was not unreasonable. Id. at 768–69. Here, condition SA13E is not unreasonable and not unconstitutionally vague for similar reasons. SA13E need not specify every

program that Abdulrazzak would be required to complete; it was enough to put Abdulrazzak on notice that he would have to complete programs as directed.

The additional parole conditions were not inconsistent with the conditions imposed by the sentencing court. The sentencing court's conditions restricted Abdulrazzak, having been convicted of possessing child pornography, from "be[ing] 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 release[] from custody." Doc. 13-1 at 2–3. Although some of the parole conditions imposed restrictions on Abdulrazzak's ability to contact, socialize with, date, or otherwise interact with minors, these restrictions supplemented and did not contradict those of the sentencing court. Doc. 13-2 at 5. Thus, because the additional conditions were reasonable and not inconsistent with those imposed by the sentencing court, Abdulrazzak's claim that the revocation of his parole was improper because the Parole Board imposed additional conditions is without merit.

4. Improper Modification of Parole Agreement

Abdulrazzak claims that the Parole Board modified his parole agreement in April 2016 to unconstitutionally impose harsher conditions. Doc. 1 at 10. Specifically, he argues that he was not required to undergo sex offender treatment in his initial Individual Program Directive (IPD) or parole agreement in 2014, but he was required to do so in his subsequent parole agreement in 2016. Doc. 19 at 38. He claims that his initial lack of sex offender treatment was a determination by the Department of Corrections that such treatment was unnecessary and that this determination was impermissibly reversed by the Parole Board. Id.

Abdulrazzak argues that the Parole Board lacked the power to alter his IPD or parole agreement. Id. But he provides no support for his claim that this alteration was done by the Parole Board or by an agent of the Parole Board. Although he is correct that his parole agent,

Dusti Werner, stated in an affidavit that he needed to have a pre-release psychosexual assessment, this was not a decision made by Dusti Werner. See 4:17-cv-04058-KES Doc. 82-15 at 1. Instead, Werner was quoting from an e-mail she received from Brenna Carlson. Id. Carlson was, at the time, an employee of the South Dakota Department of Corrections. 4:17-cv-04058-KES Doc. 84 at 1. Abdulrazzak makes no showing that Carlson was acting under Parole Board authority and not Department of Corrections authority. Further, Abdulrazzak agreed to an Individualized Supervision Agreement as part of the South Dakota Department of Corrections Sex Offender Management Program providing that "failure to comply with any portion of this contract may be grounds for termination from the individualized supervision program and may result in a violation of [his] parole." 4:17-cv-04058-KES Doc. 82-2. His argument that these conditions were imposed by the Parole Board holds no merit.

Even if Abdulrazzak were correct as to which body imposed these conditions, South Dakota law contemplates parole modifications by the Parole Board. See SDCL § 24-15A-31;[3] SDCL § 24-15-27.[4] Abdulrazzak argues that Werner violated these statutes by failing to obtain prior approval before imposing new parole conditions. Doc. 19 at 42. However, as stated above, Werner did not impose a pre-release psychosexual assessment, but was quoting an e-mail from the Department of Corrections.

[3] "If the parolee or the parole agent wish to modify the terms, conditions, restrictions, and requirements contained within a parolee's parole agreement, the request shall be forwarded to the executive director of the board for approval."

[4] "If the parolee, the Department of Corrections, or the agent wish to modify board-ordered terms, conditions, restrictions, and requirements contained within a parolee's parole agreement, the request shall be forwarded to the executive director for submission to a panel or board. No board-ordered terms, conditions, restrictions, or requirements in a parole agreement may be modified without the concurrence of two board members."

Abdulrazzak cites South Dakota v. Blakney, 851 N.W.2d 195 (S.D. 2014), and United States v. Kent, 209 F.3d 1073 (8th Cir. 2000), for the proposition that "treatment programs . . . recommended by a non-judicial officer must be approved by the court before becoming effective." Blakney, 851 N.W.2d at 199. But Blakney and Kent pertain to probation, where probation officers imposed treatment program conditions beyond those ordered by the courts. Blakney, 851 N.W.2d at 199–200, Kent, 209 F.3d at 1078–79. Probation is a punishment, the conditions of which must be court-determined. See Kent, 209 F.3d at 1078 ("[T]he imposition of a sentence, including any terms for probation or supervised release, is a core judicial function." (quoting United States v. Johnson, 48 F.3d 806, 808 (4th Cir. 1995)). Parole in South Dakota, on the other hand, involves a parolee like Abdulrazzak entering into a parole agreement. In that parole agreement, Abdulrazzak not only acknowledged that he was subject to its conditions, but also agreed to those conditions. Blakney and Kent do not support Abdulrazzak's claim.

Further, Respondent notes that Abdulrazzak could have challenged the additional conditions of his parole once they were imposed. Doc. 13 at 21 (citing SDCL § 24-15A-40). These conditions were imposed in April 2016. Doc. 13-2 at 4–5. Respondent is correct that the time to appeal an administrative ruling such as conditions of parole is 30 days under SDCL § 1-26-31. Abdulrazzak did not challenge these conditions until after his parole was revoked in March 2017, well after the 30-day deadline. See 4:19-cv-04075-RAL Doc. 1-1 at 7–9. Thus, Abdulrazzak failed to exhaust claims challenging his parole conditions, and because this failure to exhaust occurred well before his revocation hearing, any cause to excuse default connected to his untimely mailed appeal does not excuse his failure to challenge his parole conditions.

Abdulrazzak's parole agreement was not improperly modified, and Abdulrazzak failed to timely challenge the modifications to his parole agreement. Abdulrazzak's claims are without merit.

II. Motion for Certificate of Appealability

In the alternative, Abdulrazzak seeks a certificate of appealability. Doc. 31. "[A] state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition." Miller-El v. Cockrell, 537 U.S. 322, 335 (2003) (citing 28 U.S.C. § 2253). "Before an appeal may be entertained, a prisoner who was denied habeas relief in the district court must first seek and obtain a [certificate of appealability] from a circuit justice or judge." Id. at 335–36. A certificate may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A "substantial showing" demonstrates that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). This Court finds that Abdulrazzak can show cause to overcome procedural default but cannot show prejudice. Abdulrazzak has not made a substantial showing that his constitutional rights were denied, so no certificate of appealability will issue. See 28 U.S.C. § 2253(c)(2) ("A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.").

III. Motion for Appointment of Counsel

Abdulrazzak also moves for the appointment of counsel. Doc. 30. "This court, however, cannot appoint counsel to litigants before the Eighth Circuit Court of Appeals unless the Court of Appeals requests or directs this court to rule on the matter." Smith v. United States Marshals, 2016 U.S. Dist. LEXIS 172573, at *3 (D.S.D. Dec. 12, 2016). Thus, this Court cannot rule on

Abdulrazzak's motion for the appointment of appellate counsel without direction from the Eighth Circuit and will deny that motion at this time.

Therefore, it is hereby

ORDERED that Abdulrazzak's motion for reconsideration, Doc. 31, is denied. It is further

ORDERED that Abdulrazzak's motion for a certificate of appealability, Doc. 31, is denied. It is further

ORDERED that Abdulrazzak's motion for appointment of counsel, Doc. 30, is denied at this time. It is finally

ORDERED that Abdulrazzak's motion to clarify, Doc. 40, is denied as moot.

DATED September 28th, 2021.

BY THE COURT:

ROBERTO A. LANGE
CHIEF JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-2738

Haider Salah Abdulrazzak

Petitioner - Appellant

v.

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

Respondents - Appellees

Appeal from U.S. District Court for the District of South Dakota - Southern
(4:20-cv-04154-RAL)

JUDGMENT

Before GRUENDER, SHEPHERD and STRAS, Circuit Judges.

This appeal is dismissed as moot. All pending motions are also denied as moot.

January 03, 2022

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

/s/ Michael E. Gans

APPENDIX
C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-2738

Haider Salah Abdulrazzak

Appellant

v.

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

Appellees

Appeal from U.S. District Court for the District of South Dakota - Southern
(4:20-cv-04154-RAL)

ORDER

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

February 23, 2022

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

/s/ Michael E. Gans

APPENDIX
D

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

HAIDER S. ABDULRAZZAK __ PETITIONER

VS.

JASON RAVNSBORG et, al. ___ RESPONDENTS

_____

PROFF OF SERVICE

I, Haider S. Abdulrazzak, do swear or declare that on this date 11th of May, 2022, as required by the Supreme Court Rule 29, I have served the enclosed APPLICATION TO EXTEND TIME TO FILE WRIT OF CERTIORARI PRESENTED TO JUSTICE BRETT M. KAVANAUGH, on each party to the above proceeding or the party's counsel and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of these served are as follows:

JONATHAN K. VAN PATTEN
South Dakota Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501

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

Executed on 11th of May, 2022.

Haider Abdulrazzak
(signature)