No. 22-5189 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

HAIDER S. ABDULRAZZAK — PETITIONER
(Your Name)

vs.

SOUTH DAKOTA STATE ATTORNEY GENERAL — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

EIGHTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

HAIDER S. ABDULRAZZAK
(Your Name)

101 N. Indiana Avenue
(Address)

Sioux Falls, SD 57103
(City, State, Zip Code)

(605)585-3275
(Phone Number) (mobile)

QUESTION(S) PRESENTED

Petitioner and Appellant Haider S. Abdulrazzak (Abdulrazzak) was convicted by state juries with possession of child pornography, in violation to SDCL § 22-24A-3(3), the state Supreme Court summarily affirmed the conviction on direct appeal, and state courts denied his application for habeas corpus.

Abdulrazzak then filed timely Federal Habeas corpus under 28 U.S.C § 2254. However due to limit space on the forms, Abdulrazzak wrote 4 claims on the given form and filed the others as exhibits (#1 - #4). These exhibits included claims raised by Abdulrazzak' s appointed attorney in state habeas proceeding, claims raised by Abdulrazzak in state court as pro e and the direct appeal from conviction in the State Supreme Court.

South Dakota district court however reached the merits, partially, only on the claims on the form and failed to consider all the other claims filed as exhibits. This Court refused to issue a Certificate of Appealability (COA) and the United States Supreme Court denied Petition for Certiorari. Abdulrazzak filed Motion in the district court under fed. R. Civ. P. 60(b), arguing that the court procedurally erred in denying the other claims.

The district court without proper opinion, or engaging whether the motion to filed under Fed. R. Civ. P. was a second habeas petition or the motion have a valid claims summary denied the motion, only reasoning that the case was closed because this Court denied issuing a Writ of Certiorari (US Supreme Court Case No. 20-6263). See *Abdulrazzak v. Fluke*, 2021 U.S. LEXIS 274, 141 S. Ct. 1101, 208 L. Ed. 2d 550 (U.S. Jan. 11,2021), and the Eighth Circuit Court denied the issuance of Certificate of Appealability (COA) on the same issues.

Therefore, the questions presented here are the same those submitted for the Eighth Circuit Court of Appeals to issue a Certificate of Appealability (COA):

(1) Whether the district court abused its discretion when it denied *Abdulrazzak's* motion to reopen (alter or amend) final judgment under Fed. R. Civ. P. 60(b), only reasoning the finality of the previous judgment.

(2) If the presiding judge's unfitness qualifies as the sort of "defect in the integrity of the federal habeas proceeding", where the records reflect evidence that the district judge patterns of ignorance and repeated judicial errors, about the laws controlling procedural defaulted claims, Petitioner was entitled to new district judge.

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.*

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

* Initially, Petitioner named both Brent Fluke, the warden of Mike Durfee State Prison at which he was incarcerated, and the Attorney General of the State of South Dakota. However, due to the fact that Petitioner is no longer incarcerated, the warden maintain no custody over him, and only South Dakota Attorney General remain as the Respondent.

RELATED CASES

Abdulrazzak v. Fluke, 2019 U.S. Dist. LEXIS 196590, 2019 WL 5964974 (D. S.D. Nov. 13, 2019) (Appendix F)

Abdulrazzak v. Fluke, 2019 U.S. Dist. LEXIS 214376 13 (D. S.D. Dec. 12, 2019) (Appendix G)

Abdulrazzak v. Fluke, No. 4:19-cv-04025 (D. SD. June 8, 2021) (Appendix C) (Docket # 40)

Abdulrazzak v. Fluke, No. 4:19-cv-04025 (D. SD. Aug. 27, 2021) (Appendix D) (Docket # 45)

Abdulrazzak v. Fluke, No. 4:19-cv-04025 (D. SD. Oct. 5, 2021) (Appendix E) (Docket # 54)

Abdulrazzak v. Fluke, USCA Case Number: 21-3184 (8th Cir. SD., Jan. 3, 2022) (Appendix A) (Docket # 55)

Abdulrazzak v. Fluke, USCA Case Number: 21-3184 (8th Cir. SD., Feb. 23, 2022) (Appendix B) (Docket # 56)

TABLE OF CONTENTS

INDIX TO APPENDICSES

- [Appendix A]: Copy of the Eighth Circuit Court of Appeals judgment denying to issue a Certificate of Appealability entered on January 3, 2022.

- [Appendix B]: Copy of the Eighth Circuit Court of Appeals judgment denying rehearing entered on February 23, 2022.

- [Appendix C]: Copy of South Dakota district court opinion/judgment denying Petitioner's motion to reopen filed under Fed. R. Civ. P. 60(b), entered on June 8, 2021.

- [Appendix D]: Copy of South Dakota district court opinion/judgment denying Petitioner's motion to reconsider the denial of motion reopen, together with denying to issue a Certificate of Appealability (COA) entered on August 27, 2021.

- [Appendix E]: Copy of South Dakota district court granting Petitioner's application to proceed *in forma paupers* in his separated application for application for Certificate of Appealability in the Eighth Circuit Court of Appeals entered on October 5, 2021.

- [Appendix F]: copy of South Dakota Federal District Court denying Petitioner's Petition for habeas corpus filed under § 2254, entered on November 13, 2019.
  Abdulrazzak v. Fluke, 2019 U.S. Dist. LEXIS 196590, 2019 WL 5964974 (D. S.D. Nov. 13, 2019)

- [Appendix G]: Copy of South Dakota Federal District court denying Petitioner motion for reconsideration of original denial of his habeas petition entered on December 12, 2019].
  Abdulrazzak v. Fluke, 2019 U.S. Dist. LEXIS 21437613 (D. S.D. Dec. 12, 2019)

- [Appendix H]: True copy of original habeas corpus petition filed under 28 U.S.C. § 2254, with all its exhibits filed in South Dakota district court.

  [Appendix H; Exhibit #1: Copy of the amended claims filed on Petitioner's behalf by his Attorney in state habeas proceeding].

  [Appendix H; Exhibit #2: Copy of Petitioner's amended Pro se claims filed in the state Habeas court proceeding].

[Appendix H; Exhibit #3: Copy of Petitioner's initial habeas claim filed in the State habeas court].

[Appendix H; Exhibit #4: Copy of Petitioner's claims exhausted on direct Appeal].

- [Appendix I]: Hon. Justice *Brett Kavanaugh* order extending the time to filer a writ of certiorari entered on May 23, 2022.

- [Appendix J]: Copy of the Eighth Circuit Court of Appeals judgment denying possession of Petitioner's state habeas corpus transcripts entered on August 13, 2020.

- [Appendix K]: Copy of South Dakota Federal District Court refusal to present evidence of possession of state habeas hearing transcripts, entered on August 25, 2020.

- [Appendix L]: Copy of South Dakota Federal District Court shows that no state habeas transcripts were ever filed.

- [Appendix M]: Copy of the State of South Dakota Supreme Court denial to issue a Certificate of Probable Cause to appeal, accompanied with a letter from Petitioner's appointed habeas attorney (Julie Hofer), dated

TABLE OF AUTHORITIES CITED

FEDERAL CASES: **PAGE #**

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED

FEDERAL STATUES

FEDERAL STATUES

FEDERAL RULES

STATE OF SOUTH DAKOTA STATUES

OTHER SOURCES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[✓] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix AG to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the United States district court appears at Appendix EC to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[✓] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was January 3, 2022.

[ ] No petition for rehearing was timely filed in my case.

[✓] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: February 23, 2022, and a copy of the order denying rehearing appears at Appendix B.

[✓] An extension of time to file the petition for a writ of certiorari was granted to and including July 23, 2022 (date) on May 23, 2022 (date) in Application No. 21 A 737.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First and Fourteenth Amendments right of access to courts, Fourteenth Amendment right to due process, 28 U.S.C. § 2254, Fed. R. Civ. P. 60(b).

I. SUMMARY OF THE CASE

Petitioner *Haider S. Abdulrazzak* ("*Abdulrazzak*" or "Petitioner") was convicted by state juries with possession of child pornography, in violation to SDCL § 22-24A-3(3), the state Supreme Court summarily affirmed the conviction on direct appeal, and state courts denied his application for habeas corpus.

Abdulrazzak then filed timely Federal Habeas corpus under 28 U.S.C § 2254. However due to limit space on the forms, *Abdulrazzak* wrote 4 claims on the given form and filed the others as exhibits (#1 - #4) [Appendix H]. These exhibits included claims raised by *Abdulrazzak'* s appointed attorney in state habeas proceeding, claims raised by *Abdulrazzak* in state court as pro e and the direct appeal from conviction in the State Supreme Court.

South Dakota district court however reached the merits, partially, only on the claims on the form and failed to consider all the other claims filed as exhibits. The Eighth Circuit Court of Appeals refused to issue a Certificate of Appealability (COA) and the United States Supreme Court denied Petition for Certiorari. *Abdulrazzak* filed Motion in the district court under Fed. R. Civ. P. 60(b), arguing that the court procedurally erred in denying the other claims, which was denied. The Eighth Circuit Court of Appeals denied Petitioner's Application for Certification of Appealability, and denied rehearing later, as well. Justice *Kavanaugh* granted petitioner's request to extend the time to file Petition for Certiorari and Writ of Certiorari to the Eighth Circuit Court of Appeals followed.

II. STATEMENT OF THE CASE:

Abdulrazzak currently is out of the state custody due to the "expiration of the terms of his sentence", was charged in the State of South Dakota with 14 counts of possession of child pornography. A state Jury found him guilty on all counts. However, the sentencing court

imposed sentence only on Counts I-VII, for a total of 21 years with 13 years suspended. No official sentence was imposed on counts VIII-XIV.

Abdulrazzak represented by a public defender, filed a direct appeal in the State Supreme Court arguing there was insufficient evidence to support a conviction in violation to his Fourteenth Amendment right to due process and unusual and harsh sentence in violation to his Eighth Amendment. The State Supreme Court summarily affirmed the conviction on the merits on January 14, 2013. See State v. Abdulrazzak, 2013 SD LEXIS 48, 828 N.W. 2d 547, 2013 WL 1296406 (S.D., Jan. 14, 2013).

Abdulrazzak shortly thereafter filed a timely state habeas corpus arguing 75 grounds for relief. The state court appointed an attorney for him, which later filed an amended petition raising 7 grounds for relief.

Abdulrazzak also proceeding pro se, without the assistance of his appointed attorney, amended his originally filed claims and filed other 11 grounds for relief. The state court directed to hold evidentiary hearing, and one was hold on September 20, 2016, and was continued to December 13, 2016, to permit additional testimony. *Abdulrazzak* also testified in both these hearing; both hearings were stenographed.

The state circuit court denied *Abdulrazzak* any relief on March 17, 2016, and *Abdulrazzak* represented by his attorney filed an application for Certificate of Probable Cause (equivalent to Certificate of Appealability) from the state circuit court on May 16, 2017, which was denied on the merits on June 21, 2018, and filed on June 27, 2018[1], and a timely application

[1] The state circuit court originally entered its opinion to deny the issuance of the certificate on February 2018, but failed to serve it upon the parties. Upon motion filed by *Abdulrazzak*, proceeding pro se, the state circuit court vacated its original order and re-entered a new order on June 21, 2017, to permit timely filing of Certificate of Appealability in the State Supreme Court.

for Certificate of probable cause filed in the State Supreme Court on July 6, 2018. *Abdulrazzak* also sent a letter to the State Supreme Court asking the Court to consider his 11 grounds for relief, together with the 7 claims filed by his attorney.

The State Supreme Court denied on the merits on January 18, 2019. *Abdulrazzak* appointed attorney informed him "this means that at this point, all of your appeals have been exhausted in state court. Any further relief have to come through a federal habeas action". (Appendix M).

Abdulrazzak thereafter filed a timely Petition for habeas corpus in South Dakota federal district court under 28 U.S.C. §2254, by mailing it to the court on January 31, 2019, and was docketed (4:19-cv-04025-RAL).

However, due to the limited space available on the form to (four claims) and instructions on the form that other claims can be filed on separate papers, *Abdulrazzak* filled the space given in the form and filed the other claims as exhibits (#1, #2, #3 and #4). [Appendix H].

Abdulrazzak wrote to the district court [*** IMPORTANT: Petitioner's Exhibits 1, 2, 3 & 4constitute Petitioner's complete grounds for relief in this petition and should be all consider in paragraph 12, page 6, as grounds for relief continuance).

The district court directed service upon the warden on April 18, 2019, and the Warden (and the State Attorney General) filed their answer on May 16, 2019. *Abdulrazzak* filed his reply on June 18, 2019, asking the court, in part, to provide him with copies of his state habeas evidentiary hearing held on September 20, 2016, and December 13, 2016, under 28 U.S.C. §2247 and 28 U.S.C. §2249.

The district court entered its opinion on November 13, 2019, without considering all the grounds raised as exhibits (1 through 4) and only considering the 4 grounds on the form. The

court also did not provide *Abdulrazzak* with a copy of his state habeas corpus hearing. See Abdulrazzak v. Fluke, 2019 U.S. Dist. LEXIS 196590, 2019 WL 5964974 (D. S.D., Nov. 13, 2019) [Appendix F].

Abdulrazzak thereafter filed a timely motion for reconsideration under Fed. R. Civ. P. 59(e), arguing in part, that he did not receive a copy of his state habeas evidentiary hearing transcripts (held on September 20, 2016, and December 13, 2016), which prevented him from arguing his grounds for relief under 28 U.S.C. § 2254(d)(2), neither the district court filed an opinion in connect with his claims for relief filed as exhibits #1, #2, #3 and #4, and the court ignoring of facts within the records that is in favor to him, since all were attached to the original petition.

The district court in its opinion filed on December 12, 2019, admitted its awareness that *Abdulrazzak* requested the transcripts of his state habeas proceeding. The court however *falsely* opinioned that "those transcripts and copies were provided to *Abdulrazzak* ... these transcripts were used and cited in the Eighth Circuit Court of Appeals opinion and order addressing the merits of *Abdulrazzak's* claims in 19-cv-04025... ". See Abdulrazzak v. Fluke, 2019 U.S. Dist. LEXIS 214376 at [*4] (D. S.D. Dec. 12, 2019) [Appendix G].

With respect to *Abdulrazzak's* other claims (filed as exhibits), the district court admitted its awareness of filing with the original petition. However, the court refused to consider them. The court submitted:

> "... he alludes to over 90 grounds for relief requested in exhibits to his petition in his state habeas petition. 19-cv-04025. State exhaustion is required, thus, only four claims were analyzed".
>
> Abdulrazzak, 2019 U.S. Dist. LEXIS 214376 at [*5]. [Appendix G]

The district court also refused to issue a COA. *Abdulrazzak*, proceeding pro se, filed a notice to appeal to the Eighth Circuit Court which is the equivalent to application for COA from the Circuit Court. The Eighth Circuit Court of Appeals Court denied the issuance of a COA. See *Abdulrazzak v. Fluke*, 2020 U.S. App. LEXIS 17909 (8th Cir. S.D., Apr. 27, 2020).

Abdulrazzak filed a petition for rehearing accomplished by affidavit under the penalty of perjury that he exhausted his state remedies since his attorney argued the claims within Exhibit #1, were all exhausted all the way to the State Supreme Court and were denied on the merits. Similarly, he argued as pro se his claims raised within Exhibits #2 and #3, without the assistance of his attorney and Claim #4, was also exhausted when it was argued on direct appeal *Abdulrazzak* also argued that the district court erred when it failed to liberally construe his pro se federal habeas petition as required by the Federal Rules and failed to permit *Abdulrazzak* to rectify his claims by resubmitting them on proper forms that should be given by the court. *Abdulrazzak* also argued that he is entitled to procedural rules that the district court " ... must accord the parties fair notice and opportunity to present their positions before dismissing the petition on procedural grounds"; citing *Day v. McDonough*, 547 U.S. 198, 210, 126 S. Ct 1675, 164 L. Ed. 2d 376 (2006).

Nonetheless, the Eighth Circuit Court of Appeals denied *Abdulrazzak's* motion for rehearing. See *Abdulrazzak v. Fluke*, 2020 U.S. App. LEXIS 19334 (8th Cir. S.D., June 19, 2020). Petitioner later on July 22, 2020, filed a motion to compel the Court of Appeals to present its evidence which may prove at certain time it received the state habeas transcripts. The motion was denied on August 13, 2020, stating it did not have these transcripts [Appendix J].

Abdulrazzak also filed a similar motion in the district court asking the court to present its records to prove that it possessed the state habeas transcripts when it decided his habeas petition

on November 13, 2019, which was denied by the court on August 25, 2020, [Appendix K]. opinioned that the court doesn't have to disclose its records to *Abdulrazzak. Petitioner* later on, was able to obtain the titles of the dockets filed by the parties within this case. These dockets did not reflect that such transcripts were ever presented to the court [Appendix L].

Abdulrazzak also filed an Application for Writ of Certiorari in the United States Supreme Court arguing the same, which was denied[2]. See *Abdulrazzak v. Fluke*, 2021 U.S. LEXIS 274, 141 S. Ct. 1101, 208 L. Ed. 2d 550 (U.S. Jan. 11, 2021) and later denied his petition for rehiring. See *Abdulrazzak v. Fluke*, 2021 U.S. LEXIS 1812, 2021 WL 1241031 (U.S. Apr. 5, 2021).

Abdulrazzak initiated the subject of this application for COA, when he filed a motion to Alter or Amend final judgment (reopen) the court dismissal some of his claims on procedural grounds under Fed. R. Civ. P. 60(b), when he mailed it to the district court on May 20, 2021, however, denied the motion *without* explaining its reasons or citing any legal authorities on June 8, 2021 [Appendix C]. The Clerk of the court also failed to inform *Abdulrazzak* about his ability

---

[2] But See *United States ex rel. Smith v. Baladi*, 344 U.S. 561, 565, 73 S. Ct. 391, 97 L. Ed. 2d 549 (1953) (the denial of certiorari in habeas corpus cases does mean nothing except that the certiorari is denied. It is without substantive significance); *Yee v. City of Escondido*, 48 U.S. 519,533, 112 S. Ct. 1522, 118 L. ed. 2d 153 (1992) (A denial of certiorari by the United States Supreme Court expresses no view on the merits of a claim).

4 Fed. R. Civ. P. 60(b) provides, "On motion and just terms, the court may relieve any party or its legal representative from 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 new trial under Rule 59(b)'

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by 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.

to file separate application for COA from the Eighth Circuit Court of Appeals and the court failed to mention whether its intention is to issue a COA or not.

Abdulrazzak thereafter filed a motion for reconsideration or in the alternative to issue a COA to permit him appeal to Eighth Circuit Court of Appeals, which was denied on August 27, 2021. [Appendix D].

Abdulrazzak filed a timely an (application for COA) from Eighth Circuit Court of Appeals, together with application to proceed in forma paupers, which was granted by the district court on October 5, 2021, [Appendix E], finding that the appeal is taken in good faith. A separate COA was filed with the Eighth Circuit Court of Appeals which was denied on January 3, 2022, [Appendix A] and later on denied rehearing on February 23, 2022. [Appendix B].

Petitioner filed application to extend the time to file a writ of Certiorari to the Eighth Circuit Court. Hon. Justice *Kavanaugh* granted the application on May 23, 2022. [Appendix I].

Therefore, this Application for certiorari to the Eighth Circuit Court of Appeals is timely filed.

III. REASONS FOR GRANTING THE PETITION

Violation of clearly established rules as dètermined by the United States Supreme Court precedent opinions controlling Fed. R. Civ. P. 60(b) in federal habeas petition filed by state inmate and as will be discussed below.

(A) Standard for Issuing a Certificate of Appealability) (COA):

Before a petitioner may appeal from a denial of habeas corpus petition under 28 U.S.C. §2254, he is required to obtain a Certificate of Appealability (COA). 28 U.S.C. §2253 (c)(l); Fed. R. App. P. 22(b)(l).

In *Buck v. Davis*, 137 S. Ct. 759, 777, 197 L. Ed. 2d 1 (2017), the United States Supreme Court opinioned:

> "A litigant seeking a Certificate of Appealability must demonstrate that a procedural ruling barring relief id itself debatable among jurists of reasons; otherwise, the appeal would not deserve engorgement to proceed further".

This Court also noted:

> "A claim can be debatable even though every jurist of reason might agree after the certification of Appealability (COA) has been granted and the case has received full consideration, the petitioner will not prevail".

Buck, 137 S. Ct. at 774. The Court opinioned that:

> "28 U.S.C.S § 2253 sets forth a two-step process: an initial determination whether a claim is reasonably debatable, and then, if it is, an appeal in the normal case. Judicial procedural does not mean to specify what procedures may be appropriate in every case But Whatever procedures are employed at the COA stage should be consonant with the limited nature of the inquiry".

Circuit Courts of Appeals "review for abuse of discretion a district court's Fed. R. Civ. P. 60(b)(6) determination". *Davis v. Kelly*, 855 F.3d 833, 835 (8th Cir. 2017). The Supreme Court in *Buck* noted:

> "The Rule 60(b)(6) holding Buck challenges would be reviewed for abuse of discretion during a merits appeal, and the parties agree that the COA question is therefore whether a reasonable jurist could conclude that the District Court abused its discretion in declining to reopen the judgment". *Buck*, 137 S. Ct. at 777.

Certain circumstances has been rules to be an abuse of discretion when the district court applied the correct legal standards, See e.g. *Ortega v. Uponor, Inc.*, (*In re Uponor, Inc.*), 716 F.3d 1057, 1065 (8th Cir. 2013) (A district court abuses its discretion when it "rests its conclusion on clearly erroneous factual findings or erroneous legal conclusions"; *Luxottica Grp., S.p.A. v. Airport Mini Mall, LLC*, 932 F.3d 1303, 1311 (11th Cir. 2019) (A district court abuses its discretion when it applies incorrect legal standards, follows improper procedures, or makes

findings of fact that are clearly erroneous). See also *Mitchell v. Rees*, 261 Fed. Appx. 825, 829 (6th Cir. 2008):

"A district court's decision to grant relief under Rule 60(b) is reviewed for an abuse of discretion. a district court abuses its discretion when it applies the incorrect legal standard, misapplies the correct legal standards, or relies upon erroneous finding of fact".

other circumstances also determined to be an abuse of discretion when the court rest its decision was an arbitrary. See. See *United States v. McTague*, 840 F.3d 184, 189 (4th Cir. 2016):

> "A district court abuses its discretion when it (1) acts arbitrary, as if neither by rule nor discretion, (2) fails to adequately take into account judicially recognized factors constraining its exercise of discretion, or rests its decision on erroneous factual or legal premises).

Circuit Courts of Appeals also concluded a district court also abuses its discretion when it failed to set its reasons for such opinions. See *LaSale National Bankv. County of DuPage*, 10 F.3d 1333, 1338 (7th Cir. 1993):

> (a "district court abuses its discretion when it [grant or] denies sanctions with no explanation, or with an explanation that is so conclusory that the appellate court cannot review the substance of its decision").

See also *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983):

> (Stating that a district court must provide an explanation for its decision such that an appeals court has a "basis for judging the exercise of the district judge's decision"). (internal quotation marks omitted).

(B) Petitioner presented the following questions as grounds for the relief he is asking this Court to grant:

(1) Whether the district court abused its discretion when it denied Abdulrazzak's motion to reopen (alter or amend) final judgment under Fed. R. Civ. P. 60(b), only reasoning the finality of the previous judgment.

(a) Denial of Rule 60(b) based on the finality of last judgment:

Abdulrazzak initially would submit that he is unaware of which standards, legal authority or Federal Rules upon which the district court concluded that he cannot reopen his case under

Rule 60(b) after the United States Supreme Court denied to issue a writ of certiorari to the Eighth Circuit Court of Appeals.

Even if the court refused to cite any legal authority of federal rules, the undisputed fact is the district court submitted in its opinion only the historic procedure of the case, and concluded that "... this case is closed, done and over". *Id.* The United States Supreme Court however permitted district court to reopen a habeas petition under Fed. R. Civ. P. 60(b). See *Gonzalez v. Crosby*, 545 U.S. 524, 527, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005) (Fed. R. Civ. P. 60(b)(6) permits a court to relieve a party from the effect of final judgment).

The Supreme Court permitted a district court to reopen is previous judgment only when the challenge is to the integrity of the procedure used by the district court. The court noted:

> (A [petitioner] is not filing a new habeas petition when he merely asserts that a previous ruling which precluded a merits determination was in error -- for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar).
>
> *Gonzalez*, 545 U.S. at 532 n.4.

The Eighth Circuit Court of Appeals has instructed that when a petitioner files a Rule 60(b) motion in a close habeas proceeding, a district court should "conduct [] a brief initial inquiry to determine whether the allegation in the Rule 60(b) motion in fact amount to a second or successive collateral attack under either 28 U.S.C. §2255 or 28 U.S.C. §2254". *Boyd v. United States*, 304 F.3d 813, 814 (8th Cir. 2002), *cert.* denied 538 U.S. 953 (2003). If the Rule 60(b) motion is actually a second or successive habeas petition, the district court should dismiss it for failure to obtain authorization from the Court of Appeals or, in its discretion, [] transfer the [motion] to the Court of Appeals". *Id*

The Eighth Circuit Court of Appeals defined "claim" as "an asserted federal basis for relief from a state's court's judgment of conviction or as attack on the federal court's previous

resolution of the claim on the merits". Williams v. Kelly, 858 F.3d 464, 469-70 (8th Cir. 2017). The Eighth Circuit Court of Appeals determined that:

> "no claims is presented if the motion attacks some defect in the integrity of the federal habeas proceeding or if the motion merely asserts that a previous ruling which precluded a merits determination was in error, for example, a denial for such reasons as failure to exhaust, procedural default, or statute of limitation bar".
>
> Williams, 858 F.3d at 469-70.

Abdulrazzak would submit that the district court failed to initially examine his Fed. R. Civ. P. 60(b) to determine whether the claims constitute a second or successive petition. The district court also was required to "consider a wide range of facts.

Those may include, in an appropriate case, the risk of injustice to the parties, and the risk of undermining the public's confidence in the judicial processes". Buck, 137 S. Ct. at 777-778.

The undisputed fact that *Abdulrazzak* was asking the court to reopen his claims filed within Exhibits (1 through 4) which the court dismiss without considering the merits for failure to exhaust. Abdulrazzak, 2019 U.S. Dist. LEXIS 214376 at [*5] [Appendix G].

Abdulrazzak also would submit he diligently appealed the denied claims on the procedural grounds and now established unusual circumstance and conditions beyond his control when the district court denied his claims based on factual errors that the claims were not exhausted. See Maday v. Sat. Pierre, 2020 U.S. Dist. LEXIS 151113, 2020 WL 4904055 [*5] (D. S.D. 2020):

> "Because this court relied on dispositive factual error regarding *Maday*' s access to court's claim, *Maday* has stated an exceptional circumstance that denied him a fair opportunity to *Abdulrazzak* therefore in submitting that the district court abused its discretion by its litigate his claim under rule 60(b)(6)".

failure to follow the correct legal standards when it denied the motion to reopen by merely stating the case [*id*] closed. See. *Peterone v. Werner Enters.*, 940 F.3d 425, 433 -34 (8th Cir. 2019) (A district court abuses its discretion when it applies an incorrect legal standards).

The district court also abused its discretion when it failed to explain its reasons for its decision or mere conclusory reasons, to permit this Court understand the basis for the appeal.

(b) District Court failed to liberally construing *Abdulrazzak' s* federal habeas corpus claims filed under 28 U.S.C. § 2254:

In *Rodriguez v. Fla. Dep't. of Corr.,* 748 F.3d 1073, 1076 (11th Cir. 2014), the Eleventh Circuit Court of Appeals determined:

> "There are two sources of procedural rules in § 2254 proceeding. The primary source is the Rules Governing§ 2254 Cases in the United States District Court (Habeas Rules). However, if Habeas Rules do not fully delineate the proper procedure, or if the requirements under these rules are not clear, courts may tum to the Federal Rules of Civil Procedure (Civil Rules) to fill any procedural gaps resolve lingering ambiguities).

Abdulrazzak would submit that "under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a state prisoner always gets one chance to bring federal habeas challenging his conviction". *Banister v. Davis*, 140 S. Ct. 1698, 1704, 207 L. Ed. 2d 58 (2020). Petitioner as pro se is entitled to liberally construing his habeas petition. See *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (A document filed pro se is to liberally construed, and a pro se complaint, however unartfully pleaded must be held to less stringent standards than formal pleadings drafted by lawyers). See also *Spencer v. Haynes*, 774 F.3d 467, 471 (8th Cir. 2014) (A court construes prose habeas petition liberally).

Pursuant to the Rules Governing § 2254 Cases R.2 and under revised R.3(b) in 2004:

> "The clerk of the court is obligated to accept and file a petition despite a failure to comply with requirements for form and filing set forth in Rules 2 and 3. The Advisory Committee believed that the better procedure was to accept the defective petition and require the petitioner to submit a correct petition that confirms to Rules 2 and 3".

Randy Hertz & James S. Leibman, *Federal Habeas Corpus Practice and Procedure*, 7th Edition, § [15.1] (Matthew Bender).

Abdulrazzak mailed to the district court all of his claims in his first petition. As discussed above, the district court acknowledged that fact. *Abdulrazzak*, 2019 U.S. Dist. LEXIS 214376 at [*5] [Appendix G]. These claims listed in separate pieces of papers attached as (Exhibits 1, 2, 3, and 4) [see generally Appendix H].

Abdulrazzak informed the district court that these exhibits constitute all his claims for relief, see supra page 7-8. The district court required to screen these pro se claims, liberally construe them, and inform *Abdulrazzak* about any deficiencies to be rectifying (i.e. all the claims should be on forms and not as separate sheets of paper). The district court failed to do so. In an unpublished decision set within USCS § 2254 R.4, it was noted that:

> "Advisory committee notes to R. Governing §2254 Cases U.S. Dist. Cts. 2, when read together with R. Governing§ 2254 Cases U.S. Dist. Cts. 4's requirement that judge "promptly examine" petition, showed that filers needed to be promptly notified of obvious deficiencies in their petitions so that they could timely corrected them".

Hung Viet Vu v. Kirkland, 363 Fed. Appx. 439 (9th Cir. 2010).

District courts historically provided pro se inmates with forms to file their habeas petitions. See *Parkers v. Arkansas*, 2013 U.S. Dist. LEXIS 4379, 2013 WL 1249629 [*2] (D. AR. 2013). Other district courts hold the same[3].

In *Harris v. Wallace*, 984 F.3d 641, 647 (8th Cir. 2021), The Eighth Circuit Court of Appeals granted petitioner's application for a COA, and remanded the case to the district court to consider all the remain claims that were submitted on separate sheets of paper.

---

[3] See e.g. *Werner v. Wall*, 2006 U.S. Dist. LEXIS 65917 [*4] (D. RI, 2006) (sending proper § 2254 forms to petitioner to submit his claims); *Graham v. South Carolina*, 2012 U.S. Dist. LEXIS 19535 [*6-*7] (D. SC., 2012) (same); *Johnson v. Dretke*, 2003 U.S. Dist. LEXIS 18297 (D. TX., 2003) (same).

The Eighth Circuit Court of Appeals opinioned:

> "*Harris* sufficiently pleaded the claim at issue. While all the supporting facts are not written on the habeas form, they are stated in the attachment Harris included within his petition. Between the habeas form and the attachment, which comprised a single filing, Harris alleged sufficient facts to apprise the district court and the state distinct basis for his claim ... The allegation in their habeas petition give adequate notice of the substance of Harris 's claim and the type of the evidence that could be expected to be developed as the case progress".

Harris 's Court concluded that "because the district court did not recognize *Harris's* claim, it never reaches the issue of procedural default or determined whether the *Martinez*[4] ... is applicable". Harris, 984 F.3d at 649. The Eighth Circuit Court of Appeals "remanded the case to the district court to hold evidentiary hearing to consider these matters in the first instance". Harris, 984 F.3d at 649.

Abdulrazzak would submit that because the district court failed to liberally construe his claims and failed to inform him about the deficiencies, and the requirements to file the petition on proper form, the court abused its discretion.

The Eighth Circuit Court of Appeals Court also should grant *Abdulrazzak* a relief and remand the case to the district court for proper consideration of his claims in according with Harris 's case, and to hold evidentiary hearing to proper determination of the existence of any default claims, as *Abdulrazzak* alleging that the district court committed a procedural error.

(c) Unexhausted claims or otherwise procedurally defaulted:

Even if The Eighth Circuit Court of Appeals is to determine that the district court is not required to provide Petitioner with the proper forms, it is undisputed that the district court dismissed *Abdulrazzak's* claims within [Appendix H] (Exhibit 1), all claims within exhibits# 2-4, as "unexhausted". *Abdulrazzak*, 2019 U.S. Dist. LEXIS 214376 at [*5] [Appendix G].

---

[4] *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012)

Harris 's Court concluded that "because the district court did not recognize *Harris's* claim, it never reaches the issue of procedural default or determined whether the *Martinez* ... is applicable". Harris, 984 F.3d at 649. The Eighth Circuit Court of Appeals "remanded the case to the district court to hold evidentiary hearing to consider these matters in the first instance". Harris, 984 F.3d at 649.

Abdulrazzak would submit that because the district court failed to liberally construe his claims and failed to inform him about the deficiencies, and the requirements to file the petition on proper form, the court abused its discretion.

The Eighth Circuit Court of Appeals also should grant *Abdulrazzak* a relief and remand the case to the district court for proper consideration of his claims in according with *Harris 's* case, and to hold evidentiary hearing to proper determination of the existence of any default claims, as *Abdulrazzak* alleging that the district court committed a procedural error.

Where a district court faced with unexhausted claims, the Eighth Circuit Court of Appeals, instructed district courts to follow four steps:

> "The four steps must consider before dismissing a habeas petition for failure to exhaust state remedies are: (1) Whether "the petitioner fairly presented the federal constitutional dimensions of his federal habeas corpus claims to the state courts"; (2) Whether the exhaustion requirement is nevertheless met because no "currently available, non-futile state remedies through which petitioner can present his claim" exist; (3) whether petitioner has demonstrated "adequate cause to excuse his failure to raise the claim in state court properly"; and (4) Whether the petitioner has shown actual prejudice to his defense resulting from the state court's failure to address the merits of his claim".
>
> Smittie v. Lockhart, 843 F.2d 295, 296 (8th Cir. 1988).

Abdulrazzak would submit that the district court in nowhere within its filed opinions any discussion for either of these steps, although the court dismissed the claims as unexhausted. See Abdulrazzak, 2019 U.S. Dist. LEXIS 214376 at [*5] (... state exhaustion is required, thus, only four exhausted claims were analyzed) [Appendix G].

The United States Supreme Court, procedurally, instructed the lower courts that:

> "Before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions. Further, the court must assure itself that petitioner is not significantly prejudiced by delay focus on the limitation issue, and "determine whether the interest of justice would be served" by addressing the merits or by dismissing the petition".

Day, 547 U.S. at 209.

Abdulrazzak would submit that the district court failed to permit the parties an opportunity to present their positions regarding the existence of any procedural default. See also *Dansby v. Hobbs*, 766 F.3d 809, 824 (8th Cir. 2014) (holding that district court is required to provide notice and opportunity to the parties to be heard when a federal court chooses to address procedural default on its own initiative).

Abdulrazzak would submit that the exhaustion requirement maybe satisfied when, first, the petitioner "fairly presented his claims to the highest state court. See *Anderson v. Harless*, 459 U.S. 4, 6, 103 S. Ct. 276, 74 L. Ed. 2d 3 (1982); *Picard v. Conner*, 404 U.S. 270, 276-78, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971). This circumstance is described as exhaustion by "presentation".

Second, the requirement is satisfied when the petitioner failed to fairly present his claims to the highest state court and is without an "available" state remedy by which to do so. See *Coleman v. Thompson*, 501 U.S. 722, 732, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991); *Castille v. Peoples*, 489 U.S. 346,351, 109 S. Ct. 1056, 103 L. Ed. 2d 380 (1989). This second circumstance is described as exhaustion by "procedural default".

The exhaustion is also satisfied when a claim presented on direct appeal to the State Supreme Court which ruled upon on the merits. See *Brown v. Allen*, 344 U.S. 443, 447, 73 S. Ct. 397, 97 L. Ed. 469 (1953):

"A claim raised in state court at trial and on direct appeal satisfies the exhaustion before requirement and that a habeas corpus petitioner need not also raise the claim in a collateral attack proceeding in federal court".

In the case beforehand, the undisputed fact is that *Abdulrazzak* filed all 92 claims in the initial federal habeas, which correctly noticed by the district court as discussed above. Petitioner's attorney informed him that at that point he exhausted all his claims in state courts and the next relief should be come from a federal court (Appendix M).

Abdulrazzak also exhausted the claims raised within on direct appeal, which was denied by the State Supreme Court on the merits.

Abdulrazzak therefore would submit that the district court abused its discretion when (1) determined as fact that the claims where not exhausted, and (2) when it failed to permit the parties to address, the claims; which the court believed were not exhausted, on procedural grounds before acting on its initiative and dismiss them as unexhausted.

These claims are cognizable grounds for relief under Fed. R. Civ. P. 60(b) because it's merely challenge the integrity of the proceeding at which the district court dismissed them for failure to exhaust. The Eighth Circuit Court of Appeals noted that:

"No claim is presented if the motion attacks some defect in the integrity of the federal habeas proceeding or if the motion merely asserts that a previous ruling which precluded a merits determination was in error, for example, a denial for such reasons as failure to exhaust, procedural default, or statute of limitations bar".

Williams, 858 F.3d at 470.

In *Phelps v. Alameida*, 569 F.3d 1120, 1140 (9th Cir. 2009), the Court noted:

"Although appellate courts rarely reverse a district court's exercise of discretion to deny a Rule 60(b) motion, they have reversed when denial of relief precludes examinations of the full merits of the case, explaining that in such instances even a slight abuse may justify reversal. A central purpose of Rule 60(b) is to correct erroneous legal judgment that, if left uncorrected, would prevent the true merits of a petitioner's constitutional claims from ever being heard. In such instances, this factor will cut in favor of granting Rule 60(b)(6) relief". *Id.*

Abdulrazzak also would submit that the Warden would not be prejudiced by granting a relief under Rule 60(b), to address the claims the district court dismissed as unexhausted since he should not expect finality on claims not discussed on its merits.

> "The whole purpose of Fed. R. Civ. P. 60(b) is to make an exception to finality. When a habeas petition is dismissed on flawed procedural grounds, there are no past effect of judgment that would be disturbed if the habeas proceeding were reopen for further consideration, and the state's interest in finality deserve little weight".

Bynoe v. Baca, 966 F.3d 972, 985 (9th Cir. 2020)

Abdulrazzak accordingly ask this Court to grant him relief on this point and remand the case to the lower courts with instruction to consider *Abdulrazzak* claims rose in exhibits 1-4, on the merits, which the district court alleged to be not exhausted.

(d) State Habeas Corpus Evidentiary Hearing Transcripts:

It is undisputed that that *Abdulrazzak* had evidentiary hearing on the merits of his habeas corpus claims on September 20, 2016 and December 13, 2016, at which witnesses from both parties testified under oath and the testimonies were stenographed. The district court admitted its knowledge that *Abdulrazzak* requested a copy of these transcripts. See Abdulrazzak, 2019 U.S. Dist. LEXIS 214376 at [*3-*4] [Appendix G].

Abdulrazzak submitted that he needed these transcripts as evidence that the factual finding entered by the state court is not supported by the records pursuant to 28 U.S.C. §2254(d)(2). See Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003):

> ("Factual determinations by state courts are presumed to be correct absent clear and convincing evidence to the contrary, 28 U.S.C.S. § 2254(e)(l), and a decision adjudicated on the merits in state court and based on factual determination will not be overturn on factual grounds unless objectively unreasonable in light of the evidence presented in the state court").

While the district court submitted it used these transcripts within its opinion entered. See *Abdulrazzak,* 2019 U.S. Dist. LEXIS 214376 at [*4] [Appendix G], it is in nowhere within the district court opinion any references to such transcripts. See generally, *Abdulrazzak v. Fluke*, 2019 U.S. Dist. LEXIS 196590, 2019 WL 5964974 (D. S.D. Nov. 13, 2019) [Appendix F].

Abdulrazzak is entitled to have a copy of these transcripts as a matter of right under the due process clause of the Fourteenth Amendment since he is proceeding pro se and the state must provide them. See *Lang v. District of Iowa*, 385 U.S. 192, 194, 87 S. Ct. 362, 17 L. Ed. 2d 290 (1966) (State must provide transcript of post-conviction proceeding); *Britt v. North Carolina*, 404 U.S. 226, 227, 92 S. Ct. 431, 30 L. Ed. 2d 400 (1971) (the state must provide an indigent defendant with a transcript of prior proceedings when it needed for an effective defense or appeal).

Furthermore, Rule 5(c) of the Rules Governing Habeas corpus Cases under §2254 in Federal District Courts, the Rule provides: "the answer must also indicate what transcripts (of pretrial, sentencing, or post-conviction proceeding) are available, when they can furnish, and what proceeding have been recorded but not transcripts ... ", *Abdulrazzak* would submit in nowhere within the state answer any references to the state habeas transcripts.

In *Townsend v. Sain*, 372 U.S. 293, 83 S. Ct. 745, 760, 9 L. ed. 2d 770 (1963), the United States Supreme Court noted that:

> "A district court sitting in habeas corpus clearly has the power to compel production of the complete state-court record. Ordinary such record -- including the transcripts of testimony (or if unavailable some adequate substitute such a narrative record), the pleadings, court opinions, and other pertinent documents is indispensable to determining whether the habeas applicant received a full and fair state court evidentiary hearing resulting in reliable findings -- of course, if because no record can be obtain, the district judge has no way of determining whether a full and fair hearing in finding of relevant fact was vouchsafed, he must hold one".

Abdulrazzak accordingly would submit that the district court abused its discretion when it failed, as a legal matter, to compel the state to provide the state habeas evidentiary hearing transcripts. The district court could not have verified wither *Abdulrazzak* received a fair hearing or whether the facts entered by the state courts are supported by the testimony or evidence presented, and *Abdulrazzak* was prejudiced by such abuse of discretion because he could not carry his burden and prove that the state court's facts not supported by the evidence. See also *Gardener v. California*, 393 U.S. 367, 370, 89 S. Ct. 580, 21 L. Ed. 2d 601 (1969):

> "Since our system is an adversary one, a petitioner carries the burden of convincing the appellate court that the hearing before the lower court was either inadequate or that the legal conclusions from the facts deduced were erroneous. A transcript is therefore the obvious starting point for those who try to make out a case for a second hearing".

Upon The Eighth Circuit Court of Appeals denial to issue a COA from the denial of the original habeas application, See *Abdulrazzak v. Fluke*, 2020 U.S. App. LEXIS 17909 (8th Cir. S.D., April 27, 2020), *Abdulrazzak* submitted to The Eighth Circuit Court of Appeals an affidavit on May 22, 2020, declaring under the penalty of perjury that he did not receive a copy of these transcripts.

Furthermore, on July 29, 2020, *Abdulrazzak* filed a Motion within the Eighth Circuit Court of Appeals to compel the Court to present its evidence that it possessed said transcripts and to provide him with a copy. The Eighth Circuit Court of Appeals denied the motion on August 13, 2020, stating " ... this court is in no possession of the requested transcripts". [Appendix J].

Abdulrazzak also submitted filed similar motion in the district court on August 18, 2020; to compel the court to present its records that it ever possessed the state habeas transcripts, as a matter of public records that he is entitled to review. See *Pratt & Whitney Can., Inc., v. United States,* 14 CL Ct. 268, 273 (1988) (considering as public records "[a]ll pleading, orders, notices, exhibits and transcripts filed in the ... Court).

Nonetheless, the district court denied that motion on August 25, 2020, stating in part "... this court sees no good reason to compel itself to produce its judicial records". [Appendix K]. *Abdulrazzak* however would submit that the only reason for the district court failure to disclose its records because it never possessed it and the state never produced them.

Abdulrazzak later on contacted the clerk of South Dakota federal district court asking for a copy of the titles of files filed within the court by parties. The clerk of the court mailed to *Abdulrazzak* a copy of these titled and these dockets are empty from whatsoever reference[5].

Abdulrazzak would submit that the district court abused its discretion when it denied him the access to these habeas transcripts, claimed the transcripts were existing, where it has never been filed. Also because no United Supreme Court decision neither and Circuit Court of Appeals held that pro se indigent inmates not entitled to their state habeas transcripts, this Court is required pursuant to the doctrine of stare decisis to provide *Abdulrazzak* with these transcripts. See *Arizona v. Grant*, 556 U.S. 332, 348, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009):

> "The doctrine of stare Decisis is of course essential to the respect accorded to the judgment of the court and to the stability of the law, but it does not compel the court to follow a past decision when its rational no longer withstands "careful analysis". Under the doctrine of stare decisis courts are generally bound by previous decisions on

the same issues. See e.g. *Dickerson v. United States*, 530 U.S. 428, 443, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). A district court must follow decisions from higher courts. *Rodriguez de Quijas v. Shearon/Am. Exp., Inc*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989). See also *Kimble v. Marvel Entm 't, LLC*, 576 U.S. 446, 135 S. Ct. 2401, 2409, 192 L. Ed. 2d 463

[5] *Abdulrazzak* accordingly is filing a motion in this Court to take judicial notice of these records as a fact and submitted within that motion a copy of these records as (Appendix L) for this Court to review.

(2015) ("*Stare decisis* -- in English, the idea that today's Court should stand by yesterday's decisions -- is 'a foundation stone of the rule of law'").

Abdulrazzak is entitled to access to these transcripts as a matter of due process and access to court pursuant to the First and Fourteenth Amendment and pursuant to the doctrine of stare decisis. *Abdulrazzak* is entitled for relief under Rule 60(b)(6) [as well Rule 52(b) and Rule 59(e)], and *Abdulrazzak* requesting for these transcripts as a matter of attacking the integrity of the proceeding in his federal habeas petition. See Ansoumana v. Gristede's Operating Corp., 255 F. Supp. 2d 197, 198, 2003 U.S. Dist. LEXIS 3470 (S.D.N.Y. 2003):

> "On motion for reconsideration, moving party must demonstrate that court failed to consider controlling decisions or factual matters that were put before it on underlying motion, and which, they had been considered, might reasonably lead to different result".

Abdulrazzak would submit that the State would not deny that it never presents the state habeas hearing transcripts held on September 20, 2016, and December 13, 2016. The district court abused its discretion when it determined factually that the state habeas hearing transcripts were in the records.

The doctrine of stare decisis is also applicable to the standards of construing *Abdulrazzak* initial application for habeas petition liberally, and his entitlement to chance to present a "cause and prejudice" as determined in *Day*. supra p. 10.

Abdulrazzak would submit that he satisfied the extraordinary circumstance because he is entitled to one federal habeas petition under 28 U.S.C. §2254. The risk of injustice that result from the district court refusal to consider claims properly filed as exhibits within his initial petition on wrong procedural grounds by the district court, is exist. "... the risk of injustice to the parties and the risk of undermining the public confidence in the judicial process". Buck, 137 S. Ct. at 778. The Ninth Circuit Court of Appeals also noted:

"Dismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protection of the Great Writ entirely, risking injury to an important interest in human liberty. Accordingly, in applying Fed. R. Civ. P. 60(b) is to those cases in which the true merits of a case might never be considered.

Phelps, 569 F.3d at 1140.

Because the procedural rules used by the district court was in error, reasoning, in part, the finality of its previous judgment, the denial to liberally construing his claims, denial to consider properly exhausted claims, refusal to permit the parties to file brief on (cause and prejudice) for unexhausted claims if any, *Abdulrazzak* satisfied the requirement to issue a COA. See *Martin v. Ark. Blue Cross & Blue Shield*, 299 F.3d 966, 969 (8th Cir. 2002) (en banc) (a district court abuses its discretion when there is lack of factual support for its decision, or when it fails to follow applicable law).

This Court opinioned that:

("The United States Supreme Court may review the denial of a Certificate of Appealability (COA) by lower courts. When lower courts deny a COA and the Court concludes that their reason for doing so was flawed, the Court may reverse and remand so that the correct legal standard may be applied").

Ayestas v. Davis, 138 S. Ct. 1080, 1089 n.2, 200 L. Ed. 2d 376 (2018).

It is therefore due to the fact the lower court summarily denied *Abdulrazzak's* Motion to reopen filed under Fed. R. Civ. P. 60(e) was merely to the *closing* of the case when this Court denied previously Petitioner's application for writ of Certiorari, and because, as discussed above, a motion to reopen permit lower courts to reopen to correct any procedural error, the decision of the lower court was flawed and this Court should grant this writ and reverse with instruction for further proceeding.

(2) *Where the records reflect evidence that the district judge is ignorant about the laws controlling procedural defaulted claims, Petitioner was entitled to new district judge*

Abdulrazzak also filed a motion in the district court (that was never considered), requesting that the presided district judge [Honorable Roberto Antonio *Lange*] to recuse himself from the case beforehand, due to facts supported by legal authorities, reflects pattern of ignorance about the laws controlling procedurally defaulted claims, and knowingly stating facts that he know to be false, and reference to evidence he know as a fact not exist (lying in the records).

Initially as a matter of procedural, Judge *Lange* dominated his ignorant about the laws controlling his discretion to proceed on Fed. R. Civ. P. 60(b) when he denied the motion due to the finality of the case, although the plan language of the rule permit reopening of closed cases. *Gonzalez*, 545 U.S. at 527.

- In *Abdulrazzak v. Fluke*, 2019 U.S. Dist. LEXIS 196590, (D. S.D. Nov. 13, 2019)[6]

the issue dominated his ignorant about the law is his believe that claims

raised in direct appeal are not to be considered properly exhausted, to the contrary of Rules long established by the United States Supreme Court which held:

> "A claim raised in a state court at trial on direct appeal satisfies the exhaustion requirement and that a habeas corpus petitioner need not also raised the claim in a collateral attack before proceeding in federal court".
>
> *Brown* 344 U.S. at 447.

The undisputed fact is *Abdulrazzak* submitted as Exhibit #4 [see Appendix H], his claim raised on direct appeal, and which the State Supreme Court affirmed the conviction on the merits.

[6] The district judge consolidated two different cases (#4:19-cv-04025-RAL [related to original criminal conviction] and #4:19-cv-04075-RAL [related to parole revocation proceeding]) in one opinion.

Abdulrazzak in his motion to for reconsideration remained the judge that he failed to consider that claim. The judge as discussed above denied the claim as unexhausted submitted "State exhaustion is required, thus only four exhausted claims were analyzed". *Abdulrazzak*, 2019 U.S. Dist. LEXIS 214376 at [*5] [Appendix G].

This opinion was not only related to this claim but to all other claims filed by *Abdulrazzak* as exhibits. "He alludes to over 90 grounds for relief requested in exhibits to his petition in his state habeas petition". Id. [Appendix G]

Judge *Lange* is unaware of the procedural rule, even if these claims were not directly exhausted is nonetheless exhausted where there is no further state proceeding remaining for such exhaustion under the doctrine of procedural default highlighted in *Coleman*, supra p. 23., which required the court to permit the parties to file briefs on the cause and prejudice issue as holed by *Day's* case. supra p. 22.

holding that "before acting on its own initiative, a court must accord the parties fair notice and opportunity to present their position". *Day*, 547 U.S. at 210. See *Abdulrazzak*, 2019 U.S. Dist. LEXIS 214376 at [*5] (he allotted to over 90 grounds for relief requested in exhibits to his petition in his state habeas. .." [Appendix G].

To this date, Judge *Lange* refused to recognize the Supreme Court authorities and instruction as discussed above to permit the parties to present their position regarding the exhaustion of these "over 90 grounds for relief'. Id. Judge *Lange* refuse to acknowledge whether there were any state remedies left to *Abdulrazzak* to exhaust his state 90 claims for relief.

Judge *Lange* also should be aware of the Supreme Court "instruction to liberally construing his claims and to hold it to a lesser pleading standard than other parties" and to permit

Abdulrazzak to file his claims on proper forms instead of dismissing them for failure to exhaustion". *Whitson v. Stone County Jail*, 602 F.3d 920, 922 n.1 (8th Cir. 2010).

Within the same case [4:19-CV-04025-RAL], *Abdulrazzak* had two evidentiary hearings in his state habeas court on September 20, 2016, and December 13, 2016, in which a transcripts were taken for the testimonies. Judge *Lange* blatantly lied in the records when he falsely claimed that the "transcripts and copies were provide to *Abdulrazzak*". *Abdulrazzak*, 2019 U.S. Dist. LEXIS 214376 at [*4] [Appendix G]. In nowhere within Judge *Lange* opinions any references to neither the state habeas transcripts, nor the state submitted that it provided such like copies to the court or *Abdulrazzak* in their answer filed in the district court on May 16, 2019 [... References to jury trial and sentencing transcripts will be made as (JT) and (ST) with each volume appropriately following the reference]. Answer at #3.

Also reading the plain language of Judge *Lange* opinion above, it appears that the Judge is unaware about the differences between state jury trial and state habeas evidentiary hearing transcripts since the Judge were referring to the state jury trial transcripts as the habeas hearing transcript, when Judge *Lange* submitted "This court also received transcripts for bond hearing, pretrial conference, jury trial and sentencing". *Abdulrazzak*, 2019 U.S. Dist. LEXIS 214376 at [*4] [Appendix G].

- In *Decory v. Young*, 2019 U.S. Dist. LEXIS 115370, 2019 WL 3035499 (D. S.D., Jul. 11,2019), Judge *Lange* repeated the same fact which reflect his ignorance about the proceeding controlling the procedural controlling procedurally defaulted claims and the state laws controlling state habeas statute of limitations.

The circumstances in *Decory* reflects that he filed his habeas petition under 28 U.S.C. §2254, on January 14, 2019. Id at [*1]. *Decory* did not exhaust his state remedies; he did not file

any state habeas corpus. Id at [*2]. *Decory* however filed a direct appeal from his conviction in the State Supreme Court, but later on he filed a motion to dismiss that appeal, which was granted by the Court on June 30, 2016. Id at [*2].

In ruling whether *Decory* still have state remedies to be exhausted, Judge *Lange* cited the old statute of SDCL § 21-27-3.1[7] which held that a habeas petition in state courts could be filed at any time. This language was repealed effectively July 1, 2012, and removed the phrase of anytime.

SDCL § 21-27, which control the proceeding of state habeas corpus, have been amended since July 1, 2012 to permit"... two years' statute of limitation applied to all applications for relief under this chapter. SDCL § 21-27-3.3.

Judge *Lange* opinioned:

> "Although *Decory* dismissed his direct appeal of his judgment of conviction and the time to file direct appeal has long since passed, he still has the opportunity to present the claims he makes in his § 2254 petition to the state court by way of state habeas petition".
>
> *Decory*, 2019 U.S. Dist. LEXIS 115370, 2019 WL 3035499 at [*4].

Judge *Lange* dismissed *Decory's* federal habeas petition for failure to exhaust to permit him to go back to the state courts to exhaust his state remedies although there are no further state remedies left. Judge *Lange* should be aware that *Decory 's* federal claims were procedurally defaulted at the time of filing and under the state statute of limitations (two years), he has no further state remedies to be exhausted since June 30, 2018. (Two years from when the state Supreme Court dismissed *Decory's* direct appeal on June 30, 2016).

---

[7] The old statute of SDCL § 21-27-3.1, reads "An application for relief under this chapter may be filed at any time except that proceeding thereunder cannot maintained while an appeal from the applicant's conviction and sentence is pending or during the time within such appeal may be perfected". This Language was repealed, effectively on July 1, 2012.

Judge *Lange* also should be aware that *Decory*'s state judgment of conviction became final when the state Supreme Court granted his motion to dismiss his direct appeal on June 30, 2016, and because there was no pending state habeas, there is no statutory tolling for the period of 1 year to file his federal habeas corpus under 28 U.S.C. § 2244(d)(l) and (2), and therefore the time was expired since (or about) June 30 2017.

Even if *Decory* still have time to file state habeas corpus on July 11, 2019 (the date which Judge *Lange* filed his opinion in *Decory*), Still *Decory*'s federal habeas should be considered untimely filed on January 14, 2019, under the AEDPA, because the statutory tolling has long expired on June 30, 2017 (one year from the dismissal of his direct appeal). See *Jackson v. Ault*, 452 F.3d 734, 735 (8th Cir. 2006):

> "It does not matter that [petitioner] ... state post-conviction relief application was timely under [state] law. The one-year AEDPA time limit for federal habeas filing cannot be tolled after it has expired".

The proper proceeding in *Decory* is that Judge *Lange* should permit the parties to file briefs on whether he should be entitled to equitable tolling as determined by United State Supreme Court. *Day*, 547 U.S. at 210, and whether Judge *Lange* failed to use the proper procedural requirement due to his ignorant about both federal and state laws controlling habeas petitions.

- In *Dowty v. B.O.P.*, 2015 U.S. Dist. LEXIS 7627, 2015 WL 269387 (D. S.D. Jan. 21, 2015), which related to a federal inmate who was challenging a state conviction, Judge *Lange* failed to use the correct federal procedural rules, and failed to direct the parties to file motions whether *Dowty* can establish cause and prejudice for his two unexhausted state claims due to failure to file state habeas corpus, while considered the claim exhausted on direct appeal. Id at [*9].

Due to the facts supported by legal authorities that Judge *Lange* showing of pattern of ignorance about the procedural default claims, and because *Abdulrazzak* previously asked for the judge to recuse himself for same reasons and fear of retaliation, Appellant filed a motion for Judge to recuse himself again.

While Judge *Lange* failed to consider the motion on the merits, the judge addressed similar motion in different case at which he claimed that his ignorance about the law is nothing but disagreement on opinions. *Abdulrazzak v. Fluke*, 2021 U.S. Dist. LEXIS 123361, 2021 WL 2711636 [*2] (D. S.D. Jul. 1, 2021).

However, as it was settled by the United States Supreme Court opinions, petitioner is entitled to new judge as procedural right under the due processes, where the Court made no different between a bias judge and a judge who is ignorant about the law. The Eighth Circuit Court of Appeals opinioned:

> " ... there can be no meaningful constitutional differences between trial that is fundamentally unfair because of the judge's possible bias, and on that is fundamentally unfair because of the judge ignorance about the law".
>
> *N. v. Russell*, 427 U.S. 328, 345, 96 S. Ct. 2709, 49 L. Ed. 2d 534 (1976).

Abdulrazzak would submit that the judge failed to defend his opinions filed within both *Decory* and *Dowty*, or showed to the contrary that he did permit the parties to filed briefs on the cause and prejudice. Judge *Lange* as well within the case beforehand has failed to show a reason for his failure to permit the parties to argue the cause and prejudice, or even to ask the Warden about which claims have been exhausted and which not.

Judge *Lange* also should be aware that *Abdulrazzak* is not an attorney, and therefore, he cannot appeal on behalf of either *Decory* or *Dowty*.

As discussed above, Judge *Lange* also lied about the existence of the state habeas transcripts, and failed on all different levels to take correctional act regarding the pure defection in his opinions regarding his ignorant about federal habeas procedural rules governing federal habeas corpus' petitions, and he would not hastate to file opinion he knows as a matter of fact is wrong (blatantly lying) or not supported by the records in order to satisfy the state position.

Even if the judge refuses to recuse himself, it is undisputed that Circuit Courts of Appeals retain the jurisdiction to reassign a case to a different district judge on remand, under certain circumstances under 28 U.S.C. § 2106[8], as determined by the United States Supreme Court. See *Liteky v. United States*, 510 U.S. 540, 554, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994):

("Federal appellate courts' ability to assign a case to a different judge on remand rests not on the recusal statutes alone, but on the appellate courts' statutory power to 'require such further proceeding to be had as may just under circumstances'. 28 U.S.C. § 2106").

In *Sentis Group, Inc., v. Shell Oil Co.*, 559 F.3d 888, 904 (8th Cir. 2009), the Eighth Circuit Court of Appeals opinioned:

> "Although in general, reassignment should be rest upon an appearance of bias or prejudice derived from an extrajudicial source, reassignment may be necessary based solely on events transpiring in current proceeding or court's statements or ruling they reveal such high degree of favoritism or antagonism as to make fair judgment impossible".

Abdulrazzak would submit that Judge *Lange* readiness to lie into the record and intentionally refusal to recognize the Supreme Court authorities and other federal rules, and his

[8] 28 U.S.C § 2106, provides: The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

ignorance about the law, which as discussed above made no different between a bias judge and ignorant about the law, *Abdulrazzak* is entitled that this case remanded with instruction that new district judge be assign.

In United States v. Sears, Roebuck & Co., 785 F.2d 777, 780 (9th Cir. 1986) cert. denied 479 U.S. 988 (1986), the Court advocated a three-part approach to be used in the absence of personal bias to determine whether circumstances warrant remanding to a new district judge. These are:

> "(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out his mind previously-expressed views or findings determination to be erroneous or based on evidence must be rejected, (2) Whether reassignment is advisable to preserve the appearance of justice, and (3) Whether reassignment would entail waste and duplication out of proportion to any given in preserving the appearance of fairness".

Sears, Roebuck & Co., 785 F.2d at 780. (quoting United States v. Arnett, 628 F.2d 1162, 1165 (9th Cir. 1979).

The Court further noted "A finding of any first two factors identified in *Arnett* support reassignment on remand". Sears, Roebuck & Co., 785 F.2d at 780. Other Circuit Courts of Appeals[9] adopted the same three-part approach, yet, there are no Eighth Circuit Court of Appeals opinions either to adopt or reject these approaches.

As discussed above, *Abdulrazzak* submitted facts supported by legal authorities that Judge *Lange* has a pattern of ignorance about the laws controlling federal habeas corpus, since on multiple occasions he dismissed petitions without directing that petitioners be provided with proper forms, pattern of lying on the records in order to enter order favorite to the state, without

[9] See e.g. in re IBM Corp., 45 F.3d 641, 645 (2nd Cir. 1995) (same); United States v. Guglielmi, 929 F.2d 1001, 1007 n.5 (4th Cir. 1991) (same); United States v. Aragon, 922 F.3d 1102, 1113 (10th Cir. 2019) (same); United States v. White, 846 F.2d 678, 696 (11th Cir. 1988) (same).

even ordering the state to file response on matter of procedural rules for fear that it may contradict with his lies/opinions, and pattern of ignorant about the federal rules controlling procedurally defaulted claims and to issue orders he know to be contradict with the United States Supreme Court opinions. It is also undisputed that Judge *Lange* may and would retaliate against *Abdulrazzak's* properly exhausted claims due to his [*Abdulrazzak*] multiple complaints about Judge *Lange* knowledge about the laws.

In other cases, filed by *Abdulrazzak,* Judge *Lange* went to the level to deny exhibits he previously acknowledge its existence merely to meet with the warden stories filed by *Abdulrazzak.* Compare, *Abdulrazzak v. Fluke*, 2019 U.S. Dist. LEXIS 196590, 2019 WL 5964974 [*24-* 25] (D. S.D. Nov. 13, 2019) (taking Judicial notice of certain exhibits) [Appendix F] with, *Abdulrazzak v. Fluke*, 2021 U.S. Dist. LEXIS 123361, 2021 WL 2711636 [*13-*14] (D. S.D. Jul. 1, 2021) (denying the existence of same exhibits).

Abdulrazzak would submit that he is entitled to different district judge on remand due to the judge ignorant about the law and favoritism towards the state to the level of lying in the records, and for the fairness of the proceeding.

IV. CONCLUSION:

The district court abused its discretion when it denied *Abdulrazzak* motion under Fed. R. Civ. P. 60(b) base on the finality of the judgment; the district court also abused its discretion by its failure to permit *Abdulrazzak* to amend his petition on proper form and for its refusal to reopen on ground of defective in its previous opinion when it dismissed properly failed claims on

procedural grounds and its failure to direct the Warden to file opinions regarding which claims have been exhausted and which was not[10].

The decision of the lower courts contradicts with well settled opinions by this Court and Accordingly, *Abdulrazzak* pry to this Court to grant his pro se application for COA and to appoint him an attorney upon, to properly argue the merits of this application.

Petitioner entitled procedurally to obtain his state habeas transcripts.

Petitioner also entitled to proper consideration for all his exhausted claim (over 90) which the district judge acknowledged its presentation when *Abdulrazzak* filed his habeas petition at the state level either through direct appeal, presented by his appointed attorney or the claims raised as pro se by petitioner himself. Or in the alternative to present argument before the court dismiss the claims as "unexhausted", by permitting Petitioner to submit briefs on the "cause and prejudice"

Please look at my case and consider my hard working as a pro se to write to you and my consistent to reopen my case. I did not have the transcripts of my state habeas hearing and the judge refuse to consider my filed claim as exhibits although he acknowledges their existence.

Please you are my last hope to reopen my case and have the state attorney response to the existence of the transcripts, and reverse even summerly to have the state attorney response.

The writ should be granted.

---

[10] *Abdulrazzak* on October 13, 2021, sent a letter to Respondents' attorney of records asking for the state stipulations to the facts of the existence of the state habeas transcripts and to the existence of the claims filed by his attorney both by direct appeal or post-conviction and by him as a prose. However, todate, *Abdulrazzak* have not received any response back either to affirm the stipulation or deny it.

Respectfully submitted.

Dated this July 21, 2022

Haider S. Abdulrazzak
101 N. Indiana Avenue
Sioux Falls, SD 57103

Phone (mobile): (605)585-3275
Email: haider.abdulrazzak1@gmail.com

Petitioner/ Pro Se