UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-3184

Haider Salah Abdulrazzak

Plaintiff - Appellant

v.

Brent Fluke; Attorney General for the State of South Dakota

Defendants - Appellees

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

JUDGMENT

Before GRUENDER, SHEPHERD, and STRAS, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. Appellant's motion to disclose records and the motion for judicial notice are also denied. The appeal is dismissed.

January 03, 2022

Appendix
A

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

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-3184

Haider Salah Abdulrazzak

Appellant

v.

Brent Fluke and Attorney General for the State of South Dakota

Appellees

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

ORDER

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

February 23, 2022

Appendix B

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

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

HAIDER SALAH ABDULRAZZAK, Plaintiff, vs. BRENT FLUKE, ATTORNEY GENERAL FOR THE STATE OF SOUTH DAKOTA, Defendants.	4:19-CV-04025-RAL ORDER DENYING POST-DISMISSAL AND POST-APPEAL RECONSIDERATION

This Court issued an Opinion and Order Dismissing Petitioner's claims, Doc. 1, and dismissed this case back on November 13, 2019, Doc. 18. This Court denied Petitioner's motion for reconsideration through another Opinion and Order dated December 12, 2019. Doc. 24. Petitioner appealed, and the United States Court of Appeals for the Eighth Circuit, on April 27, 2020, denied issuance of a certificate of appealability after review of the record, Doc. 28, and later denied a petition for rehearing en banc, Doc. 29. Petitioner filed a petition for writ of certiorari to the Supreme Court of the United States, which was denied in January of 2021. This case is closed, done and over.

Yet, on May 24, 2021, Petitioner filed a Motion to Alter or Amend Final Habeas Corpus Judgment, continuing his arguments for relief. Doc. 39. Petitioner invokes Rule 60 of the Federal Rules of Civil Procedure and then reargues claims he has lost in this case. For good cause, it is hereby

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ORDERED that the Motion to Alter or Amend Final Habeas Corpus Judgment, Doc. 39, is denied.

DATED this 8th day of June, 2021.

BY THE COURT:

s/ Roberto A. Lange

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.	4:19-CV-04025-RAL ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION AND OTHER MOTIONS

This Court issued an Opinion and Order Dismissing Petitioner's claims, Doc. 1, and dismissed this case on November 13, 2019, Doc. 18. This Court denied Abdulrazzak's motion for reconsideration through another Opinion and Order dated December 12, 2019. Doc. 24. Abdulrazzak appealed, and the United States Court of Appeals for the Eighth Circuit, on April 27, 2020, denied issuance of a certificate of appealability after review of the record, Doc. 28, and later denied a petition for rehearing en banc, Doc. 29. Abdulrazzak filed a petition for writ of certiorari to the Supreme Court of the United States, which was denied in January of 2021. On May 24, 2021, Abdulrazzak filed a Motion to Alter or Amend Final Habeas Corpus Judgment under Rule 60 of the Federal Rules of Civil Procedure. Doc. 39, in which he reargued his previous claims. This Court denied this motion in an Order dated June 8th, 2021. Doc. 40.

Abdulrazzak now files a Motion to Reconsider the Denial of Reopening His Habeas Petition Filed Under 28 U.S.C. § 2254 and Application for Certification of Appealability (COA). Doc. 41. Again, Abdulrazzak reargues his previous claims under Federal Rule of Civil Procedure

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60(b) and presents no new grounds for relief that would fall under Rule 60(b). Similarly, Abdulrazzak makes no showing that a Certificate of Appealability is appropriate.

Abdulrazzak also files a motion to proceed in forma pauperis, Doc. 42, and a motion to appoint counsel, Doc. 44. As Abdulrazzak has no claim to pursue, these motions are moot. For good cause, it is hereby

ORDERED that Abdulrazzak's Motion for Reconsideration and for a Certificate of Appealability, Doc. 41 is denied. It is further

ORDERED that Abdulrazzak's motion to proceed in forma pauperis, Doc. 42, is denied as moot. It is finally

ORDERED that Abdulrazzak's motion to appoint counsel, Doc. 44, is denied.

DATED this 27th day of August, 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.	4:19-CV-04025-RAL ORDER GRANTING PETITIONER'S MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

Plaintiff, Haider Salah Abdulrazzak, filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Doc. 1. Respondents filed a motion to dismiss, Doc. 8, which this Court granted. Doc. 17. Judgment was entered against Abdulrazzak, and he filed a notice of appeal. Docs. 18 and 20. Abdulrazzak also filed a motion to reconsider, Doc. 19, which this Court denied. Doc. 24. The Eighth Circuit Court of Appeals denied Abdulrazzak's application for a certificate of appealability and dismissed his appeal. Doc. 28. Abdulrazzak then filed a motion to alter judgment, Doc. 39, which this Court denied. Doc. 40. In response, Abdulrazzak filed a motion for reconsideration of this Court's denial of his motion to alter judgment, Doc. 41, which this Court denied as well. Doc. 45.

Abdulrazzak has filed a notice of appeal regarding this Court's denial of his motion to alter judgment and denial of his motion for reconsideration. Doc. 46. He filed a motion for leave to appeal in forma pauperis and has included a prisoner trust account report. Docs. 47 and 48. The Eighth Circuit historically has looked to district courts to rule on in forma pauperis motions for appeal and has held that the filing-fee provisions of the PLRA do not apply to habeas corpus

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actions. Malave v. Hedrick, 271 F.3d 1139, 1140 (8th Cir. 2001). To determine whether a habeas petitioner qualifies for in forma pauperis status, the court need only assess (1) whether the petitioner can afford to pay the full filing fee, and (2) whether the petitioner's appeal is taken in "good faith." 28 U.S.C. § 1915(a)(1), (3). Abdulrazzak's prisoner trust account report indicates that he has average monthly deposits to his prisoner trust account of $83.42 and an average monthly balance of $56.94. Doc. 48. Abdulrazzak's appeal appears to be taken in good faith. Abdulrazzak has insufficient funds to pay the $505.00 appellate filing fees, so his motion for leave to appeal in forma pauperis is granted.

Accordingly, it is

ORDERED that Abdulrazzak's motion for leave to appeal in forma pauperis, Doc. 47, is granted.

DATED this 5th day of October, 2021.

BY THE COURT:

ROBERTO A. LANGE
CHIEF JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

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

I. Claims and Procedural History

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

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

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

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

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

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

II. Facts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Exhaustion Requirement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Conclusion and Order

For the reasons explained above, it is hereby

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

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

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

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

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

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

DATED this 13th day of November, 2019.

BY THE COURT:

ROBERTO A. LANGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

HAIDER SALAH ABDULRAZZAK, Plaintiff, vs. BRENT FLUKE, ATTORNEY GENERAL FOR THE STATE OF SOUTH DAKOTA, Defendants.	4:19-CV-04025-RAL JUDGMENT OF DISMISSAL

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

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

ORDERED that no certificate of appealability issues.

DATED this 13th day of November, 2019.

BY THE COURT:

ROBERTO A. LANGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

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

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

I. Motions for Reconsideration[1]

A district court's decision on a motion for reconsideration rests within its discretion. Hagerman v. Yukon Energy Corp., 839 F.2d 407, 413 (8th Cir. 1988). "Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present

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

Appendix G

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

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

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

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

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

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

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

II. Motions to Appeal without Prepayment of Fees

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

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

III. Order

Accordingly, it is

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

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

DATED this 12th day of December, 2019.

BY THE COURT:

ROBERTO A. LANGE
UNITED STATES DISTRICT JUDGE

Petition for Relief From a Conviction or Sentence By a Person in State Custody

(Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus)

Instructions

1. To use this form, you must be a person who is currently serving a sentence under a judgment against you in a state court. You are asking for relief from the conviction or the sentence. This form is your petition for relief.

2. You may also use this form to challenge a state judgment that imposed a sentence to be served in the future, but you must fill in the name of the state where the judgment was entered. If you want to challenge a federal judgment that imposed a sentence to be served in the future, you should file a motion under 28 U.S.C. § 2255 in the federal court that entered the judgment.

3. Make sure the form is typed or neatly written.

4. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.

5. Answer all the questions. You do not need to cite law. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a brief or arguments, you must submit them in a separate memorandum.

6. You must pay a fee of $5. If the fee is paid, your petition will be filed. If you cannot pay the fee, you may ask to proceed in forma pauperis (as a poor person). To do that, you must fill out the last page of this form. Also, you must submit a certificate signed by an officer at the institution where you are confined showing the amount of money that the institution is holding for you. If your account exceeds $ _____ , you must pay the filing fee.

7. In this petition, you may challenge the judgment entered by only one court. If you want to challenge a judgment entered by a different court (either in the same state or in different states), you must file a separate petition.

8. When you have completed the form, send the original and ____ copies to the Clerk of the United States District Court at this address:

Clerk, United States District Court for
Address
City, State Zip Code

If you want a file-stamped copy of the petition, you must enclose an additional copy of the petition and ask the court to file-stamp it and return it to you.

9. **CAUTION: You must include in this petition all the grounds for relief from the conviction or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.**

10. **CAPITAL CASES: If you are under a sentence of death, you are entitled to the assistance of counsel and should request the appointment of counsel.**

Appendix H

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District: South Dakota
Name (under which you were convicted): HAIDER SALAH ABDULRAZZAK	Docket or Case No.:
Place of Confinement: Mike Durfee State Prison	Prisoner No.: 04373
Petitioner (include the name under which you were convicted) HAIDER SALAH ABDULRAZZAK	Respondent (authorized person having custody of petitioner) v. BRENT FLUKE
The Attorney General of the State of: SOUTH DAKOTA	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:
Second Circuit Court, Minnehaha County Circuit Court, Sioux Falls, South Dakota

(b) Criminal docket or case number (if you know): CR10 5422

2. (a) Date of the judgment of conviction (if you know): June 30, 2011

(b) Date of sentencing: December 20, 2011, Final written on Jan. 20, 2012

3. Length of sentence: 21 years with 13 years suspended and 180 days credit

4. In this case, were you convicted on more than one count or of more than one crime? ☑ Yes ☐ No

5. Identify all crimes of which you were convicted and sentenced in this case: Convicted with 14 counts of Possession of Child Pornography and sentenced for 3 year with 2 years suspended for Counts I, II, III, IV V and VI sentenced for 3 years ~~suspended~~ with 1 year suspended on Count VII. No sentence was imposed on Count VIII through XIV (see attached exhibit 10)

6. (a) What was your plea? (Check one)

☑ (1) Not guilty ☐ (3) Nolo contendere (no contest)

☐ (2) Guilty ☐ (4) Insanity plea

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? N/A

(c) If you went to trial, what kind of trial did you have? (Check one)

☑ Jury ☐ Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

☑ Yes ☐ No

8. Did you appeal from the judgment of conviction?

☑ Yes ☐ No

9. If you did appeal, answer the following:

(a) Name of court: South Dakota Supreme Court

(b) Docket or case number (if you know): 26274

(c) Result: Affirmed

(d) Date of result (if you know): January 14, 2013

(e) Citation to the case (if you know): 2013 S.D. LEXIS 48, 828 N.W.2d 547

(f) Grounds raised: I) Whether there was Sufficient Evidence t Support the Jury Verdict; II) Whether the Sentence Imposed by trial Court Violates Appellant's Eighth Amendment Rights. See generally Attached Exhibit 4

(g) Did you seek further review by a higher state court? ☐ Yes ☑ No

If yes, answer the following:

(1) Name of court: N/A

(2) Docket or case number (if you know): /

(3) Result: /

(4) Date of result (if you know): /

(5) Citation to the case (if you know): /

(6) Grounds raised: /

(h) Did you file a petition for certiorari in the United States Supreme Court? ☐ Yes ☑ No

If yes, answer the following:

(1) Docket or case number (if you know): /

(2) Result: /

(3) Date of result (if you know): /

(4) Citation to the case (if you know): /

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? ☑ Yes ☐ No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: Second Circuit, Minnehaha County, Sioux Falls

(2) Docket or case number (if you know): Civ. 13-2004

(3) Date of filing (if you know): June 18, 2013

(4) Nature of the proceeding: Habeas Corpus Petition

(5) Grounds raised: ineffective assistance of Counsel, see generally attached Exhibit 3, others amended See Exhibits 1 and 2 (the amended grounds submitted in Exhibit 1 was raised and argued by Petitioner's attorney "Julie Hafa" while Exhibit 2 claims presented by Petitioner as Pro Se without assistance by attorney submitted in Petitioner's own words to the Circuit Court/Minnehaha County)

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☑ Yes ☐ No

(7) Result: Petition Denied. See Attached Exhibit 5

(8) Date of result (if you know): March 17, 2017

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: N/A

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☐ No

(7) Result:

(8) Date of result (if you know):

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☐ No

(7) Result: /

(8) Date of result (if you know):

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: ☒ Yes ☐ No

(2) Second petition: ☐ Yes ☐ No

(3) Third petition: ☐ Yes ☐ No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

N/A

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: Counsel was ineffective for not filing suppression Motion for the audio recorded interrogation in violation to Petitioner Fifth, Fourteenth Amendment.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Petitioner was subjected to a custodial interrogation in his apartment under the totality of circumstance without the benefit of "Miranda" warning. Petitioner at time was newly arrived to the United states (6 months). The interrogation was secretly recorded and later used in Petitioner's trial. (See Exhibit i, Page 2-3)

(b) If you did not exhaust your state remedies on Ground One, explain why:

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☑ No

(2) If you did not raise this issue in your direct appeal, explain why: Was not raised because South Dakota Supreme Court do not usually look at claims of ineffectiveness on direct appeal

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☑ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Habeas Corpus Petition

Name and location of the court where the motion or petition was filed: Second circuit Court, Minnehaha County Circuit, Sioux Falls, SD

Docket or case number (if you know): Civ. 13-2004

Date of the court's decision: March 17, 2017

Result (attach a copy of the court's opinion or order, if available): denied (see attached Exhibit 6)

(3) Did you receive a hearing on your motion or petition? ☑ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☑ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☑ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: South Dakota Supreme Court, Pierre, South Dakota

Docket or case number (if you know): #28056

Date of the court's decision: January 18, 2019

Result (attach a copy of the court's opinion or order, if available): denied (See attached Exhibit 9)

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

N/A

(c) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: only State Habeas proceeding available

GROUND TWO: Trial Counsel failure to file motion to supress Petitioners Interview with Detective due to language barriers, Violation Fifth & Fourteenth Amendments

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Petitioner's attorney failed to file motion to supress his interview with detective Kuchenreuther from December 22, 2009 because petitioner did not understand the language line interpreters interpretation. Petitioner speak Iraqi Arabic language and have difficulty in communicating with other Arabic Non Iraqi language. See Exhibit 1 Page 3

(b) If you did not exhaust your state remedies on Ground Two, explain why: was exhausted

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☒ No

(2) If you did not raise this issue in your direct appeal, explain why: South Dakota Court Proceeding usually do not permit claims of ineffective assistance of Counsel on direct appeal

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition for Habeas Corpus

Name and location of the court where the motion or petition was filed: Second Circuit Court, Minnehaha County Court, Sioux Falls, South Dakota

Docket or case number (if you know): Civ. 13-2004

Date of the court's decision: March 17, 2017

Result (attach a copy of the court's opinion or order, if available): denied (See attached Exhibit 6)

(3) Did you receive a hearing on your motion or petition? ☒ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☒ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☒ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: South Dakota State Supreme Court, Pierre, South Dakota

Docket or case number (if you know): # 28656

Date of the court's decision: January 18, 2019

Result (attach a copy of the court's opinion or order, if available): denied (See attached Exhibit 9)

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

N/A

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two : only state habeas corpus available.

GROUND THREE: Petitioner could not understand the Proceeding of trial and Counsel failed to obtain Arabic Iraqi, violate MY Sixth Amendment

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Petitioner who is from Iraq, didnot understand the Egyption Arabic interpreter who interpret the trial proceeding. Petitioner Properly informed Counsel about his difficulty in communicating with the interpreter. Petitioner could not understand what I was saying considering the facts of the difficulty or the terms used by the State and Petitioner's own Counsel. (See exhibit Exhibit 1, Page 41)

(b) If you did not exhaust your state remedies on Ground Three, explain why: Was exhausted

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☑ No

(2) If you did not raise this issue in your direct appeal, explain why: South Dakota Court generally do not allow ineffective assistance claim on direct appeal

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☑ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition of State habeas Corpus

Name and location of the court where the motion or petition was filed: Second Circuit Court, Minnehaha County Court, Sioux Falls, SD

Docket or case number (if you know): Civ. 13-2004

Date of the court's decision: March 17, 2017

Result (attach a copy of the court's opinion or order, if available): denied (See attached Exhibit 6)

(3) Did you receive a hearing on your motion or petition? ☑ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☑ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☑ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: South Dakota State Supreme Court, Pierre, South Dakota

Docket or case number (if you know): #28656

Date of the court's decision: January 18, 2019

Result (attach a copy of the court's opinion or order, if available): Denied. (See attached Exhibit 9)

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

N/A

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: Only State Habeas Corpus available

GROUND FOUR: Counsel failure to investigate Petitioner's Potential alibi evidence violating Petitioner's Sixth and Fifth Amendment

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Petitioners Counsel at trial didnot investigate Petitioner's Potential alibi evidence regarding the dates and times that the child Pornography was accessed, downloaded and Viewed. Petitioner had alibi witnesses as I was not near the Computer or in apartment at all at the time at least 2 images were downloaded which support the fact the petitioner did not downloaded these images

(b) If you did not exhaust your state remedies on Ground Four, explain why: Was exhausted

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☒ No

(2) If you did not raise this issue in your direct appeal, explain why: South Dakota Court Laws and proceeding usually donot permit claims of ineffective assistance of Counsel to be raised on direct appeal

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition of State Habeas Corpus

Name and location of the court where the motion or petition was filed: Second Circuit Court, Minnehaha County Court, Sioux Falls, South Dakota

Docket or case number (if you know): CIV. 13-2004

Date of the court's decision: March 17, 2017

Result (attach a copy of the court's opinion or order, if available): denied (See attached exhibit 6)

(3) Did you receive a hearing on your motion or petition? ☒ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☒ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☒ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: South Dakota State Supreme Court, Pierre, South Dakota

Docket or case number (if you know): #28656

Date of the court's decision: January 18, 2019

Result (attach a copy of the court's opinion or order, if available): denied (See attached exhibit 9)

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

N/A

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: only State Habeas Corpus Proceeding available

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? ☐ Yes ☑ No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them: Petitioner unsure since Petitioner believe he Recieved Ineffective assistance at habeas trial level on his Pro Se grounds (exhibit #2), However Petitioner sent letter to the State Supreme Court to tell the court about this grounds and Never get response.

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

No

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? ☐ Yes ☑ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available. N/A

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? ☐ Yes ☑ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: don't know/not sure

(b) At arraignment and plea: Michael W. Hanson, 505 W. 9th Street, Suite 100, Sioux Falls, SD 57104

(c) At trial: Michael W. Hanson, 505 W. 9th street, suite 100, Sioux Falls, SD 57104

(d) At sentencing: Michael Hanson, 505 W. 9th street, suite 100, Sioux Falls, SD 57104

(e) On appeal: Nicole J. Laughlin, Minnehaha County Public Defender, 413 North Main Avenue, Sioux Falls, SD 57104

(f) In any post-conviction proceeding: Julie Hofer, Minnehaha County Public Advocate, 415 N. Dakota Avenue, 3rd floor Sioux Falls, SD 57104

(g) On appeal from any ruling against you in a post-conviction proceeding: Julie Hofer, 415 N. Dakota Avenue, 3rd floor, Sioux Falls, SD 57104

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? ☐ Yes ☑ No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

N/A

(b) Give the date the other sentence was imposed: N/A

(c) Give the length of the other sentence: N/A

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? ☐ Yes ☐ No N/A

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.*

Petitioner filed direct appeal (timely) to the State of South Dakota Supreme Court and a judgment affirmed the conviction entered on January 14, 2013 (See attached Exhibit 5) at which time tolled. Petitioner would have another 90 days (3 months) at which time tolled for filing a petition for certiorari in the United States Supreme Court (Petitioner

did not file said petition) the period ends on or about April 15, 2013. The time would run again until filing Petitioner of Habeas Corpus in State Court on at which timely filed June 18, 2013, the Circuit Court entered judgment denying Petitioner Habeas Corpus on March 17, 2017 (see attached Exhibit 6) and order Quashing the Circuit Court Provisional Writ of Habeas Corpus on May 23, 2017 (see attached Exhibit 7) Petitioner thereafter filed (timely) for Certificate of Probable Cause at which denied on Feb. 2018. However, because the Court did not properly informed Petitioner about it decision, a new order entered and filed on June 27, 2018 (see attached Exhibit 8). Thereafter petitioner filed timely for certificate of Probable Cause with the State Supreme Court on July 6, 2018. and the Supreme Court denied the Certification on January 18, 2019 (See attached Exhibit 9) ["The one year statute of limitation is tolled in accordance with § 2244(d)(2) while a "Properly filed application for state Post-conviction or collateral review is Pending. The time between the conclusion of a direct appeal and filing of state court habeas application does not toll "McMullen v. Roper, 599 F.3d 849, 852 (8th Cir 2010). Therefore excluding the period between April 2013 - June 2013 this Habeas is timely filed.

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* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief: ①Direct Respondent to bring Petitioner along with cause of detention infront this court for hearing ②Declare Pet/Movant's sentence null & void and relieve Petitioner of all restraints imposed thereby.

or any other relief to which petitioner may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on 01/31/2019 (month, date, year).

Executed (signed) on 01/31/2019 (date).

Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

N/A

PETITIONER'S APPENDIX FOR EXHIBITS' SUBMISSION

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted.

Dated this 31 day of January, 2019

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

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

* *

HAIDER ABDULRAZZAK, *

Petitioner, * CIV. 13-2004

V. * AMENDED APPLICATION FOR WRIT OF HABEAS CORPUS

*

ROBERT DOOLEY, Warden, Mike Durfee State Prison, *

Respondent. *

* *

Comes now Haider Abdulrazzak, hereinafter referred to as the "Petitioner", by and through his attorney of record Julie A. Hofer, and respectfully petitions this Honorable Court to issue a Writ of Habeas Corpus on his behalf, pursuant to S.D.C.L. §21-27, et seq., and hereby alleges the following in support thereof:

1. Petitioner is currently an inmate in the South Dakota State Penitentiary, Mike Durfee State Prison;

2. Robert Dooley, hereinafter referred to as "Respondent", is the Warden having charge of and supervisory authority over, the Mike Durfee State Penitentiary;

3. On September 9, 2010, Petitioner was charged by Indictment in Minnehaha County with fourteen counts of Possession of Child Pornography in violation of SDCL 22-24A-3.

4. The Minnehaha County Public Defender's Office was appointed to represent Petitioner. Subsequent to that

Appendix H
Exhibit 1

appointment, Petitioner retained attorney Mike Hanson to represent him on these charges.

5. Circuit Court Judge Peter Lieberman presided over the jury trial from June 28 to June 30, 2011. The jury found Petitioner guilty of every single charge in the indictment.

6. On December 20, 2011, Judge Lieberman sentenced Petitioner to three years in the state penitentiary for each count 1-7 (a total of twenty-one years), consecutive, with thirteen of those years suspended. Judge Lieberman did not impose a sentence on counts 8 through 14.

7. Petitioner timely filed a Notice of Appeal on February 14, 2012. The legal issues raised by the Petitioner in his appeal were (1) whether there was sufficient evidence to support the jury verdict and (2) whether the sentence imposed by the trial court violated Petitioner's Eighth Amendment rights. A Judgment of Affirmance was filed with the South Dakota Supreme Court on January 14, 2013.

9. At all times since December 22, 2011, the Petitioner has been in the custody of the Respondent at either the South Dakota State Penitentiary or Mike Durfee State Prison.

10. Petitioner has not filed a previous request for a Writ of Habeas Corpus in Minnehaha County.

FIRST CLAIM FOR RELIEF

11. Petitioner's counsel was ineffective for not filing a

suppression motion as Petitioner was subjected to a custodial interrogation without the benefit of "Miranda" warnings. This failure to file a suppression motion fell below reasonable standards for attorney conduct and Petitioner was prejudiced as a result thereof. This violated Petitioner's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the U.S. Constitution and Art. VI, sec. 7 of the South Dakota Constitution. Petitioner was also denied his right to a fair trial under the Fifth Amendment and Fourteenth Amendment to the U.S. Constitution and Art. VI, sec. 2 of the South Dakota Constitution.

SECOND CLAIM FOR RELIEF

12. Petitioner's trial counsel was ineffective for not filing a motion to suppress Petitioner's interview with Detective Kuchenreuther from December 29, 2009 because Petitioner did not understand the language line interpreter's interpretation. This failure to file a suppression motion fell below reasonable standards for attorney conduct and Petitioner was prejudiced as a result thereof. This violated Petitioner's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the U.S. Constitution and Art. VI, sec. 7 of the South Dakota Constitution. Petitioner was also denied his right to a fair trial under the Fifth Amendment and Fourteenth Amendment to the U.S. Constitution and Art. VI, sec. 2 of the South Dakota Constitution.

THIRD CLAIM FOR RELIEF

13. Petitioner, who is from Iraq, did not understand the Egyptian Arabic interpreter who interpreted the trial proceedings. Petitioner made trial counsel aware of this fact. Trial counsel did not obtain an Arabic interpreter from Iraq so Petitioner would be able to understand the proceedings. This failure to file a suppression motion fell below reasonable standards for attorney conduct and Petitioner was prejudiced as a result thereof. The Petitioner was denied due process of law and his right to a fair trial under the Fifth and Fourteenth Amendments of the United States Constitution and Article VI, section 2 of the South Dakota Constitution. This also violated Petitioner's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the U.S. Constitution and Art. VI, sec. 7 of the South Dakota Constitution.

FOURTH CLAIM FOR RELIEF

14. Petitioner's trial counsel did not investigate Petitioner's potential alibi evidence regarding the dates and times that the child pornography was accessed, downloaded, and viewed. This failure to investigate fell below reasonable standards for attorney conduct and Petitioner was prejudiced as a result thereof. This violated Petitioner's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the U.S. Constitution and Art. VI, sec. 7 of the South Dakota Constitution. Petitioner was also denied his right to a fair

trial under the Fifth Amendment to the U.S. Constitution and Art. VI, sec. 2 of the South Dakota Constitution.

FIFTH CLAIM FOR RELIEF

15. Petitioner's trial counsel failed to make a Motion for Disclosure of Other Acts Evidence, and failed to object to prejudicial "other acts" evidence that was mentioned to the jury during the opening and closing statements of the prosecutor, and also during direct exam of the prosecution's witness: Detective Kuchenreuther. This failure to request disclosure prior to trial and also the failure to object fell below reasonable standards for attorney conduct and Petitioner was prejudiced as a result thereof. This violated Petitioner's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the U.S. Constitution and Art. VI, sec. 7 of the South Dakota Constitution. Petitioner was also denied his right to a fair trial under the Fifth Amendment to the U.S. Constitution and Art. VI, sec. 2 of the South Dakota Constitution.

SIXTH CLAIM FOR RELIEF

16. Petitioner's trial counsel failed to object when the prosecutor improperly vouched for his witness by stating in his closing statement that Detective Kuchenreuther is honest. The prosecutor also asked the jury who had a motive to lie. The prosecutor indicated that Detective Kuchenreuther had no motive to lie. This failure to object fell below reasonable standards for attorney conduct and Petitioner was prejudiced as a result

thereof. This violated Petitioner's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the U.S. Constitution and Art. VI, sec. 7 of the South Dakota Constitution. Petitioner was also denied his right to a fair trial under the Fifth Amendment to the U.S. Constitution and Art. VI, sec. 2 of the South Dakota Constitution.

SEVENTH CLAIM FOR RELIEF

17. Petitioner's trial counsel failed to review the hard drive which was taken into evidence in this matter. This failure to review discovery prejudiced Petitioner in that it allowed rebuttal evidence to be introduced that included two more uncharged images of alleged child pornography to be shown to the jury. This failure fell below reasonable standards for attorney conduct and Petitioner was prejudiced as a result thereof. This violated Petitioner's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the U.S. Constitution and Art. VI, sec. 7 of the South Dakota Constitution. Petitioner was also denied his right to a fair trial under the Fifth Amendment to the U.S. Constitution and Art. VI, sec. 2 of the South Dakota Constitution.

WHEREFORE the Petitioner prays as follows:

1. That this Court, pursuant to S.D.C.L. § 21-27, issue a provisional Writ of Habeas Corpus, directing the Respondent to bring the person of this Applicant before the Court, along with the cause of the Applicant's detention, at the time, date and

place so designated, for a hearing on the allegations contained herein;

2. Allow Petitioner to amend this Application, as appropriate, prior to the entry of a final Order of the Court;

3. Declare Petitioner's sentence as imposed by the Court to be null and void and relieve Petitioner of all restraints imposed thereby;

4. That the Court award such other relief as it deems necessary, just, proper and equitable.

Respectfully submitted this 18 day of April, 2014.

Julie Hofer
Office of the Public Advocate
415 N. Dakota Ave.
Sioux Falls, SD 57104
(605) 367-7392
Attorney for the Petitioner

FILED
APR 21 2014
Minnehaha County, S.D.
Clerk Circuit Court

My Other Grounds in Details:

(1) Attorney fail to attack the credibility of state's witness (the expert):

My attorney failed to attack the state's expert credibility during cross examination and also failed to add instructions to the jury about how to deal with an expert testimony according to (SDCL 19-15-2(note 9)[**Reliability and relevancy of expert** "Generally an expert opinion is reliable if it is driven from the foundation of science, rather than a subjective belief."]; and fail to mention that in closing argument about the evidence towards there were many conflict and inconsistence in his statements about the evidence; which will violation [SDCL 19-14-8 (Rule 609) "Attacking the credibility of witness"]; also the instruction# 36 which show one of the ways to attack a witness credibility: "The credibility of a witness may be attacked by introducing evidence that on some former occasion the witness made a statement on a matter of fact or acted in a manner inconsistent with the issue. Evidence of this kind may be considered by you in connection with all the other facts and circumstances in evidence in deciding the weight to be given to the testimony of the witness, (but you must not consider any such prior statement as establishing the truth of any fact contained in that statement). My attorney also failed to discuss all those times with an expert to know all the facts about them.

To prove that:

- In *(JT1, Page 124)*: the detective admitted that he found the "remnants" of the *LimeWire* in the Laptop (not the external hard drive).

- In (*JT1, Page 139*) & (*JT2, Page 23*) the detective was talking about the "thumbnail" images that "they did not come from *LimeWire*".

- In *(JT1, Page 143)*: the detective admitted, "If using a file sharing program you can download it to the first folder and then take it out of there and transfer it to a different folder. In addition, the detective was talking with the prosecutor about "moving images from the sharing folder of *LimeWire* to the external hard drive" [he did not say in which way copy or cut].

- In *(JT1, Page 169)*: the detective gave definitions for the create date as: "is possibly the time when this file was placed or created onto the external hard drive"; the modified date as: "the time or the date and time when the file had finished transferring to the external hard drive", and for the access date: "was the last time that video was opened or accessed or checked by another computer-related issue or another program". Also in *(JT3, Page 42)* the access dates "the last date there was activity on that file".

- In (**JT2, Page 26**) the detective was talking about "his believe" about his downloading the four images from *my computer* and he said, "He is confirmed". His confirming did not come from science rather is just a personal unreliable opinion. My attorney fails to show that to the court, the detective opinion was just about the availability of the *LimeWire* in the laptop. In (*JT2, Page 27*), the detective was talking about the logical bath of the image from *LimeWire* to the external hard drive. He did not find the other 3 images that he initiate his investigation anywhere.

- To prove that the detective was recklessly misleading the court using the definitions he gave for creates; modified and access times;

The detective in (**JT3, Page 42**) talking about the modified date of the government assistance document (December 14, 2009 [Monday]); referring to that date of the original file; when the document was scanned; the end of the scanning time as (December 14, 2009 at 3:07 PM).

When that document was transferred to the external hard drive it has took the create date as (December 27, 2009 [Sunday] at 3:50 PM); it has kept the original modified date. It is the timestamp of that file and the detective own definitions regarding documents transferring.

SCANNED

Appendix H
Exhibit 2

For that file to have that timestamp in that way, the only way to happen is by *copy/paste*. The detective admit that he did not find any of the images which he found in the external hard drive inside the laptop even in the unallocated space; accordingly, beyond any reasonable doubt that that folder was assembled in a different computer then copied to the external hard drive purposefully. The detective testimony as in **(JT3, Page 46; line 1-4)**, he knows very well that they have been copied into there before he covering himself by saying or cut.

It cannot be that all the 287 thumbnails images that was copied into my external hard drive would have no roots at all in the laptop if they really came from there, adding to the 3 images that were brought in the last day which were as well copied into the external hard drive.

Reflecting his definitions to the counts that he claimed "was downloaded from my *LimeWire*; in **(JT3, Page 41)** the detective said that "first you have to have the create date, the modified date follows as soon as the file finished...", even that testimony was not credible and not applicable on each transfer depend on the way of how you transfer the file.

-**(Counts 1-5)**: they have no timestamps (deleted and there was no software available have found in the laptop to support the detective idea to go "later" to them; that strictly available for the law enforcement or other big organizations would be available in my laptop to enable me or anyone to review them in any way **(JT2, Page8-10)**, also, none of the keywords which the detective was talking about were found in any of those deleted images. the GUID was not available to support his testimony. The detective himself said they could be there since 2007 (JT2, P10)

-**(Count 6)**: in the external hard drive with no timestamps; nobody knows how it would come there, or under which circumstance that image would be without any timestamps. The detective failed to show timestamps or recklessly covered it; to hide evidence that could be helpful to prove falsified of those crimes, my attorney failed to ask him about those timestamps; what make them believe that it was there in or about December 29th 2009 especially if it would be treated by itself as separate count as the indictments said. That will support the argument that the counts should be treated separately, so it would not have effect on each other due to the cumulative effect to reach the verdicts.

For all counts (1-6), the state failed to show or to connect them at all to the time provided in the indictments that those crimes were committed on or about December 29, 2009, beside self-serving speculation not connected to any material evidence brought into the court.

- **(Count 7): Create Date: 8/8/2009 (August 8, 2009) at 8:01 PM [Saturday]**
Modified Date: 8/8/2009 (August 8, 2009) at 8:09 PM [Saturday]
Access Date: 12/25/2009 (December 25, 2009) [Friday]

- **(count 9): Create Date: 8/8/2009 (August 8, 2009) at 8:02 PM [Saturday]**
Modified Date: 8/8/2009 (August 8, 2009) at 8:02 PM [Saturday]
Access Date: 12/17/2009 (December 17, 2009) [Thursday]

- **(count 10): Create Date: 8/23/2009 (August 23, 2009) at 6:05 AM [Sunday]**
Modified Date: 8/23/2009 (August 23, 2009) shortly [Sunday]
Access Date: 12/26/2009 (December 26, 2009) [Saturday]

- **(count 11): Create Date: 9/13/2009 (September 13, 2009) at 5:20 PM [Sunday]**
Modified Date: 9/13/2009 (September 13, 2009) shortly [Sunday]
Access Date: 12/15/2009 (December 15, 2009) [Tuesday]

(JT1, Page 172); the important fact here is the create date; its show that the person who create it do not know about the Iraqis celebrations; we were outside having a soccer game to celebrate the end of war with Iran. If this count was downloaded from my *LimeWire* then transferred to the external hard drive, we would have the create date come later and the image will keep the modified time "8:09 PM" as what happen as a date of the original file (if it was copied) and the create date would be in any time later. What we have here is a transfer from a different computer to my external hard drive by plugs it in since it has no password. The internet search history does not contain any search terms or "thumbnails" to any such images **(JT3, Page 86)**.

The internet company did not report any suspicious activities in my IP. Using the *LimeWire* cannot do that because the file **(JT1, Page 143-144)** downloaded will go direct to file inside that software. It was cut/paste into my external hard drive in December, would make the access time December 25. The detective would be able to find that image when he initiates his investigation on December 8, 2009, but he did not. The GUID number was not available for this case to connect any of these counts into my *LimeWire*. The create date here don't represent the date when it was placed into my external hard drive as the detective said, rather than refer to the time of the original downloading into its original media storing putting a reasonable doubt in the truthfulness of the detective testimony.

In **(JT1, Page 172; line 20-23)**, the detective recklessly stated that this exhibit on August was placed into the external hard drive to give the wrong impression to the juries that this file was there for all that time and it's hard not to notice it when accessed to external hard drive without any objection from defense attorney or ask the detective for clarification on cross exam. It shows the importance of adding the circumstantial evidence instruction here.

In **(JT1, Page 173; line 1-5)**, the detective recklessly gave the impression that this exhibit could have been "knowingly possessed" by sharing in his answer to the prosecution question about the access time; it used it in the jury instructions and since that kind of possession cannot be happen since that count was out of the sharing folder and it cannot be accessed from another program; without any objection from defense attorney or request for clarification from the detective on cross examination into to narrowing the chances of founding the guilt.

The detective in his report did not show which day of the week was 8/8/2009 as well as all the images or videos brought into the court, although when anyone would click on the profile of any file inside a computer, it will tell which day of the week beside the date of that day.

- **(Count 8): Create Date: 6/15/2009 (June 15, 2009) at 3:55 PM [Monday]**
Modified Date: 2/29/2004 (February 29, 2004) at 6:39 PM [Sunday]
Access Date: 9/13/2009 (September 13, 2009) [Sunday]

write on about day 29

(JT1, Page 174) The fact about the create date; usually I would be at work inside the U.S. military camps in Iraq. I did not have the computer at that time especially noticing the operation system was installed in 2007 **[(JT2, Page 10); (JT3, Page 9]**. It is mean that somebody had it since that modified time [Feb.29th, 2004] in his computer while I was still in Iraq; According to the definition of the "create and modified dates" this file cannot be in any way to be downloaded from my *LimeWire* and the only way is if it's copied/paste from a different computer into my external hard drive due to the way of the timestamp shown. The detective also did not find that image in the laptop or its unallocated space; that file was falsified into my external hard drive.

Look at the space-time between *February 24, 2008 [Sunday]* "one day before I enter Syria; (*I have my passport to prove that*); "the 287 thumbnail images" [were copy/paste into my external hard drive from a different computer. The date of the transferring all of them on is the same. The detective did not show the modified time for a reason of it would shows that those images were copied. If we had the modified date, it would show an older dated that the create dates"; if those images were transferred into my external hard drive in according to the detective theory, we would have different timestamps". The other fact that proves that what I am saying is the truth, the detective did not find any of them inside the internet search history, or even in the unallocated space of my laptop. The detective theory was not based on any science rather than just his unfairly prejudicial personal

opinion] and the one video back to June 15th, 2009 which it was about the time when I bought the laptop; Somebody would question himself (if I am that kind of persons who downloading those images, why I would stop downloading for more than one year, and then resume just shortly before moving to the United States?! knowing that the June 15th image was copied there.

That image was in someone computer since 2004 before it was copied into my external hard drive. The modified date was remaining the same as to the original download time, while the create time was June 15.

It was created inside the external hard drive to give the jury the wrong impression that (I was downloading shortly before I came to the United States), that date put purposefully in that way since I told the detective that I bought the computer just 2 weeks before I came here.

(Count 12): Create Date: 11/19/2009 (November 19, 2009) at 8:21 AM [Thursday]
Modified Date: 11/19/2009 (November 19, 2009) shortly [Thursday]
Access Date: 12/17/2009 (December 17, 2009) [Thursday]

While the detective was talking about (Exhibit# 12) in (***JT1, Page 183***), he said: "*this image was one of them that I downloaded to initiate the investigation as well on "December 8th* [Tuesday] (he didn't say in which time exactly he initiates his investigation of that day. If someone really downloads them and they would transfer them shortly into the external hard drive, there would be no mean to keep this image in the *LimeWire* for all that time until the detective would be able to download them and then transfer later into the external hard drive.

In (***JT2, Page 27***); the detective talking about "transfer without stating in which way copy or cut" it into the external hard drive, so it will be no longer available in the *LimeWire* and that was on (November 19th [Thursday]) according to (***JT1, Page 183***), the create date, he found only this one of the 4 images (***JT2, Page 27***) with no referral in any way to why he didn't find the others. The detective should find us not count if both from some computer from modified date the same as create

In (***JT1, Page 183***) the creation date of (**Exhibit# 12**) was (November 19 [Thursday]); it was inside the external hard drive as the detective said. He explained the logical path for it in (***JT2, Page 27***) "was transfer their", so it is no longer available in the *LimeWire* sharing folder since (November 19). The detective said that he downloaded it from my laptop in (December 8th [Tuesday]) and the picture was in the external hard drive since (November 19th).; he found its remnants of *LimeWire* in the unallocated space of the laptop (however he did not provide a testimony reading how he found out the remnants belong to *LimeWire* not to other software). I also removed the LimeWire in October 2009. [I stated that also in the audio record of the interrogation in our apartment]. Or, how he knew that it was the LimeWire itself no other sharing program.

Therefore, there is NO WAY the detective would download any image of his four images that he initiates his investigation from my laptop or the external hard drive since and according his theory that image was inside the external hard drive since November 19; not in *LimeWire*. The detective purposefully misleads the jury towards makes them believe that it was me who was looking for those images; in that, he did not accept the idea that somebody else was doing that. It is a pure clear fact beyond any reasonable doubt; the detective has no way to download them from my IP.

The *LimeWire* wasn't in my laptop at all during any of those times. In addition, due to the placing time in the external hard drive was before the detective was able to download it by himself). The modified date is after the create date which is lead to it is have been placed from different server and did not came from *my LimeWire*. The create date would represent the date when the original file was downloaded and the access date would be the date when the file would be transferred; usually you cannot have an access date till after you move the file. That file also has no existed in my laptop. According to the GUID number, I am also believed that I was at the school [volunteers of America] for my GED.

In **(JT1, Page 183; line 6-10)**, the detective recklessly stated that this exhibit on November was placed into the external hard drive to give the wrong impression that this file was there for all that time and it's hard not to notice

it when accessed to external hard drive, without any objection from defense attorney or ask for clarification on cross exam that the create date here refer to the original downloading on a hard drive rather than the transferring date to the external hard drive.

In **(JT1, Page 183; line 13-18)**, The detective recklessly gave the impression that this exhibit could have been "knowingly possessed" by sharing in his answer to the prosecution question about the access time since they used it in the jury instructions and since that kind of possession cannot be happen since that count was out of the sharing folder and it cannot be accessed from another program; without any objection from defense attorney or request for clarification on cross examination into to narrowing the chances of guilt foundations.

- **(Count 13) Create Date: 8/23/2009 (August 23, 2009) at 5:31 AM [Sunday]**
Modified Date: 8/23/2009 (August 23, 2009) shortly [Sunday]
Access Date: 12/17/2009 (December 17, 2009) [Thursday]

(JT1, Page 185): the create date was Sunday early morning; close to Count# 10; **"count 10 at 6:05 AM".** It also has the same Access time. This one cannot be downloaded from my *LimeWire*; it is having been placed direct into my external hard drive from different computer using the order Cut\Paste. The create date would represent the original file when its downloaded and don't represent the date of the file when it was placed in the external hard drive as the detective testified; recklessly misleading to lead the juries to believe that file was in my external hard drive since August 23rd. the access date is December 17th, so that file should be available for the detective to see it when he initials his investigation in December 8. The GUID number was not available there were nothing to support that that file was came from my *LimeWire*.

The access date will show that both this count and ***count# 12.*** Both have the same access date, which it would mean both have the same activity at that time which will refer that if the detective was able to find count 12 in my *LimeWire* he should find this one adding *LimeWire* was not installed in my laptop in November **(Count# 12)** [such like transferred in same time].

In **(JT1, Page 185; line 7-10)**, the detective recklessly stated that this exhibit on August was placed into the external hard drive to give the wrong impression that this file was there for all that time and it's hard not to notice it when accessed to external hard drive, without any objection from defense attorney or ask for clarification on cross exam that the create date here refer to the original downloading on a hard drive rather than the transferring date to the external hard drive.
In **(JT1, Page 185; line 13-17)**, The detective recklessly gave the impression that this exhibit could have been "knowingly possessed" by sharing in his answer to a question about the access time since they used it in the jury instructions and since that kind of possession cannot be happen since that count was out of the sharing folder and it cannot be accessed from another program; without any objection from defense attorney or request for clarification from the detective on cross examination into to narrowing the chances of founding the guilt.

Defense attorney have also responsibility to hire an expert to explain to the jury all the conflicts in the detective theory and to clarify the issues that were in dispute with the prosecution.

- **(Count 14) Create Date: 11/22/2009 (November 22, 2009) at 5:01 PM [Sunday]**
Modified Date: 11/19/2009 (November 19, 2009) [Thursday]
Access Date: 12/13/2009 (December 13, 2009) [Sunday]

(JT1, Page 187): The modified date has the same create date of (Count 12) "November 19th". The same person has placed both of them in the external hard drive in the same date and time. This one was transferred by **copy/paste** into my external hard drive and the create date changed only 3 days; the create time here refer to the time when it was copied into the external hard drive. That's why the modified date remain the same, while the create date become newer.

This count was not duplicated in my external hard drive and was not found in the laptop also according to the SHA-1, if its duplicated then we would have the SHA number as 99.999 as the detective state in his testimony **(JT1, Page 106; line 10-18)**. The detective was purposefully misleading the court towards making wrong convictions in my case. He knows it was a copy into the external hard drive but he chooses to mislead the court. There is no meaning of why someone would copy one image into the external hard drive while will transfer by cut/paste the other into the external hard drive. The detective could never found this count when he initiates his investigation on December 8.

In the 3rd day of jury trial, the state brought into the evidence "the inventory sheet of the property which they seized from the apartment". My attorney failed to question the detective about the time of the sheet when it would be signed; was it the time when they finished questioning us in the apartment? Was it before or after they finished the interrogation? Was it being possibly they stayed for longer time from the time that was there? About who wrote the date there? About if it is possible that it the time was put at the time when they finished searching and they asked me to sign it when they finished interrogation me in some time later and then asked me to sign it. That time could not be accurate as to the time when they finished interrogation. The detective without any reasonable doubt recklessly misleads the court and my attorney failed to cross-examination him to show that fact to the court and the jury. That time is not necessary the time when they finished their interrogation rather than the time when they prepared it, which would be another prove to custodial interrogation.

The detective admit that he starts searching our apartment while we were outside **(JT1, Page 122)**; cleared the resident and took their time in searching and taking pictures before we arrive after founding my roommate phone number, then we contact a friend that he called them back and then he called as later to tell us about the officers in our apartment. Our apartment contains two bedrooms and a kitchen; the pictures he took could prove other facts regarding the timestamps and the status of my computer at the seizing time. It is more likely a studio rather than an apartment. All that time was used by the multiple numbers of law enforcements who were searching and especially the computers; CD's were on "*Plain view" on* tables; wasn't hidden that it takes longer time to search and comparing to size of the apartment.

(SDCL 22-1-2(1)(e)) defined the word reckless as: (the word "reckless, recklessly," and all derivate thereof, import a conscious and unjustifiable disregard of a substantial risk that offender's conduct may cause a certain result or may be of a certain nature. A Person is reckless with respect to circumstances if that person consciously and unjustifiably disregards a substantial risk that such circumstances may exist). That definition would be applied to wherever a statement said by the detective or the prosecutor into mislead the juries in them foundation regarding the facts of my case.

Other misleading statements by the detective and the prosecutor were to create confusion in issues, in **(JT2, Page 36)** about the (music portion in *LimeWire*); there are nothing called music portion. They aimed to mislead the jury towards making them believe that there are such like portions and there are people who would go to those portions direct to search for music, or other portions for pornography. In addition, both of them have no idea what kind of languages that the Arabian community may use for their songs [could use any or both Arabic and English]. Therefore, the detective answer was unreliable and violation to [SDCL 19-15-2(9) Reliability and relevancy of expert] which my attorney failed to show that the detective testimony was based on subjective believe rather than derived from the foundations of science. The detective himself do not know how words to be written in Arabic, and he will not be able to understand any Arabian word that have been written there.

My attorney failed to exam the circumstances of the interrogations in our apartment and to use a psychologist expert to explain to the jury, which rather answers that, could be got from someone who was terrified and tortured in his own country and lived all his life where the law enforcement would use violence to get answers. I have informed all my attorneys how I was so terrified during the interrogation especially the detective had a gun and in many times was pointing at or would lift his hands up to show he have one; they ordered me to answer their questions in that audio record although they told us (we don't have to talk!). the court in [***State v. Mauchley*, 2003 UT 10, 67 P.3d 477 (Utah 2003)** (although outright physical violence by police officers is largely a thing of the past, psychological threats are equally as coercive)].

State v. Helmenstein, 2000 ND 223, 620 N.W.2d 581, 585 (N.D. 2000) (Questioning suspect in home, but allowing suspect to walk freely around house, did not make interrogation custodial).

Police often arrive at a suspect's home and conduct extensive and intensive questioning there. Again, absent physical placement of police limiting a person's movement, the situation will be deemed non-custodial [**Questioning in home is not per se custodial.** ***United States v. Vinton*****, 631 F.3d 476 (8th Cir. 2011);** ***United States v. Swanson*****, 627 F.3d 170 (4th Cir. 2010).** See CJT3, P76, line 2-9) ⇒ is conform to my answer to his question in CJT2 P8

see ***United States v. Borostowski*****, 775 F.3d 851 (7th Cir. 2014)** (District court erred when it concluded that appellant was not in custody for Fifth Amendment purposes where appellant was restrained in and around his home for twenty-five minutes, followed by confinement in a small room with an armed officer blocking the door for the next three hours. See also of [illegible]

- In ***(JT2, Page 11; line 4-12): the detective said again that he run scan of internet protocol or IP addresses that had been seen recently seen on the file-sharing programs that have been seen possessing child pornography; seen by whom? And who would decide what the picture is especially he wasn't able to view any picture till he finished downloading*** **(JT1, Page 110; line25) (JT1, page 111; line 1-11);** ***if was able to view the contain, why he did not see the once which would be most likely be there since the create date was in December for the ones placed in the external hard drive by cut/paste. He also said that he was able to browse those IP addresses sharing folder and view the contents or the file titles; how he knows it was belonging to LimeWire not any others software? When he came to our apartment, he was talking direct about the LimeWire.*** The detective also said in cross examination another leads to the person who set me up in ***(JT2, Page 11; line 1); he said that he did not start his download by checking images that have been downloaded; he did not start his investigation by checking actual images that have been downloading which is mean that I have been framed for those crimes, the state covering the identity of the person who did that.*** Nor he started by entering key word to see who was sorting for that word (JT2, P10, line 20-23)
- The prosecutions in their replay to my appeal, claimed that [*the direct evidence admissions such as using LimeWire to download pornography, along with searches for "young movies" (JT1, Page 129). At trial, Defendant attempted to minimize his admission by arguing that the term "young" in Arabic has the meaning of those between twenty and forty years old…*]; adding [defendant own résumé claims that has "good" English skills **(JT3, Page 11)**. Some of the images *he* downloaded used the term "*young*" in English and never in Arabic **(JT2, Page 28-29)**]. [redacted]

In ***State v. Riley*****, 2013 S.D.95, 2013 WL 6699996** the court considered them as circumstantial evidence rather than a direct evidence to conclude the guilt. The question was which term did you used to [search], and not which term you used to [search pornography]. The term *young* could be reconciled with other meaning and that came from witnesses' testimony including certified interpreters. I did never say that I was looking for movies or songs only in Arabic. In **(JT2, Page 80)** in my answer to the prosecution question regarding the term "*young movies*" was just a general term that I gave to the detective to describe what I was searching for; and that the *action movies* as a part of the term *young movies*. Conflicts in testimonies could not be resolved by court rather than its ultimate question for the jury. The detective himself admitted that when he starts his investigation, he downloaded four images from my IP that all of them contain the word *young* to be included two adult pictures (although he did never found only one of the four.) **(JT2, Page 28; line 6-24).** (JT2, P27, line 10-13)

In that same case, the Supreme Court states in their definition for the sole domain on the IP or computer, "when the defendant introduce no evidence that someone else was using his IP address".

In my case, as another prove of the insufficient evidence to support convictions, the testimony provided by the state witness" Akeel Abed" **(JT 2, Page 40-41)** and Adel Abdul Hassan **(JT 2, Page 54)** would prove otherwise the prosecution misleading claims in closing argument **(JT 3, Page 86)**.

A prosecution simply cannot establish a conviction by recklessly misleading statements not supported by evidence. The detective states that, during the interview I told him "I downloaded pornography using the term "*young movies*". See also **(JT3, Page 84)**. The claim of the meaning of the word *young* is *witnesses supported*

"Shabab"; one of them was interpreter for the court (Adel Abdul Hassan). In addition, about the résumé, it was under preparing inside my external hard drive; originally prepared by the Lutheran Social Services; four different résumés support that.

However, the detective states that the term was "*young little girls*" and not *young movies*; because a single word could be used in a different sentence that do not make it direct evidence since *young* do not mean children. Typing the term *young movies* is not automatically would show child pornography, however, when I was on the stand I told the court from cross-examination that I told the detective the term young as "general term" ((**JT2, Page 80**). According to the detective testimony, the term has been used was "young little girls". Using a single word of a term don't mean the sentence in full unless you put the other terms with such as "Pass over; Pass in; Pass out; look out; look for; look after ..." or even that PTSD or PTHC, taking in consideration that in the United States, a pornography magazine called "Young & nasty", [redacted].

The important of the jury instruction regarding how to deal with circumstantial evidence would come clearly from all the timestamps that came in my case. My attorney also failed to cross-examine the detective credibility about the transferring 287 thumbnail images since all were copied into my external hard drive from a different computer from the timestamps. He also failed to cross-examine the detective about those images timestamps (hours; minutes, seconds), such as questions would make with no doubt that they had been copied/paste there. The detective knows that as a fact and that's why he hides those details and was lie to the jury by stating that those images have been saved individually by making *right click and save as* in attempt by him to create the believe of knowingly possessed. → [redacted]

- ***(2) Attorney failure and the court fail to instruct the jury about how to deal with (Circumstantial Evidence):*** SDCL 23A-44-15 (12) (Rule 52(b))

Under the Due Process Clouse of the Fifth Amendment, the prosecution is required to prove beyond a reasonable doubt every element of the crime with which a defendant charged. ***See Fiore v. White, 531 U.S. 225, 228-29 (2001) (per curiam)*** (due process violated by conviction of defendant without proving each element of crime beyond reasonable doubt)

In closing argument, the prosecutor asked the juries to think about the evidence as a *whole* (**JT3, Page 71; line 20**). In (**JT3, Page 79; line 5-10**), he asked the juries to put the *fact* of the password with all the other facts to make "complete and absolute sense".

[redacted]

The prosecutions stated in their reply to my appeal (*Id* at 8): [*Defendant argues that his conviction lacks sufficiency of evidence. Defendant's argument is without merit. Circumstantial evidence can be the bases of a conviction.* ***Hage, 532 N.W.2d at 410-11 (S.D. 1995). Circumstantial evidence is not second-rate evidence but "is equal to and sometimes more reliable than direct evidence" Id at 411 (see also State v. Best, 232 N.W.2d 447, 258 (S.D.1975)).*** *A conviction can be established completely on circumstantial evidence*]. The importance of using such as instruction is related to the prosecution theory of guilt. That was came to support their arguments to conclude the guilt, entirely or substantially from the circumstantial evidence since the court of appeal conclude that in ***Hage*** case to upheld the conviction and that convection was entirely based on circumstantial evidence.

The Court failed to add instruction regarding the circumstantial evidence; as well my trial attorney. Appeal attorney failed to do that when she had the opportunity to write a reply to the state's answer for my appeal; it was a plain error. SDCL 23A-44-15 (12) (Rule 52(b))

According to [***State v. Breed*, 399 N.W. 2d 311; 1987 S.D.**]: the trial court did not instruct the jury that *"Where the case of the state rests substantially or entirely on circumstantial evidence they are not permitted to convict the accused unless: (1) the provided circumstances are not only consistent with the guilt of the accused, but cannot be reconciled with any other rational conclusion and (2) each fact which is essential to complete a set of circumstances necessary to establish the accused guilt has been proved beyond reasonable doubt."*. [***State v.***

Luna, 264 N.W. 2d 488 (S.D 1978)]; [_State v. Schafer_, 297 N.W. 2d 473 (S.D. 1980)]; [_State v. Hall_, 353 N.W. 2d 37 (S.D. 1984)]; [_State v. Weismstein_, 367 N.W. 2d 201 (S.D. 1985)].

My trial attorney had the knowledge about the circumstantial evidence and did not ask the court to give the juries the instructions regarding that kind of evidence; the court failed to do so. My appeal attorney failed to discuss that as plain error.

The fact that no counts found in the external hard drive did came from my *LimeWire* from the GUID number; have been copied or cut from other computer, which could be proven from the timestamps. The timestamps could be reconciled with a different theory that could come from the create; modified and access times, which would be, refer to the time was transferred into there and not as the detective describe "that they have been placed in the external hard drive at the date of create. It would mean that he would find them in the sharing folder of *LimeWire* at that time and that would put a real reasonable doubt regarding the prosecution theory especially; no testimony was ever provided as to someone did saw any of those images.

- By applying those two instructions to my case, we will find: the state indicated that they depend on the *circumstantial evidence* and they wrote about that in their reply to my appeal. Starting with the *IP* address; reading [*(1) the provided circumstances are not only consistent with the guilt of the accused, but cannot be reconciled with any other rational conclusion]*:

All witnesses including [Akeel Abed], and [Adel Abdul-Hassan] stated that many people were coming to our apartment and with them computers [**(JT2, Page 40-41) (JT2, Page 54) (JT2, Page 74)**]; that would be a reconciled with other conclusions, that testimony proved that others were using the IP address as well the internet password. We have a very clear reasonable doubt regarding this matter regarding why the jury should not find me guilty if that instruction was available.

As about [(2) *each fact which is essential to complete a set of circumstances necessary to establish the accused guilt has been proved beyond reasonable doubt]*. The state could not prove beyond reasonable doubt that it was my computer's *LimeWire*, which was used to download. That came direct from the detective during his cross-examination **(JT2, Page 8-10)**, and when re-direct examined. The detective was talking about what was leading him to believe that the *LimeWire* was exist in sometime in my laptop which wasn't really necessary since I already stated that during the interrogation, although he did not show which remnants exactly he found and what's makes him believe they belong to *LimeWire* and not any other software.

There was testimony from a certificated interpreter (Adel Abdul-Hassan); as well the court interpreter which appointed to me, translate the word *young* into "*Shabab*"; the state's witness "my roommate" testified that the word "Shabab or young" refer to the people who are over the age 18. The detective opinion as expert would be reliable only if it's driven from the foundation of science, rather that subjective belief (SDCL 19-15-2(9) [Reliability and relevancy].

Accordingly, the detective opinion was not reliable in **(JT2, Page 26)**; the state cannot claim that using the term *young movies* is direct evidence since the word *young* proven to be used for adult rather than children, using the term *young* do not lead to "child pornography" without the other paragraphs according to their claims.

- The forensic examination did never found anything that would suggest any of those images came from my *LimeWire* **(JT2, Page 6)** about the GUID number. From the detective answers; in **(JT2, Page 33)** "it was the only profile on the laptop computer that had been used", which it means that there were other profiles for other previous users; the detective said that he found the images in the unallocated space in my laptop which don't have profile name. Therefore, by not informing the juries about how to deal with the circumstantial evidence, will substantially subject my case to misleading and confusing of issues.

- *The circumstantial evidence should not be reconciled with other rational conclusion*; those images came in different ways into my external hard drive. The deleted images in my laptop were not accessible since there

was no software available to find them or even to have timestamps to connect them to the indictments' date; those images had no names or timestamps; founded in the unallocated space which as the detective explain that those images could be in the laptop which was bought used **(JT2, page 10; line 13-15)**. The rational conclusion is available here. There was a reasonable doubt about how they came into my external hard drive and the state theory could be reconciled with other rational theories. According to instruction # 27, (the mere fact that a person is near a location or had access to a place where child pornography is found is not by itself sufficient proof of possession).

- All those facts support that the source of the pictures are to be reconciled with other rational conclusion and there is reasonable doubt about the state's theory by connecting the pictures to the GUID number and timestamps to prove that none of them have come from my *LimeWire*. According to (SDCL 19-15-2(9)) the detective opinion was not reliable because it did not come from the foundation of science, and my attorney failed to explain that; the soul domain was not available for me as the only user for the computer and the IP. According to **[*State v. Riley*, 2013 S.D.95, 2013 WL 6699996]** when introduce no evidence that someone else was using his IP as circumstantial evidence, my case convictions should be revoked. The detective was also recklessly misleading the jury by his statements that those images were in the external hard drive at the date of "create". in that same case, the supreme court considered defendant statements as part of the circumstancial evidence.
- About the "password" as circumstantial evidence; my laptop had no password; when they took it, it was ON; there was a testimony by the detective about the password that it was "*changed*" on December 27th ***(JT3, Page 78; line 23)*** without referring to what was the meaning; defense attorney did never attempt to ask such like question! It could mean it was taken away. The detective did never testify as about his exact copy of my hard drive was needed a password to log into. My attorney failed to hire an expert or even by a phone.

If I really was using the external hard drive as they claimed to hide such like images, somebody would ask himself, why I did not protect that external hard drive with a password so nobody can have access it as in **[*State v. McKinney*, 2005 SD 74; 699 N.W.2d 460; 2005]**, when the record showed that his computer account's password was changed and that even that his wife don't know what it was; his step daughter testified that he did showed her an image, while in my case, the computer was open to everyone to use it. All the counts he was charged with have timestamps.

The external hard drive was not hiding in anywhere, but they found it connected to the laptop using a USB cable, again not protected by a password. If really someone want to hide such like images, he would hide that external hard drive in somewhere that there are no hands could reach it as in **[*State v. Bruce*, 2011 SD 14; 796 N.W.2d; 2011 S.D]** when he kept the images in CDs in his safe or footlocker so nobody can reach them, noticing that my roommate computer was a USB connection capable.

By arguing the prosecutors' viewpoint, they suggestion that all the witnesses who testified, that visitors were using my laptop and my roommate are lying [*Adel Abdul Hassan & Akeel Abed*]. That's mean even if there was a password, there were people who had access to my laptop also to the external hard drive especially there was no testifying about a password for the external hard drive; could be connected to any computer not necessary my roommate's. We have images had been copied or cut into their without and foundation for them in the laptop. The images which founded in the laptop were deleted and were not being able to be viewed by not having forensic tools which was available to the detective exclusive or other companies purchase them" to conduct them business **(JT2, Page 28)**; no specific formal training to use it or to be installed inside the laptop; the laptop purchased used. Those facts would not support the term "knowingly of possession", so that would not be proven beyond any reasonable doubt.

My résumé was admitted as evidence to prove that the external hard drive was mine **(JT3, Page 10, line 10-20)]**. In my résumé, it was said computer experience for 4 years with no specific of special training in any fields as it came in the detective own résumé. The detective did not found any temporary internet files or forensic software

inside my laptop, which may refer to founding or searching to any of those images or videos **(JT3, Page 86)**. I am not a computers forensic expert.

By connecting this evidence to the instructions which if my attorneys discussed them, then the verdict will be different; ((1*) the provided circumstances are not only consistent with the guilt of the accused, but cannot be reconciled with any other rational conclusion*), the simple fact of the external hard drive was not password protected and it was easily to be connected to other computer, also the detective said that he found the images in the unallocated space of the computer; was not accessible only by using a special software that was not available in my computer nor any special training skills in forensic programing; did never found any copy for them in the external hard drive; there were multiple users for my computer, making this point very strong to give reasonable doubts. Those facts cannot establish any guilt by the "password in the computer" beside the other facts that, and to what was proven by the witnesses that there were others who were using the computer and the IP. It would be concealed to other theories.

As about ((2) *each fact which is essential to complete a set of circumstances necessary to establish the accused guilt has been proved beyond reasonable doubt.*). the testimony that was provided by both Akeel Abed and Adel Abdul Hassan that there were other users for my computer put a reasonable doubt about having the access to that computer and put no meaning for the password. They used the computer registration document, which have only my first name **(JT3, Page 9)**; I am not the only one whose name is "*Haider*"; that document does not contain any other names. the user name could be changed any time from the *Control Panel*, therefore the detective testimony was just to unfairly prejudice and mislead the juries by lying to them about that into connect me to the thumbnails images which they said they found them in my external hard drive by making them believe that it was me the owner of that laptop since 2007 and it was me who transfer them into the external hard dive while the fact they had being copied from a different computer. That could be proven from the timestamps on them which all the same time [create and access time are the same and newer than the modified time], and to the fact that they have been put purposefully in that date when I was on the board of Syria, so that document by itself and according to that instruction would prove nothing about my case.

The court allowing of using my under preparing résumés into the circumstantial evidence should be argued by my appeal attorney since it is to be considered as plain error, and violation to (SDCL 19-14-10). Defense attorney made objection **(JT3, Page 39-40)**. [

The prosecutor opens the door widely regarding my English skills at direct examination to the directive **(JT1, Page 127; line 1-4)**. My statements regarding my English come in my direct examination after the detective testified and were supported by his previous foundation and were not to contradict with it. When the state brought that exhibit; **[(JT3, Page 9; line 5-20) (JT3, Page 10, line 10-20)]: on (Page 10)**: they were talking about my résumé to prove that the external hard drive was mine which I already told the court was mine in the 2nd day of trial **(JT2, Page 77)**. The fact of having four résumés is support my claims that it was prepared by the Lutheran Social Services and they were still under updating. The Judge should also make a balance between its probable values against its prejudice effect (SDCL 19-12-5(3) [Construction and application] "evidence rule governing admissibility of prior act evidence is a rule of inclusion and establishes that such evidence is only inadmissible if offered to prove character ***State v. Anderson*, 608 N.W.2d 644, 2000 SD 45**); also (SDCL 19-12-5 (10)).

There was no definition given to "computer experience" in the juries' instructions or to me. My college degree in materials engineering not computers; we do not have in Iraq computer classes as it in the U.S; I did never say that I never had a computer experience **(JT2, Page 76)**.

By applying ((1) *the provided circumstances are not only consistent with the guilt of the accused, but cannot be reconciled with any other rational conclusion*); having knowledge in computer does not mean having all the knowledge of how to download those items; and all the key words which used to download them specially there was no keywords found at all in the computer internet searching history that would lead to believe that it was used to download or search for those items would put a real reasonable doubt.

About ((2) *each fact which is essential to complete a set of circumstances necessary to establish the accused guilt has been proved beyond reasonable doubt.*), nothing was given to support that any of the forensic tools or training were available for the detective was available for me, so having knowledge in computers is different from knowledge in the forensic software tolls. The term young were proven it was belonging to "Shabab" in Arabic; the term young, that was given to the detective used as a general term **(JT2, page 80)**.

- The registry document which the prosecution used to recklessly; unfairly prejudice the juries by telling incorrect and misleading information by stating that the name in the profile in 2007 is the same of the person who install the operation system in "2007": The first issue about that, the computers when you buy, it will come with its operation system installed already there. They used the registry document to say the laptop was password protected. However, nobody discussed the computer name in my roommate registry. The Windows
- came already installed the name changed from control panel.

I bought the laptop almost 2 weeks before my arrival to United States **(JT3, Page 48)**. The detective testimony that it was "*me*" is who install the Operation System in 2007 and it was my name there since 2007 should not be admitted because it came from a personal prejudicial opinion without scientific grounds; especially the scientific opinion would show that the name would be changed after bought from the Control Panel. The detective knows very well that the user name in a computer profiles would be changed; the detective answers were made unfairly prejudice and recklessly misled the jury and to connect me unfairly to the thumbnail images.

The prosecutor question, which was irrelevant to the event that "*if he found any other documents on the hard drive to lead it had been accessed frequently*? Computers generally designed to be used; my computer had a dead battery that makes it not work unless it has bulged into electricity power. I stated that I used it beside many others and that what the other two witnesses said "*Akeel Abed and Adel Abdul Hassan*". His answer about his "personal believe" that it was me "*Haider*" since 2007 is completely unreliable; based on ((SDCL 19-15-2(9) "an expert opinion is reliable if it's derived from the foundation of science rather than to subjective belief") although could be right the name there could be mine, but it was used to mislead the jury and connect me to the thumbnails and since that name was changed later from the control panel; the detective opinion because of that should not be overruled by the judge and that's also what my appeal attorney had failed to discuss with the Supreme Court.

Adding instructions of the circumstantial evidence would change the jury verdict; since the evidence could be reconciled with other rational conclusion. The detective's theory doesn't base on any facts rather than his personal opinion. As about *each fact which is essential to complete a set of circumstances necessary to establish the accused guilt has been proved beyond reasonable doubt.* The state had to prove beyond reasonable doubt it was I who install that operations system in "2007". The answer will be clearly NO based on the evidence which was provided. The prosecution doesn't know who was the first buyer the theory which the detective put don't based on any scientific facts, even that the word *may be* would be a reasonable doubt. Accordingly, to (SDCL 19-14-10(4) the detective statement should be inadmissible and according to (SDCL 19-15-2(9)) the detective statement was unreliable.

The 287 thumbnail images have the same timestamps, which prove that beyond any reasonable doubt that they assembled; copied from different computer and that would be the only way in my case. That would be very strange that he would find 287 thumbnails in that external hard drive without any roots for them in the laptop. A court or juries did also not prove them as Child Pornography or even formal convictions or charging. In addition, the court did not tell the jury that I was innocent on those count and they cannot make any speculations regarding who made the transfer creating confusing of issue.

In **(JT1, Page 142)**, the detective purposefully misleads the jury when he said "it would not happen by accident" since he knows exactly that those images in total was copied to the external hard drive.

The thumbnail images can be reconciled with other rational conclusions, and accordingly they have been never proven beyond a reasonable doubt it was me. There was gap in time, since the transfer of those images was in February 2008 and the next was almost 2 weeks before my travelling to the United States in 2009, that evidence was plotted inside the external hard drive just too purposefully mislead the juries. If as the state was arguing it

was I who was downloading those images, there will be no reason for me to stop downloading for one year or more then resume downloading just days before my moving to the U.S.!

- About the file of the 3 images which was brought it last day as "*contradiction evidence*": the detective" admitted that it's "*possible*" was that folder have been transferred. The other fact is there were no roots for that folder in my laptop. The detective himself said he did not found any of the images inside the laptop inside the external hard drive. By reviewing the dates of that file, it will show that that folder was COPY/PASTE later in the external hard drive from different computer. In *(**JT3, Page 46, line 1-4**): the detective instant answer to the question of how the was transferred; he said, "**Probably would have been a copy**". He knows very well they have been copied from a different computer into my external hard drive, where it was assembled by him or by someone who he knows. He added "**Or cut either one**".*

An element of a claim is ``fabricated" when it misrepresents the truth. Black's Law Dictionary 597 (8th ed. 2004) (stating that ``fabricated evidence" is ``[f]alse or deceitful evidence"). A ``deliberate" fabrication involves a knowing and intentional misrepresentation of the truth. Id. at. 459 (stating that ``deliberate" means ``[i]ntentional; premeditated; fully considered").

*In comparing the detective's answer to his other answers regarding the counts in indictments; The detective here in his second attempt was to cover his mistake when he said "**copy**" because he knows that how it transferred into my external hard drive; he knows it was prepared in a different computer then copied into my external hard drive purposefully.* When copy/ paste a file the only date will change is the create and access dates while will keep its original modified date as the original file downloading; that is what happen here. All the other documents were collected either from my laptop or from the external hard drive; put together in a different computer; add the three images and then copied to the external hard drive. There are no other ways for that folder to be transferred there. That folder can be concealed with rational theories and was not proven and very clearly and beyond a reasonable doubt, that it was I who did that.

As about the time line of moving that folder, the person who moved it studies very well the timelines of the government assistant scanning. He moved that folder in a timeline (December 27, 2009 at 3:50:46 PM) close to the time when that assistance government scanned (was scanned at 3:07:48 PM as it appears from the modified date **[JT3, Page 42; line3-19]**.

The government assistance document was created in the computer according to the modified date and then they brought those images; Mike Hanson did not exam any of those dates. By applying the rules of the circumstantial evidence [(1) *the provided circumstances are not only consistent with the guilt of the accused, but cannot be reconciled with any other rational conclusion],* we can find and a very clearly that those evidence are to be reconciled with other rational conclusion; that it was copied from a different computer.

By reading (2), *each fact which is essential to complete a set of circumstances necessary to establish the accused guilt has been proved beyond reasonable doubt.*) By reviewing **(JT3, Page 45-46)** we will find the detective answers "possible" or "plausible" is not conforming beyond a reasonable doubt; the external hard drive was not password protected, nobody know who download them; could be reconnected with other computers using a USB cable; the time stamp of the folder show how the dates studied very well; chosen of Sunday to be a weekend holiday, and by adding those instructions it will lead to the verdict of not guilty. The downloading of the three images theory was not proved beyond reasonable doubt that who made it rather that self-serving speculation by the prosecution with no foundation.

Evidence of other offences is relevant if it tends to make "the existence of any fact that is of consequence to the determination of the action more probable or less probable than it without the evidence SDCL 19-12-1.

In ***State v. Hage*, 532 N.W.2d 406; 1995 S.D.** the State Court of Appeals did not err the trial court decision into not admitting into evidence of prior burglaries at dental office by an (*unknown intruder*) applying SDCL 19-12-3 (Rule 403) in its considering for the relevant evidence. For the same reason, the file of the three images with the

government assistance document should not be admitted since it was the identity of the person who downloads them was unknown. My testimony regarding that file came in a later time after the admitting, overruling defense attorney objections by the reasons of unfairly prejudicial grounds and relevancy issues since it will only serve to mislead the jury and create confusing in issues. There was nothing other than the download itself, the person who did that act was totally unknown in the record to support this hypothesis. ***State v. Hanson*, 456 N.W.2d 135, 138 (S.D. 1990); *State v. Bawdon*, 386 N.W.2d 484, 486 (S.D. 1986).** My appealing attorney failed to argue that fact with the State Supreme Court although there was an objection by trial defense attorney in **(JT3, Page 15)**. Appealing attorney also failed to argue that. 45 prejudicial evidence

Jury instruction # 38, as well the prosecution in (JT3, Page 77; line2-6), told the jury in closing argument that, "... The fact of the matter is a guilty on count I, doesn't mean a guilty on count II through XIV. A not guilty on count I don't mean a not guilty on II through XIV..." for that, we need to know if the prosecution and the court suggesting that there was somebody else who download those images beside me? That is a clear reasonable doubt as to the finding the guilt. My trial attorney failed to discuss that with the court or to the jury, as well, my appeal attorney failed to discuss that in my appealing processing, especially she had two opportunities to talk to the State Supreme Court, but she failed to do that.

That evidence was provided by the state as it came in the prosecution question to the detective that if he found in the external hard drive whatever proves that I *request some government assistance*, which by itself irrelevant to the case in its entire. **(JT3, Page 12; line 6-4)**.

See also, ***O'Laughlin v. O'Brien, 568 F.3d 287, 304,308 (1st Cir. 2009)*** (due process violated because only evidence linking defendant to crime scene was circumstantial and inferences of guilt was speculative); ***Brown v. Palmer, 441 F.3d 347, 351 (6th Cir. 2006)*** (due process violated because facts could only reasonably establish that defendant was present at crime and acquainted with perpetrator, but not that defendant was guilty); *see, e.g.,* ***Rivas v. Fisher, 687 F.3d 514, 546-47,552 (2nd Cir. 2012)*** (procedural default excused under actual innocence exception because petitioner's claim established expert testimony casting considerable doubt on the "central forensic proof" used to convict him).

Those instructions about the circumstantial evidence are requested according to **South Dakota Pattern Jury Instruction 1-14-1**; that whenever the state case rests ***entirely*** or **substantially** on circumstantial evidence those instructions should be given.

- ***(3) Attorney fail to object to prosecutor unfairly prejudicial and misleading statements:***

My trial attorney failed to object to the prosecutor misleading statement in closing argument that I said, *"I bought the laptop in 2008"* **(JT3, Page 65)** in that argument they were aiming towards mislead the jury and connecting me to the timeline of unproven "other acts" claimed by the state and accusing me of them back to 2008. This argument came as self-serving speculation without any foundation. In the same day of the closing arguments I clearly said *"I bought the laptop 2 weeks -10 days"* before my arrival to the United Sates **(JT3, Page 48) (JT2, Page 62)**. Such like statement created a great confusion of issues, and was acting in bad faith by using improper methods so infected the trials with unfairness to create wrongful convictions.

In my appeal, the same thing happen when the state used the same wrong argument in their response; they know I did not say that; they have the transcripts; but that's also go toward the bad faith in act by them towards upholding wrongful convictions; the prosecutor may not knowingly present false testimony and has a duty to correct testimony he or she knows to be false **[*Drake v. Portuondo*, 553 F.3d 230, 241 (2nd Cir. 2009)** (prosecutor's knowledge that expert witness testimony was false required reversal). My appeal attorney had the opportunity to correct that by writing an answer to the state wrongful misleading argument, but she did not.

In (JT3, Page 66, Page 78), the prosecutor said that there was no English language in middle east computers placing himself as a computer marketing expert or expert in operation systems of middle east computers was improper **[*United States v. McDonald*, 905 F.2d 871, 875-76 (5th Cir. 1990)** (prosecutor's comment referring to

Judge add explasis to prosecutor's fact them

defendant's custody battle improper because acting vas expert witness on divorce and custody law); ***United States v. Wright*, 6255 F.3d 583, 610-11 (9th Cir.2010)** (prosecutor's comments about similar cases he tried improper because reflected prosecutor's impression of the evidence and introduced prosecutor's personal experience); ***United States v. Lee*, 612 F.3d 170, 195 (3rd Cir. 2010)** (prosecutor's comment about his own personal experience with dogs improper)].

His statements would be also conflict with another testimony by the detective when he said, "he found Arabic music and songs" **(JT2, Page 16; line4-20)**. Also talking about my roommate computer as having the Arabic language "Which he bought from the United States" While mine which bought from "Syria" would not have Arabic language! How there will be Arabic music or songs as the detective said while there were no Arabic in the computer as the prosecutor said? (JT2, P 45).

In [***State v. Darby*, 1996 SD 127, 556 N.W.2d 311; 1996 S.D**], the state Supreme Court held that, "Though no specific test exists to determine if a potential juror is impartial, the *voir dire* must show the jurors understand that: 1) the state must prove guilt beyond a reasonable doubt; 2) a defendant is presumed innocent until proven guilty; and 3) a determination of a defendant's guilt must be based solely on the evidence and testimony introduced at trial. [***Etzkorn*, 1996 SD 99, PP 8-9, N.W.2d at (quoting *Hansen*, 407 N.W.2d at 220)**]. In closing argument, the prosecution keeps telling the jurors that they can "connect the dots" or guessing the missing picture to solve the puzzle" ***(JT3, Page 61; line 24-25), (JT3, Page 62; line 1)*** with no objection from defense attorney or clarification regarding that, they cannot connect the dot or guess the missing picture; leading them for speculations outside the court records to reach the verdict.

In **(JT3, Page 62; line 3-5)**, the prosecution told the jury in closing argument that "you don't need every piece to know what that puzzle shows" without any objection from defense attorney or to put more clarifying to the jury that they are not allowed to reached the verdict by that, rather than just using the evidence and testimony that was brought into the court.

In **(JT3, Page 65-66)**, the prosecution in closing arguments, told the jury that the same one who download the 287 thumbnail images in Syria, is the same person who download the others, that argument was without any clarification from defense attorney or the court since it conflicts with instruction # 38, although it could be right since the same person who falsified the 287 thumbnails, falsified the others. That would be a fact, taking in consideration all the falsified evidence and the misleading detective testimony.

Also, appeal attorney failed to discuss the attorney objection to the recklessly misleading statements by the detective as to "who he was believe "*Haider*" in the laptop registry document in **(JT3, Page 9)** since it considered recklessly because it was unfairly aimed to connect me to the 287 thumbnail and the detective know very well the name in the registry could be change later from the control panel without referring in any part of his testimony to that fact. ***State v. Helland*, 707 N.W. 2d 262, 2005 S.D. 121.**

The prosecution after the jury reached the verdict told the judge [look at him, he is 36 years old single; have no kids or girlfriend. People like him should not walk free in streets". This prejudicial profiling came with no objection from defense attorney, however, when the transcripts generated, it was taken away and none of defense attorneys wants to investigate that because they believed that the court's reporter loves her job. ✱

➢ ***(4) Court err by admitting into the evidence the file of the government assistance:***

My attorney should object to allowing the jury to test and examine those (other acts) evidence and that violation to the state law. All those "other acts evidence" were no proven done by whom other than the prosecution self-serving speculation, and the testimony was given regarding them was not inspected by an expert from the defense side. The judge as well stated in (JT1, P7) that he is going to use Federal Rules ✱

The prosecution argued that he wants to admit the file of the three images (without referring to the source of those images) accomplice with the scanned government assistance document as "impeachment by contradiction". In ***State v. Byrum*, 399 N.W.2d 334, 337-38 (S.D. 1987)** the Supreme Court held that, (extrinsic evidence of drug sale which may be not admissible under SDCL 19-14-10 was admissible to impeach by contradiction as allowed by SDCL 19-14-8 (Fed. R. Evid. 607). These evidence were copied into the external hard drive

In ***Byrum's*** case, the court allowed for evidential testimony regarding other "*Bad Act Evidence*" came from testimony. SDCL 19-14-9 (Rule 608(a)) (Opinion or reputation on character of witness) offered by a witness "***Henning***" that "***Byrum*" *that*** he was in real contact with him and did in fact sold drugs to him in a prior time; "*Byrum*" did not deny knowing "*Claire Henning*" the state's witness. In my case there was no testimony ever as to anyone have seen me looking; searching for such like items or even found any computer searching history or in the temporary internet files to be included the detective who exams my computer. There was no testimony at all about someone who seen inside my computer or external hard drive such likes images. Besides that, the court erred by considering them to be done by me as "prior bad act evidence" pre-assuming my guilt to the jury for those 3 images although the court had informed them that "I am not in court to be charged with those images" overruling its instruction to the jury of presumption of incense (instruction #7) and creating confusing of issues.

In "***Byrum***" case, the argument was that he sold drugs in a prior time to this case that he was on trial for, however, in my case the prosecution brought into the evidence "by contradiction" some images they claimed have been *"transferred"* to the external hard drive just 2 days before they searched our apartment. Those dates go to sometime after the times of the indictments themselves. This is even newer dates from the indictments themselves, which would leave question as to how to be considered "prior bad act evidence".

Simply putting specific instances of conduct, under certain circumstances, may be inquired into on cross-examination but *may not be proved by extrinsic evidence.* No evidence at all even that the GUID number showed that any of those images came from my laptop or *LimeWire;* the state has the burden to prove the guilt; the person who transfer them was unknown. However, it was proven that all that file has been assembled in a different computer before it was *copied* into my external hard drive.

18 § 26A.02(3)(a) criminal defense

One of the longest standing rules governing the admissibility of other crimes evidence is that the evidence must be submitted for a disputed issue. ***U.S. v. Brennan*, 798 F.2d 581 (2nd Cir. 1986)**, habeas corpus granted in part, 685 F. Supp. 883, aff'd, 867 F.2d 111, cert. denied, 490 U.S. 1022, 109 S. Ct. 1750, 104 L. Ed. 2d 187 (other crimes evidence must be relevant to some disputed issue); ***State v. Hernandez*, 170 N.J. 106, 784 A.2d 1225 (N.J. 2001)** (other crimes evidence admissible when relevant to material issue in genuine dispute; trial courts must make careful and pragmatic evaluation of evidence based on specific context in which it is offered); ***Rankin v. State*, 974 S.W.2d 707 (Tex. Ct. Crim. App. 1998)** (absent disputed issue, offer of other crimes evidence is merely prejudicial).

→ 18 §

One of the clearest illustrations of an undisputed issue is the question of intent in a case where a defendant claims he is not the person who committed the crime, i.e., the defendant does not deny that the act was done with the requisite criminal intent but rather says that he is not the person who did the act. Thus, the element of intent is not disputed and any other crimes evidence offered to show intent must be excluded ***United States v. Ferrer-Cruz*, 899 F.2d 135 (1st Cir. 1990).**

While the rule is most frequently applied to the issues of intent and identity, it is also applicable to other issues such as motive. *See* ***Fallen v. United States*, 220 F.2d 946 (5th Cir.), cert. denied, 350 U.S. 924, 76 S. Ct. 213, 100 L. Ed. 808 (1955).**

An issue is not in dispute simply because it is an element of the offense. ***United States v. Ring*, 513 F.2d 1001, 1009 (6th Cir. 1975).** Rather, the determination depends on "the nature of the facts sought to be proved by the prosecution or the nature of the facts sought to be established by the defense." ***United States v. DeCicco*, 435 F.2d 478, 483 (2nd Cir. 1970).** *See also* ***State v. Bolte*, 530 N.W.2d 191 (Minn. 1995)** (trial court may postpone final decision on admissibility until State has presented all other relevant evidence and strength of the State's case on

disputed issue); ***State v. Darby*, 174 N.J. 509, 809 A.2d 138 (N.J. 2002)** (under first prong of four-part test determining when other-crime evidence is admissible, other-crime evidence must be relevant to "material issue genuinely in dispute").

If the State's announced purpose is not an issue contested by defendant, then the probative value of the other crimes evidence is "acutely if not fatally diminished" ***Smith v. State*, 232 Ga. App. 290, 501 S.E.2d 523, 526 (Ga. Ct. App. 1998)**, *citing* ***State v. Cofield*, 127 N.J. 328, 605 A.2d 230 (N.J. 1992)** (allowing evidence on disputed issue but requiring limiting jury instruction).

Where the conduct did not result in a conviction, whether because charges were never brought, dropped or dismissed, or because the conduct was not criminal, the conduct must be proved in the same manner as all other facts, through witnesses and tangible evidence. [For an example of the efforts that may be involved in proving other crimes evidence. *see* ***State v. Fortin, 162 N.J. 517, 745 A.2d 509 (2000)*** (evidence of prior bad acts must be relevant not merely to material issue, but to material issue that is genuinely disputed).

The court should restrict the government's use of other crimes evidence to instances where the evidence is necessary to refute specific assertions of the defense. The government may not raise other crimes evidence merely because the defendant denies having committed the crime [***U.S. v. Paredes*, 176 F. Supp. 2d 172 (S.D.N.Y. 2001)** (denying admission of other crimes evidence where defendant did not put intent or knowledge at issue). *Cf.*, ***State v. G.V.*, 162 N.J. 252, 744 A.2d 137 (N.J. 1999)** (defendant offered vendetta defense at trial; state argued that Appellate Division unfairly imposed on it "the burden to accurately a defendant's defense before use of other crimes evidence under N.J.R.E. 404(b) may be permitted").

➢ ***(5) State failure to disclose evidence:***

The state failed to disclose evidence according to (SDCL 23A-13-14) and (SDCL 23A-13-15(2)); my appeal attorney also failed to argue that. The state is clearly erred in failing timely disclose to defendant to provide a copy of the state expert forensic report since it is a discovery evidence and request evaluation since they built their case against me from the forensic report generated by the detective. The detective was talking about the operation system of the laptop as it was installed in (November 2007) and about the registry file in **(JT2, Page 10)**, and in **(JT2, Page 32)** about the password, and in **(JT2, Page 33)** about my résumé; he was talking about all of those things even before I go to the stand. → and gov. assistance document

Those reports were used in my trial. Not disclosing them was unfairly prejudices my case towards preparing for the defense; to disclose the results of the detective report with the defense expert to be evaluated; to give us sufficient time to search that facts of the last day file of the three images. There were testimony regarding other people who would use my computer and that I testified that there was no password and the detective argued that the password has been ***changed*** on December 27, without any further clarifications ***(JT3, Page 78; line 23).***

The detective was talking about his forensic report in different times, such as **(JT3, Page 46)**; the detective did not show what was inside his forensic report the scientific facts to support his claims "why *it was possible and not plausible*" that someone else was using my laptop although there were 3 witnesses "including me" stated there were others who were using the laptop. There is a clear fact about misleading the jury to create a wrongful convictions and the detective opinion was not reliable according to (SDCL 19-15-2(9)).

In **(JT2, Page 45)**, the detective admitted he "*don't know who was using the computer through that IP*", while in **(JT3, Page 46)** he said "according to his undisclosed forensic report will be [*possible not plausible*];

The detective answer in **(JT2, Page 33; line 14-19)** regarding my [résumé in "English] and as well as a ... it looked like a benefit's application on the external hard drive as well]. In **(JT3, Page 8)** he said that "he investigates it further in last night". In **(JT3, Page 14-15)**, the prosecutor was talking about the detective "*missed a picture*" was not truth. In **(JT3, page 14)** they said he prepared it last night, while in **(JT2, Page 33)** he was talking about the government assistance document. In **(JT3, Page 40)** he was talking about last night pulling the evidence using

his tool kit again; they have them all from the beginning but they did not disclose them at all and they lie to the court. The prosecutor in **(JT3, Page 16)** told the judge "the evidence was not discussed with defense attorney before *and weren't copied and made available even to the detective CD until 11:30 last night*, so everything was available for them. Failure to disclose such like folder; not discuss it with an expert; the judge not giving us the time to do so result in admitting a prejudicial evidence that was not proven of guilt; done by unknown person.

The state failure of disclosing evidence comes at the first beginning of the opening statement when the prosecutor said that the detective came through *(particular IP) [JT1, page 95; line 24]*. It was not a random IP; they identified my IP from the beginning; in this case, the prosecution is trying to cover the identity of the person who framed me; it was my defense from the beginning that other people who put me in trouble and evidence have been falsified.

They recklessly didn't tell us so we would not bring that person alibi of why he would set me up; why it's only him who saw those counts, while my roommate who lived with me never seen them, and also the other Iraqi guys who my attorney knows about them but did not call them to testify that they had never seen those images or counts.
* or seen anybody who could down load them-

In **(JT1, Page 110; line25) (JT1, page 111; line 1-11)**: *The detective in his answer for a question of wither the computer program would tell what they are (the nature of the images or videos); he denied that, stating he was clicking through them in order to view them. This would be connected directly to his statements in (Page 113) that they have been seen. This would mean that his software does not tell him the nature of images on each LimeWire sharing folder before he downloads it from an IP address.*

* CJT2, P41)

In **(JT1, Page 113, line 22-25)**: the detective said he search for IP addresses that are currently online have been using these file sharing programs and have been *seen* to possess child pornography. *Seen* by whom? That's mean that someone seen those images and was the only one? Why the prosecution did not say that person name? Why they were covering him unless they know he framed me? In **[JT2, page 11, line 1]** the detective answer that he did not download those images from my computer into his computer using the *LimeWire*, there are no reason to believe that my *LimeWire* used to download such like images.

The Sixth Amendment Confrontation Clause provides a criminal defendant the right to directly confront witnesses, the right to cross examine adverse witnesses, and the right to be present at any stage of the trial that would enable the defendant to effectively cross-examine adverse witnesses. ***See Childers v. Floyd, 642 F.3d 953, 970 (11th Cir.2011)*** (confrontation right allows defendant opportunity to "expose witness's bias and motives to lie."); ***See also, United States v. Jackson, 780 F.2d 1305, 1311 n.4 (7th Cir. 1986)*** (government's bad faith attempt to suppress evidence a "common Sense" indication of materiality when materiality had not yet been conclusively determined). *

(JT1, Page 114): the detective said, [he downloaded from the "*IP sharing folder*"], (no mentioning to *LimeWire* sharing folder); he does not know what the software was. How he determines that it was the sharing folder for the *LimeWire* not for any other software while questioning us in the apartment, he went direct to *LimeWire*. (Listen to the apartment interrogation) now, he was asking about *LimeWire* and no other software, while he was on the stand and without any further questioning from defense attorney regarding how he knew that there was *LimeWire* there.

They start searching before we came there about (20-30 minutes or more); for an unknown time till they found the phone number, and calling us. The computers and the external hard drive were on the desk in my room and my roommate's room, so it wasn't hard for them to seize our properties. How longer that they were need to completed them search especially our apartment was small and there were many law enforcements for the search? Most likely, they are done with the search by the time we arrived or shortly after that, which would make their interrogation custodial interrogation.

➢ ***(6) Attorney failure to inspect trial transcripts and other records: -*** (as well not focused) ⇒

Appeal attorney failed to inspect the trial transcripts especially that there were too many words have been changed such as "*Shabab* to *Shabob*" in multiple places; when the state's witness "Akeel Abed" said "*shab*" have been changed to "*Shabba*"; removing my argument at the first day of trial beginning when I asked the judge to change the interpreter with someone who may speak my dialog. In **(JT2, Page 64)**, I did never say, "*I land in North Carolina*".

Other incidents during my sentencing; the prosecutor said that he talked to one of the jury in the 2nd day of the trial and she told him that she was through up after she saw the images, which in those transcripts changed to be the 3rd day after the trial. The prosecution comments about me after the verdict as [look at him he is 36 years old, single with no kids or girlfriend, he looks weird. people like him should not walk free in streets …] also taken of the transcripts.

- Another incident has been taken away from the transcripts that when I was on the stand I told the court that the detective did not allow to us to communicate with our Lutheran Social Service authorized interpreter (Adel Abdul-Hassan), the prosecutor claimed that they did that "*for the security of the investigation*". This statement has been taken away from the transcripts. This would support the custodial interrogation claims if it were not taken away especially by applying [***United States v. Kim*, 292, F.3d 969, 978 (ninth Cir. 2002)** (in custody because door locked, not allowed to communicate with husband or son, and surrounded by police officers)]. When the law enforcement did not allow to defendant to talk with her husband. In the last day trial, when the juries sent a note to the court, the judge was talking about not letting them go home until they reached verdict was also taken away from the transcripts.

When I asked my appeal attorney to investigate the transcripts issues, she refused and insists that "*the court reporter loves her job*" and that's why she will not do something like that. That's a clearly not accepted excuse. [***United States v. Gallardo-Trapero*, 185 F.3d 307, 319 (5th Cir. 1999) (prosecutor's closing argument asking "do you think that agents for the federal government and a prosecutor for the federal government, for the [United States], are going to risk their "career" to commit perjury" was improper]**. I asked from all my attorneys to let the final word go to the judge and not for them, but they refused.

Such like investigation by defense attorneys, if have been done, would show how I was prejudiced in unfairly way by the government in my trial and by changing facts and taking away arguments that may reverse the convections by the Supreme Court.

In (SDCL 23A-29-1) about [Time for motion for new Trial-Rulings thereon- Extension of time]; it is stated that there were some cases regenerate the transcript and also the audio record of the trial which I asked from my appeal attorney to review and to compare the Audio with the transcripts to find all the wrong terms and to ask to regenerate them according to the Audio record, in many cases, the judge order for a new trial. ***State v. Dupris*, 1985, 373, N.W. 2d 446.**

My appeal attorney did never discuss with me my options; did never let me know what she was writing; did never send me the transcripts when I asked her; she was not focused enough in my case; some of the things to prove that were she said that I had degree in mechanical engineering while I said I in materials engineering; she said in my appeal "the résumé was transferred with the government assistance document while in **(JT3, Page 23, line 16-18)** nothing like that was said, and when I asked her to write a response to the prosecution brief she refused.

And regarding the court records for the audio records of interrogation in resident, that record have been altered, and a huge part of the beginning of the interview have been taken away; that record do not start from the moment when we entered our apartment; padding us, questioning without interpreter, and asking from my roommate to change his seat to sit beside me, it also do not contain the interview with the FBI agent from the terrorist task force. When I told my attorneys about that they refused to do any kind of even a simple investigation or talking

with the court regarding have the permission to investigate further that matter especially by checking the main record device tools that have been used for that or ask the FBI for clarification.

In addition, none of my attorneys request to have access to the photos that they took in our apartment (**JT1, Page 122**) shortly after the entered, especially regarding the time stamps and the possession or status of the computer at the time when they seized it, the size of the bedroom and apartment in general, and all the other details.

- ***(7) State introducing my résumé into the evidence:***

The transcripts show the state discussed my résumé's issue in (**JT3, Page10; line 10-20**) when they introduce it as Exhibit # 32 as prove that the external hard drive was mine.

The prosecution did never argue with the judge that they are going to use my résumé as evidence to be "impeachment by contradiction while he was questioning them about the new evidence that they said pulled them just "*last night*" (**JT3, Page 10 - 16**), throwing in in the middle.

The prosecutor was talking with the judge in (**JT3, Page 16**) regarding the file of the 3 images as a response to defense attorney's argument regarding admitting those 3 images together with the government assistance scanned document as it came in (**JT3, Page 15**). In (**JT3, Page 13**) the prosecutor was talking only regarding the file of the three images to be used as "impeachment by contradiction" giving no relevancy regarding how to connect the résumé to his impeachment by contradiction arguments. The trial court did not specifically state under what authority it has been admitted.

In (**JT3, Page13; line 23-25**) (**JT3, Page 14; line 1-6**) The prosecutor failed to answer a question to the judge regarding how he was willing to tied up the résumé into the case; the only answer was given came in (**JT3, Page 14; line 2**) when he told the judge "the résumé is separate". When the prosecutor was talking about the impeachment by contradiction was regarding the file of the three images (**JT3, Page 19**). In (**JT3, Page 23**), the prosecutor again corrects the judge statement regarding admitting the résumés referring to that he was talking to the Government assistance yellow document. My attorney never discussed my computer's skills on direct examination.

In (**JT3, Page 6; line 4-6**) I answered a question by the prosecutor regarding my knowledge in computers, "I was still learning how to use a computer" since everybody is trying to learn how to use them; that could be proven by the nature of the programs installed there. Nobody questioned me regarding "how many years I have of computer experience" or in which field it was. The detective found nothing to suggest that there was any kind of special knowledge or training in the fields of the forensic software. If someone really has, such like training in, he would put it in his résumé as the detective did.

In (***JT2, Page 73***), I was talking about my ability to communicate with the detective who has all the knowledge about English. My understanding to his terminology was [very little]; my testimony was supported by the detective testimony (**JT1, Page 127**) (**JT2, Page 18; line 9-13**). I mansion that I attended English classes at the Lutheran Social Services; shortly after my arrival to the U.S. they were who helped me doing my résumé.

- The prosecution opens the door regarding my résumé and *was prepared in English* during direct examination the detective (**JT1, Page 127; line 1-4**); (**JT2, Page 33; line 14-19**) before my testifying. In [(**JT3, Page 9; line 5-20**) (**JT3, Page 10, line 10-20**) [exhibit 32], they introduce my résumé as evidence to prove that "the external hard drive was mine"; the prosecutor asked the detective "if he found any word documents that indicated it was my external hard drive", then, he went further in the details of my résumé (**JT3, Page 11-12**) although I mention that I had my résumé inside my external hard drive during cross examination in (**JT3, Page 5; line 21-25**). My trial attorney made ~~an~~ objection for introducing it to the exhibit ~~without stating directly the reasons for~~ No

~~that objection.~~ However, the judge overruled that without showing under which authority he accepted it ***State. v. Weber*, 487 N.W.2d 25; 1992 S.D.**

- I already testified that the external hard drive and the laptop were mine **(JT2, Page 77)**, so, the résumé should not be admitted into the evidence; both of my attorneys failed to argue that; nobody called me for a job interview based on my résumé; none of my résumés did have my signature. The reason for having four different résumés was training me how to make finale one.

SDCL 19-14-10(1) in general: - Even if impeachment evidence is not admissible under court rule which prohibits the use of extrinsic evidence to prove specific instances of conduct, it may be admissible to impeach by contradiction as allowed by court rule allowing party to attack credibility of a witness. SDCL 19-14-8, 19-14-10. **[*State v. Litschewski*, 590, N.W. 2d 899, 1999 SD30]**. A résumé in general is character evidence that someone would describe his skills; the detective himself admits that people usually would over skills themselves to find a job **(JT3, Page 39-40)**. My case similar to ***State v. Weber*, 1992, 487, N.W. 2d 25** (*Defendant never testified concerning his character for truthfulness*). In my direct examination, I did never argue that I was accurate and very carefully in preparing my résumés. My testimony regarding my résumés came after the prosecution brought into the exhibits in the 3rd day.

In **[*State v. Fowler*, 552 N.W.2d 92, 1996 SD 78]**, the state provided his résumé into the exhibits since it was produced by him and have been used in his recent employment; it was accomplice to his application form and kept in his file. He opens the door toward his knowledge. The questioning produced inconsistencies between Fowler's direct testimony and the written document that he lies in direct examination ~~and his direct examination~~. Defense attorney regarding this exhibit as "character evidence" has made no objection. The Supreme Court, hold his trial attorney the fault of not objecting the admission of the resume as a character evidence, which it would be the same in my case, since my trail attorney failed to rise such like objection.

The Supreme Court held that "Defendant could not appeal issue of whether evidence of defendant's employment and education history that was contrary to his direct testimony was improperly admitted as character evidence, since issue was not raised either as grounds for objection by defendant's attorney or as explanation of its cross-examination by state SDCL 19-14-10."

The Supreme Court held in that case "*this court does not address objections not raised before the trial court*"; adding "the trial court must be given an opportunity to correct any claimed error before we will review it on appeal" ***State v. Henjum*, 1996 SD 7, ¶ 13, 542 N.W.2d 760, 763.**

In my case, it was the state witness who opens the door toward my English skills **(JT1, Page 127; line 1-4)**; my testimony regarding my English was supported the detective. By comparing his résumé to mine regarding how he describe knowledge in computers, also, no evidence provided that my résumé was accurate; all the four résumés were under preparation and was made by assistance from the Lutheran Social Services since.

Appellate attorney could still argue admitting my résumés as a plain error since there were no clear reasons given by defense attorney for his objection" if the court decided that there was no a properly objection to be considered as it came in **(JT3, Page 30; line 4)**". In ***State v. Holloway*, 482 N.W. 2d 306,309 (S.D. 1999)**, the Supreme Court held that [*When an issue is not properly preserved for appeal we will not address it unless plain error is shown*]; "the Plain error rule applies only in exceptional cases, and then it must be applied cautiously; the rule does not encompass every error which occurs at trial, but those errors which are both obvious and substantial." *Id.* Plain error exist if the exhibit prejudice defendant rights ***State v. Brammer*, 304 N.W. 2d 111, 114 (S.D. 1981).** *Prejudicial error is error that in all probability must have produced some effect upon jury's verdict and is harmful to the substantial rights of the party assigning it.* ***State v. Phillips*, 489 N.W. 2d 613, 617 (S.D. 1992); *State v. Michalek*, 407 N.W. 2d 815, 818 (S.D. 1987).** Defendant also must prove that under the evidence the jury, probably would have return a different verdict ***State v. Weisenstein*, 367, N.W. 2d 201, 206 (S.D. 1985).**

The résumé in my case have been admitted as a part of the circumstantial evidence, and it substantially hurt my case; causing confusing in issue, and since there was no need for an another exhibits to prove that the external hard drive was mine, and since I already testified on the stand that I have my résumé inside my external hard drive and since it was over skilling my abilities into find a job. (JT3, P5).

Even that if the argument was presented have relevancy, it would be violation to [(SDCL 19-12-3 (Rule 403) (Note 3)) "Exclusion of relevant evidence if prejudicial, misleading or cumulative"; stated that (Although relevant, evidence may be excluded if it's probative value is substantially out weight by the danger of unfair prejudice, confusing of the issues, or misleading the jury or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence)]. The main reason for using my résumé from **(JT2, Page 33)** when the detective was referring that, he found "my résumé in English" in the external hard drive. On the stand **(JT2, Page 77)** I clearly stated, "The external hard drive was mine". In **(JT2, Page 76)** I mansion that "I am familiar or I know how to use a computer", however there were no definition given for what the mean of "familiar or know how to use the computer"; playing computer games mean "know about computers"; while cross examined by the prosecutor in the 3rd day, I told him that I have my résumé in my external hard drive. **(JT3, Page 5; line 21-25)**.

In [SDCL 19-12-5 (10) Balancing probative value and prejudice even if prior bad act evidence is found to be relevant to material issue in case, it may still be excluded if its prejudicial effect substantially out weights its probative value. SDCL 19-12-3, 19-12-5. **Matter of R.S.S., 1991, 474 N.W. 2d 743]**. according to ***State v. Weber*, 1992, 487, N.W. 2d 25** (*Unsigned federal tax return should not have been admitted against defendant to establish his character for untruthfulness, where defendant never testified concerning his character for truthfulness, prosecutor never asked defendant about return, return was work sheet prepared by defendant's accountant, and there was no evidence that return was ever mailed to IRS*); nothing was said by me was not supported by evidence; state detective testimony or the other witnesses. In my case the under preparing résumés brought into the evidence as prove that the external hard drive was mine in the 3rd day of trial.

The probable value of admitting this document should be weight against its prejudicial effects; in those résumés, I admitted that I was over skilling myself as the majority would do the same; the résumés was made by assistance of the Lutheran Social Services. The résumés should not be admitted into the evidence; I did not deny that my résumés were not in my external hard drive. Dealing with this Exhibit should be as the same of what was came in ***State v. Weber*; [*State v. Lykleen*, 1992, 484. 2d 869, 39 A.L.R, 5th 879].**

I had classes in computer back in 1993 for as it in my university certificate; I had my laptop for almost 6 months; nobody asked me regarding how many years I have computer experience. There were no specific computer skills as the detective wrote in his résumé. I uninstalled the *LimeWire* in October of 2009 because it was slow dawn my laptop; I was not in need for it.

The résumé was used just to generate substantial dangerous of the prejudice and confusing of issue, or needless presentation of cumulative evidence SDCL 19-12-3 (Rule 403). The court should not allow for that résumé to be produced into the evidence; my appeal attorney did not argue it as plain error, especially she had the chance to write back response to the state's brief. If someone really knows English, he should not put that in his résumé considering it a problem that would stand between him and finding a job. There were no official scores for my English that was brought from a qualified linguist. ✱

The prosecutor repeats it in closing argument **(JT3, Page 78; line 7-8)**; he said, "When he downloads and installs the operation system with the name "*Haider*" as the owner name"; was recklessly to mislead the jury, creating confusing of issues. My attorney failed to object that. It was very unfairly wrong and very prejudicial towards connect me to the 287 thumbnails images. Mike Hanson Failed to Vise any objection in this matter

- ***(8) Attorney failure to request for evidentially hearing regarding the jury who contact the prosecution:***

Attorney failure to inspect the unfair prejudicial impact of the state evidence on the jury especially towards the woman who was "*throwing up*" and she was so ill according to the prosecutor statement in (***sentencing transcripts, Page 23***).

The trial court must conduct a *voir dire* examination of prospective jurors in order to reveal potential bias, *see* ***Mu'Min v. Va., 500 U.S. 415, 431 (1991)*** (*voir dire* enable court to select impartial jury and assist counsel in exercising peremptory challenges).

The trial court has broad discretion over the *voir dire* procedure. *See* ***Skilling v. United States, 130 S. Ct. 2896, 2917 (2010)*** (holding that trial judges have broad discretion over jury selection).

The Sixth Amendment requires that the jury guaranteed to the defendant be impartial. The trial court is responsible for ensuring that defendant receives an impartial jury, and its findings may only be overturn for abuse of discretion. *See, e.g.,* ***United States v. Augustin, 661 F.3d 1105, 1132-34 (11th Cir. 2011)*** (no abuse of discretion to dismiss juror for failing to follow jury instruction to apply law to evidence).

The court told the jury in (**JT1, Page 21-22**) that, [*if such like type of cases would not make you comfortable, and then we would see you in different case*], also The court said, "*They do not want jury who may involve emotionally*". If that woman talked to the court about how she was feeling and how she was uncomfortable after the 1st day of the trial and she was through up and how her emotionally involved, the judge would excuse her. Those emotions generated at the first day of the trial not during the deliberation. That woman failed to discuss that, and that's why the court selects 13 jurors to dismiss one of them if he or she was ill. The judge instructs the juries in #1 & 19 that they must flow all the judge instructions including the ones that he would give during the trial, including what he said about their emotions and that person would be used in a different trial if he or she was emotionally involved in the case.

In (*SDCL 23A-20-13-1* "challenges for cause"), [the challenge #12: the prospective juror has a state of mind evincing enmity, or bias to or against an attorney, the defendant, the prosecutor, the alleged victim or complainant in case.], and in [challenge #21: a challenge for actual bias showing the existence of a state of mind on the part of prosecution, *alleged victim*, or complainant that satisfies the court, in exercise of sound discretion, that the juror cannot try the issue impartially, without prejudice to the substantial right of the party challenging.]

In [***State v. Darby*, 1996 SD 127, 556 N.W.2d 311; 1996 S.D]**, the State Supreme Court held that, "S.D. Codified Laws § 23A-20-12(2) provides the statutory basis for challenging a juror for actual bias. Section 23A-20-12(2) provides, in pertinent part: A specific challenge for cause is that a juror is disqualified from serving in the case of trial because of: (2) Actual bias. Actual bias is the existence of a state of mind on the part of a juror, in reference to the case or to either party, which satisfies the court, in the exercise of sound discretion, that he cannot try the issue impartially, without prejudice to the substantial rights of the party. In a challenging for actual bias, cause must be alleged.

In that same case, the Supreme Court continued, "*A trial judge is vested with broad discretion in determining juror qualifications. Before an appellate court will reverse a trial court's refusal to disallow foe cause potential jurors, the movement must show actual prejudice resulting from the trial court's decision. Reversible error exists only where defendant can demonstrate material prejudice*". In my case, we have very clear material prejudice evidence; that woman was throwing up and her emotion was strongly involved in the verdict.

The State's Supreme Court held that, "Claims of ineffective assistance of counsel will not ordinarily be considered on direct appeal. The preferable means to consider incompetent counsel claims is through habeas corpus proceeding, there are many reasons for this rule including the fact that the attorney accused of incompetence is then provided an opportunity to defend his or her actions. An exception to the rule exists when representation at trial was so ineffective and counsel's representation so casual that the trial record evidences a manifest usurpation of appellant's constitutional rights. ***State v. Sonen*, 492 N.W. 2d 303; 1992 S.D.**

According to Federal Supreme Courts: A petitioner can overcome procedural bar by demonstrating either: (1) cause for the procedural default and actual prejudice as a result of the alleged violation of federal law or (2) the failure to review the claims will result fundamental miscarriage of justice. Petitioner can satisfy the "cause" requirement by showing, for example, the assistance of counsel was ineffective in violation to the sixth Amendment, on that governmental interference rendered prejudicial compliance impracticable.

My attorneys failed to argue those facts of the prejudice of that juror; Appellant attorney failure to inspect the jury selection; trial attorney failed to make further inquiries regarding that juror, was violation to my right to have impartial and not prejudice or biased jury. *See, e.g., **United States v. Brown, 441 F.3d 1330, 1357 (11th Cir. 2006)*** (exclusion of juror unsure whether to vote based on law or personal values proper because could have substantially impaired performance as juror).

- ***(9) Attorney failure to argue the issue of separate the indictment counts into 2 trials to prevent unfairly cumulative prejudicial effects of counts:***

The prosecutor in closing argument **(JT3, Page 65-66)** aimed to connect the 287 thumbnail to the other counts using the cumulative effect of (unproven evidence) and count on each other suggesting that the same person who downloaded them are who download all the counts came in indictments, although it could be true but it could create some kind of confusing in issue since the instruction came to the jury was to consider each count separately, however it show the importance of separating the counts that in the external hard drive from the ones in the unallocated space of the laptop.

My trial and appeal attorneys failed to argue the issues of separating the counts that came from the unallocated space of the laptop hard drive from the counts that were found in the external hard drive which as the state argue were not deleted.

In **instruction # 38**, the court instructs the jury that each count is separated. In **(JT3, Page 77; line 1-6)** that the prosecutor said the same thing in closing arguments, while in **(JT3, Page 65-66)** was suggesting to the jury that, "the same person who download the 287 thumbnail images, is the same one who did the others".

The storage way of the unallocated space of the laptop was different from the external hard drive. The government argued that the deleted images which were in the laptop were not available to be viewed by the regular command keys unless using some kinds of software **(JT2, Page 9; line 1-16)** and that would require some kinds of forensic training.

None of the images in the allocated space were downloaded from the detective computer to initiate his investigation **(JT2, Page 11; line 1, 4-7)**; no search terms were founded in my laptop to suggest that it was used to search them; the computer temporary internet file don't contain any of such like images to suggest that it was viewing such like images; the laptop was purchased used, and the detective admit also that those images could be there before I buy it. **(JT2, page 10; line 13-15)**.

None of the images names which the detective found in the unallocated space contain the term *young*; there was no software as he described in **(JT1, Page 104; line 13-16)** which were available strictly to the law enforcement or other big originations as explained in **(JT2; Page 8-10)** were installed in my laptop to suggest that have been used to view the deleted images. There were no evidence regarding any special training of how to use them or even that the knowledge about their names. No time stamps were available that would suggest those images were available on or about December 29 as the charges read.

There would be no way that the juries would come with the verdict of guilty on any of those counts, noticing that they came back with a question to the court about "*they agreed on some counts while not on others*", then after the judge sent them his response, it did not take from them more than just few minutes to agree on all the counts; those minutes include the time when the Bailiff went to them; giving them the judge answer, make their

deliberations; send the notice back to the judge; calling them back and be seated before they give the verdicts. ***(JT3, Page 99; line 18-22).***

Instruction #22, told the jury about the indictments came as (On or About) December 29th, 2009 with no clear referring to the period time to be considered as (About) leaving it open to their speculation without any objection from trial attorney especially most of the counts given an exact date and time and there was nothing to connect the images found in the unallocated space of the laptop hard drive to the time given to the indictments counts letting the jury to use the unfairly prejudicial of the cumulative effect of counts on each other generation confusing of issues since the judge instruct them to consider each count separately.

The judge in *instruction #5*, told the jury that if the evidence proves beyond a reasonable doubt that the crime was committed *reasonably* near the date alleged in the information or indictments, that is sufficient, however, my attorney failed to cross exam the detective or to ask the judge for further explanation that should be given to the jury regarding how to consider the *reasonably near* the date alleged if we have fixed times and most in general far away from the December 29th (some back to February 2004), and if they were meaning the access date, why they gave also create and modified dates?

As about the other images in the external hard drive, some of them the detective misleading testimony about how it may come there; the use of the unfairly prejudicial evidence and testimony about the (*other acts evidence*), that they have been no conviction or charges to admit them as other acts done by me rather than the prosecution theory. About the file of the three images that they brought last day, in the 3rd day, the initial and confirming answer from the detective that *[they have been copied/paste]* into the external hard drive. He knows very well they had been *copied* into there, after have been assembled in other computer ***(JT3, Page 46; line 1-4);*** no roots at all for that file in my laptop; and see later in the next line he was trying to cover himself after what he found of making a mistake and said [*or may be cut*].

Defense attorney also failed in cross-examination of the detective to inquire for an answer from the forensic reports why it is not plausible as in **(JT2, Page 14; line 4-7)** regarding the source of the images in the external hard drive especially the timestamps prove otherwise. What he said in his testimony that they have been copied. The detective in his answer **(JT2, Page 27; line 2-9)** about their source aimed to use the cumulative effect of the 14 count to each other would be another reason to why the counts should be separated into two trials. His answer there was also regarding the installation of *LimeWire* in the laptop, which was I already confirmed in that interrogation. This also show the importance of adding the instruction regarding how to consider an expert testimony and since the prosecution depend on that *possible but not plausible* in reaching to the convictions **(JT3, Page 71; line 17-18).**

In [***State v. Breed*, 1987, 399 N.W. 2d 311**], the Supreme Court held that, [Our Legislature has directed that two or more offences (whether felony or misdemeanors) may be charged in the same information or indictment only if the offences "are of the same or similar character or are based on the same act or transaction or on two or more acts of transactions connected together or constituting parts of a common scheme or plan. "SDCL 23A-6-23. ***See State v. Closs*, 366 N.W.2d 138, 139 (S.D. 1985).** Additionally, "if it appears that a different . . . is prejudiced by the jointer of offences . . . the court may order an election or separate trials of courts . . . or provide whatever other relief justice requires. "SDCL 23A-11-2. See ***Closs*, 366 N.W.2d at 139; *State v. Hanson*, 278 N.W.2d 198, 201 (S.D. 1979); *State v. Van Beek*, 88 S.D. 154, 157, 216 N.W.2d 561, 563 (1974).**

According to the *American Bar Association Standards for Criminal Justice*, "If the offences are not related, the defendant is entitled to severance as of right . . . "Standards 13-3.1 (b), comment at 13.31; 13-1.3 commentary at 13.11 (2nd ed. 1980) (emphases added)

Unrelated offences include any offences that are not based upon the same conduct, upon a single criminal episode, or upon a common plan. Offences committed at different times are not "related" merely because they are of the same or similar character. Thus, a series of burglaries or holdups would be unrelated offences even though a

distinctive of commission is repeatedly used. There was no evidence at all to refer or to suggest that it was me in person who downloaded those images or even that had looked at them.

It may be generally stated that offences should be severed when there is a significant risk "that the jury will convict the defendant upon the weight of the accusations or upon the accumulated effect of the evidence. The defendant can also be disadvantaged if the available defenses are inconsistent or the defendant wants to testify as to one offence but not as to others. "American Bar Association Standard, id., Standard 13-2.1, commentary at 13.13 (footnotes omitted). That would apply direct on my case especially as I discussed before the different ways of the defenses about the deleted and undeleted counts. *See, e.g., **United States v. Vue, 13 F.3d 1206, 1210 (8th Cir. 1994)*** (severance justified because there was appreciable chance that defendant would not have been convicted in separate trial).

➢ ***(10) Unexplained delay in bring the indecent in earlier time:***

The Due Process Clause [The Due Process Clause of the Fifth Amendment provides in pertinent part that "[n]o person shall ... be deprived of life, liberty, or property without due process of law." U.S. CONST. amend. V. The 14th Amendment imposes this same limitation on the status. *See* U.S. CONST. **XIV**] and Federal statutes of limitations protect defendants from intentional and prejudicial pre-accusation delay. Status of limitations are the primary safeguards against prejudicial delay [*See **United States v. Marion**,* **404 U.S. 307, 32 (1971)**; see e.g., ***United States. v. Daley*, 454 F.2d 505, 508 (1st Cir. 1972)** "statute of limitations provides primary protection against prosecutorial delay ***United States v. Brown*, 498 F.3d 523, 528 (6th Cir. 2007)** "Same"]. The sixth Amendment right to speedy trial is not implicated before arrest [*See* **Marion, 404 U.S. at 320-21**], and even after arrest only applies to the charges actually made [*See, e.g., **United States v. Kelly*, 661 F.3d 682, 687-89 (1st Cir. 2011)** "speedy trial clock not started by arrest and incarceration in different district for crime unrelated to indictment";

However, the Due Process Clause may be violated even if an indictment is brought within the prescribed statute of limitation. [*See **United States v. Lovasco*, 431 U.S. 783, 789 (1977)** (statutes of limitations do not "fully define" defendants' pre-indictment rights; Due Process Clause has "limited role to play in protecting against oppressive delay").

To establish a due process violation based on pre-accusation delay, a defendant must show that the government's delay was an intentional device employed to gain a tactical advantage or to harass the defendant, and that the delay resulted in actual and substantial prejudice [*See **United States v. Gouveia*, 467 U.S. 180, 192 (1984)** (claim that pre-indictment delay violated due process valid if defendant proves government intentionally delay for tactical advantage and actual prejudicial resulted); ***Lovasco*, 431 U.S. at 780-90** (noting that government delay intended to harass or gain tactical advantage would violate due process, but declining to determine which particular circumstances would require dismissal).

A defendant may move to dismiss indictments to remedy government misconduct including vindictive prosecution, prosecutorial misconduct in grand jury proceeding, prosecutorial misconduct outside the indictment process. A defendant may also move to dismiss an indictment for unnecessary delay before presenting charges to the Grand Jury, filing an information against a defendant, or bringing the defendant to trial [See FED R. CRIM. P. 48(b);

*See also **Barker v. Wingo*, 407 U.S. 514, 531-32 (1972)** (establishment of unnecessary pre-indictment delay accomplished through 4-factor balancing test analyzing length of delay, reason for delay, whether defendant asserted speedy trial rights, and whether defendant was prejudiced); ***United States v. Marion*, 404 U.S. 307, 324 (1971)** (to succeed on claim of pre-indictment delay, petitioner must show actual prejudice and that delay was due to intentional government inaction). Denials of those motions are reviewed for abuse of discretion or clear error [***United States v. Corona-Verdbera*, 509 F.3d 1105, 1112 (9th Cir. 2007)** (denial of motion to dismiss indictment for pre-indictment delay reviewed for abuse of discretion); ***United States v. Wetherald*, 636 F.3d 1315, 1320 (11th Cir. 2011)** (same)], but review is de novo if the trial court's denial was based on a matter of law [***United States v.***

***Uribe-Rios*, 558 F.3d 347, 351 n.4 (4th Cir. 2009)** (denial of motion to dismiss for pre-indictment delay reviewed de novo)].

Generally, courts review the denial of a defendant's motion to dismiss an indictment only after the defendant has been convicted and sentenced [*See, e.g.,* ***United States v. Juvenile Male*, 554 F.3d 456, 464-65 (4th Cir. 2009)** (no interlocutory appeal of denial of defendant's motion to dismiss amended information on 1st Amendment and Commerce Clause grounds because not within collateral order doctrine)].

The prosecutor is, however, obligated to refrain from certain improper conduct while bringing and presenting the government's case *[**United States v. Hogan*, 712 F.2d 757, 761-62 (2nd Cir. 1983)** (prosecutorial misconduct when prosecutor deceived grand jurors to quality of hearsay testimony, argued defendant was "a real hoodlum", accused defendant of crimes not investigated by grand jury, and allowed government agents to make false and misleading statements prejudicing defendant). For instance, the prosecutor may not delay bringing an indictment when the delay is intended to gain tactical advantage, and it substantially prejudices the defendant [*See **United States v. Marion*, 404 U.S. 307, 324 (1971)**].

My appellant attorney (Nicole J. Laughlin) [Id *at* 5] wrote in the brief that was submitted (*It took two months for the detective to go through all the data contain on the laptop and external hard drive using the forensic software (**JT1, Page 131-32**)].*

The state purposely aimed to delay bringing charges for almost 9 months, that could be proved by the detective answer to our phone calls, especially the ones that made from the Lutheran Social Services when he was telling us and till about (June of 2010) he did not have anything against *me* and that I can leave the state freely to go to live with my family in New York. The main tactical benefit is to be used by the prosecution during my trial that (he run away because he knows he was guilty) [***United States v. Brown*, 169 F.3d 344, 349 (6th Cir. 1999)** (*stating that government had the burden of proving that defendant was actually culpable in causing the delay by evading arrest on the indictment, or was aware of the issuance of the indictment and intentionally hid himself from law enforcement agents*)]. In addition, they know they seized all my property and the Lutheran Social Services told detective that I couldn't leave without them since they were all what I have and have no money or job to buy new one. It was an intentional device employed to gain a tactical advantage or to harass the defendant, and that the delay resulted in actual and substantial prejudice.

*In (**JT1, Page 117; line 18-22**): the detective said that he has me as suspect, adding to that his believe of the use of "Young Movies term" and me telling him that I used LimeWire in that record beside having the denial of my roommate about LimeWire.*

The other tactical benefit is they know that I was new arrival to the United States and my English was limited at that time, they know that their incident was on December 29th, 2009 almost 6 months after my arrival and they know I don't know their terms, so they waited almost 9 months so they can say he know English very well as in **(JT3, Page 94)**.

The state also aimed to delay in brings indictments into getting tactical benefits into their testimony and to the believability of their theory into bolster the detective testimony by adding more experience into the detective work to be used during trial such as what came in **(JT1, Page 101; line 7-8)** when the prosecutor asked the detective about his experience (two-and-a-half years) although the investigation regarding my case started before even that the detective finished his first year since he was hired in January 2009 and **(JT1, Page 107-108)** when the detective states that he did hundreds of investigation.

- In ***McNeely V. Blanas*, 336 F.3d 822, 826 (9th Cir. 2003) (placing burden of explaining delay on state)**, the court holds that "A more neutral reason such as negligence or overcrowded courts should be waited less heavily, but, nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than the defendant.

➢ ***(11): Attorney failure to inspect the coercive factor on jury:***

The juries were discussing my case about 3 hours; by the time when they sent their note "they were agreed on some counts while not on others", suddenly after the judge sent the note, they agreed on every one [it didn't take from them more than 14 minutes to agree on all; including the time when the note was taken to them; the time when they re-discuss and the time when they seated back]. (5T3, 99-102)

In ***Allen v. United States, 164 U.S. 492, 501-02(1896)***, the Supreme Court approved the trial court's practice of admonishing a deadlock jury to make a further effort to reach a verdict, the amount of time the jury deliberates following the Allen charge, although often a factor, will not in itself indicate coercion. *See, e.g., **United States v. Freeman, 498 F. 3d 893, 908 (9th Cir. 2007)*** (no coercion though court gave *Allen* charge after 3 hours of deliberations and jury reached verdict 2 hours later). ***But See, e.g., United States v. Webb*, 816 F.2d 1263, 1267** (8th Cir. 1987) (coercion because jury returned verdict 15 minutes after court gave *Allen* charge); Weaver v. Thompson, 197 F.3d 359, 366 (9th Cir. 1999) (coercion because jury returned verdict 5 minutes after court gave *Allen* charge).

Failure of both my trial attorney and appellate attorney to discuss this issue extremely prejudiced my case and my right to have fair trial.

Individual harmless error may require reversal because of their cumulative effect. *See, **United States v. Delgado, 631 F. 3d 685, 710-11 (5th Cir. 2011)*** (errors of prosecutorial misconduct, improper jury instructions and deficient transcript of proceedings required reversal because concerned central legal and factual issues of case and rendered trial fundamentally unfair***); United States v. Wallace, 848 F.2d 1464, 1475 (9th Cir. 1988)*** (erroneous admission of prior conviction and prosecutor improperly vouching for witness not harmless because cumulatively prejudicial).

- ***The Double Jeopardy Clause and Collateral Estoppel :-***

The double jeopardy clause encompasses the doctrine of collateral estoppel, which holds that when an issue of ultimate fact has been determine by a final judgment, the issue may not be re-litigated between the same parties.

The double jeopardy clause bars a second prosecution for the same offence only if jeopardy attached in the original proceeding. ***See Ex parte Lange, 85 U.S. 163, 173-74 (1873).***

In a jury trial, jeopardy attaches when the jury is impaneled and sworn. ***See Crist v. Bretz, 437 U.S. 28, 38 (1978)***; *see also **Downum v. United States, 372 U.S. 734, 737-38 (1963)*** (jeopardy attached when jury impaneled and sworn though jury discharged before trial); *See, e.g., **United States v. Melius, 123 F.3d 1134, 1137 (8th Cir. 1997)*** (jeopardy attached when jury impaneled and sworn though mistrial declared when non-testifying witness had contact with jurors during deliberation).

The Fourteenth Amendment's Due Process Clause extends the Double Jeopardy Clause's protections to state prosecutions. ***See Benton v. Md., 395 U.S. 784, 794 (1969).*** Other guarantees deemed integral to double jeopardy also apply to the states. ***See Crist v. Bretz, 437 U.S. 28, 37-38 (1978)*** (Federal rule that jeopardy attaches when jury is sworn applies to states because integral part of 5th Amendment); ***See also Greene v. Massey, 437 U.S. 19, 24 (1978)*** (federal rule that retrial barred when conviction reversed due to insufficiency of evidence applies to states because integral part of 5th Amendment)

In ***Ashe v. Swenson, 397 U.S. 436, 443, 90 S. Ct. 1189, 1194, 25 L. Ed. 2d 469, 475 (1969)*** "A group of masked men had robbed six men who were playing poker in a basement. After the defendant was acquitted for robbing one of the men, he was convicted for robbing one of the other poker players. The Supreme Court reversed the conviction on the ground of collateral estoppel, as the acquittal in the first trial precluded the prosecution from charging him for the other robbery".

In order for collateral estoppel to prevent a fact from being reexamined in a second prosecution, three elements must be satisfied: (1) the second prosecution must involve the same parties as the first. ***See Standefer v. United States, 447 U.S. 10, 13-14) (1980)*** (acquittal of bribery charge no bar to later prosecution of different defendant for aiding and abetting bribery; (2) the fact at issue must have been necessarily decided as part of the judgment of the prior prosecution. *See, e.g.,* ***United States v. Gonzalez-Sanchez, 825 F.2d 572, 584 (1st Cir. 1987)*** (acquittal on arson conspiracy charge barred subsequent prosecution for involvement in same conspiracy); ***United States v. Davis, 460 F.2d 792, 796 (4th Cir. 1972)*** (acquittal establishing conscientious objector classification barred subsequent prosecution challenging entitlement to such classification); and (3) the resulting judgment must have been final. *See, e.g.,* ***United States v. Ford, 371 F.3d 550, 555-56 (9th Cir. 2004)*** (collateral estoppel bar to prosecution of defendant because dismissal of similar issue during Fed. R. Crim. P. 29 hearing is equivalent to adjudication on merits).

In my case, the prosecution should provide a credible evidence as to who may else download such like materials The jury instruction provided that each download is to be separate. *Jury instruction # 38, as well the prosecution in (JT3, Page 77; line2-6), told the jury in closing argument that, "... The fact of the matter is a guilty on count I, doesn't mean a guilty on count II through XIV. A not guilty on count I don't mean a not guilty on II through XIV... ".*

Grounds

First of all I would like to thank you for giving me the chance to write my "Hoboes Corpus" about both my trail attorney "Mike Hanson" and my appeal attorney "Nicole Laughlin".. First I would like to talk about "Mike Hanson"..

FIRST GROUND:
Because I was anew arrival to the US and never being in trouble with police all my life I was trying to ask from other Iraqis specially who lived in Sioux Falls and one of them refer me to him.. I have no knowledge if he specific in cretin cases or not and he never talked with me about that.. While I was visiting him in his office the longest time he spent with me might not be not more than 10 minutes.. He never brought any interpreter to help me understanding.

SECOND GROUND:
The only "evidence" he showed to me was that "CD" which have part of the conversation with the detective in our apartment which it did not start from the first beginning of entering the apartment.. That "CD" record does not consider an "evidence" for many reasons.

THIRD GROUND:
My attorney should file for motion to argue to drop that "CD" from the "evidence" before my trail start.. But he did not.. There were many issues about that record and our rights.

FOURTH GROUND:
One of our rights is to be free in our apartment.. Seating us as they like and the way how they were talking to us is violations to our rights.. And

FIFTH GROUND:
Many times pointing by hand to the gun which he have while talking would create a big fear specially for me because in Iraq I was about to be killed by guns.. I had that situation of saying my last prayers before I die.. I was afraid to go to the bathroom.. They were round us and they ordered my roommate to remove from the place where he sitting to seat him beside me.. After that.. when he moved the woman which was with the detective went and sit on the sofa where my roommate was sit.. She never asked if she can sit or not.. As to my basic knowledge of respecting others is to ask before I sit.. I told my attorney about all that but he did nothing.

SIXTH GROUND:
The other issue about the record its not all the conversation.. I asked from my attorney to send the record for an Audio expert to check if there were part cut specially the begin and the end.. The record did not start from the moment when we entered the apartment and did not end by the moment the detective end his record in that "CD".. My attorney did no action about that..
Before the record start in that "CD" there were questions from the woman with the detective about "How its make me feel to watch women having sex..".. And also there were other questions by both.. I told all that to my attorney but he never took any action.

SEVENTH GROUND:
The other issue about that "CD" record is after the detective finish his talk.. they did not left.. An other officer start to talk with us.. He show us his badge and introduce himself to us as FBI

Appendix H
Exhibit 3

officer from the department of terrorists.. He told us that he is not one of them and his duty is to protect the country and he asked us to help him.
I told my attorney about that.. But.. He never had any action.. He told me that " The detective never mention that in his report.." my attorney did a strange thing.. He just did not want to say " The state hiding facts".. so he did not had any actions about that..

EIGHTH GROUND:
Also the detective showed in his hand papers he said its from the court and other papers in English and ordered me to sign it.. I had no knowledge about what's there.. No body read it for me or explain it what's could be there.. There were no interpreter with us to help read any of them.. My attorney never had any action about that when I told him.. I've been only 6 months at that time in the US.. I would sign any thing for some one with a gun.. I don't want to be hurt.. I've been hurt before by people with guns.. I did not want those moments when I said my last prayers to get them back again.. I didn't want to begging for my life.. I hate that scary feeling and I didn't want to have it again.

NINTH GROUND:
Also.. Before we return back home we called for an Iraqi legal interpreter.. He work for the Lutheran Social Services.. He also interpreter for the court.. When we arrived he was waiting for us to help interpreting. But. The detective did not let him in.. it was difficult for me to understanding what he was talking.. I was trying to pick up one or two word of what they were talk and try to remember the words which they teach us in school.. It was very hard for me to communicate with them.. He was questioning us and he took all the rights away of understanding.. I was need for some one from Iraq to help understanding.. That Iraqi interpreter would help me read and explain for me the documents which they brought with them.. But he did not let him in.

TENTH GROUND:
The Detective decide to use some one else.. By the phone.. And do not speak the Iraqi language.. He called her direct without calling for an office and request for an interpreter.. She was clearly from different country.. Sirs.. If you asked any one in the world if all the Arabic is the same.. The answer will be "NO".. I request from my attorney to search for the facts and bring that issue which its very important part from that "CD".. he did nothing.. He did not talk with the judge or brought witnesses to support my issue.

ELEVENTH GROUND:
When I was on the witness stand I was trying to mention that and I remember the state attorney said, " He was trying to secured the investigation". Sirs.. That Iraqi interpreter was not some one from streets. He was a legal interpreter and have "ID" issued for him for that purpose.. The excuse that the state used is completely not acceptable and my attorney should argue that.. But he never say a word.. It was only me making the argument and that's make the state change them story from "46 minutes" to "90 minutes". If I had my attorney with me we could reach to all the facts about the time, the interpreting and all the other issues about that "CD". He just did nothing.

TWELFTH GROUND:

The other fact about my attorney is he never ask for a technical support from a computer expert, It was very important to have some one specially a "computer evidences" are very easy to be manipulated.. And if some one train well how to use computers it would be easier for him. A computer expert to check both "my laptop and my roommate computer" would explain more for the court about all the "evidences". But he did not.

THIRTEENTH GROUND:

Also about the police reports. I have no knowledge at all about them.. The only thing my attorney told me about them is about the FBI officer was not there.

FOURTEENTH GROUND:

Also my attorney never explain to me what is a trail court, Who should be among the juries, where from the juries, I went to the trail and have no knowledge at all about any thing; I'm a new immigrant, did not study in American schools, also, not me or any of my family being in jail or prison in any time. In my first day to the court I went wearing a T-Shirt and pants. I had no knowledge what people may wear during them trail courts.

FIFTEENTH GROUND:

A very important issue I tried to explain it to my attorney and asked him to bring it to the court, it was about that software "LimeWire", just few months before my trail the software and it's owner convicted in criminal actions in the US, that court also ruled to disable the website of "LimeWire" and all of that software properties, if my attorney did as I asked him about that case it would show to the court that there were something wrong with it and that is why it's disabled.

I told the court that that software was already installed in my laptop when I bought it.. I did not read or have ant knowledge about it or what it may have or what may do. It was just slowdown my laptop so I decided to remove it in "October 2009" just two months after we got the internet connection to our apartment. He never had any action towards explain to the court about that software.

SIXTEENTH GROUND:

When my trail start and the juries entered the court room "the first 34" to choose 13 from them, I noticed something, non of them was Asian, Afro-American, Hispanic, or Middle eastern, The juries should represent all the community but in my case I don't think so. I talked with my attorney but he never had any action about that. During the selection I've been surprised with things made me believe that the court select them very carefully for my case. The first thing draws my attention was one of them was working in Avera hospital in the department to treat the children who sexually abused, also there were 2 women among the total were sexually abused in them childhood.. Is that random selection? I don't believe there are at less 2 women among 20 or 25 who sexually abused in them childhood in Sioux Falls, also a man with his pregnant wife both among the total number, the only reason we know about them because the man said that his wife is pregnant and he will be in her place and she can not attend the court. I talked with my attorney about all those issues, but there were no response from him. Also, there were many of them who worked as baby sitters for police officers.

SEVENTEENTH GROUND:

Also, an important question my attorney should make but he did not. I wanted him to ask if they have any one who they may like or love, a friend, a family member, husband or wife, son or daughter was a solder in Iraq or even Afghanistan "many people believe both countries are the same" who had hurt or injury or killed during the war, such like question a very important because it may push them for certain kind of verdict.

EIGHTEENTH GROUND:

Before my trail start, I make it very clear to my attorney that I want an interpreter from Iraq because I have difficulty in communication with non-Iraqi speakers, I told him that I don't want what happen during the "CD record" in our apartment to happen again in my trail specially in a case that might make me loss my life, get killed and loss any chance for me to have a family. The court brought an interpreter from a different country that doesn't speak the Iraqi language. I told my attorney about that in the court again but, in aver strange way he never support me as he don't care.

NINETEENTH GROUND:

I asked from my attorney to change the time of my court till they find an Iraqi interpreter especially as to my best knowledge there were at less 3 Iraqi interpreters who works for the court at that time.

TWENTIETH GROUND:

My attorney put me alone.. I'm the new immigrant in my argument in front of the judge, he did not request from the judge to change the time of my court. When I asked for an Iraqi interpreter the judge refused to change him and he asked the non-Iraqi speaker interpreter if he could interpret for me. Sure he will say, "YES", he will be paid for that time. Sirs, it's me who know which language I speak or understand not any one else. My attorney should stand with me and make search for that and argue it, but he did nothing.

TWENTY-FIRST GROUND:

Also, few weeks before my trail, I gave my attorney a list of ten people names who may always in our apartment and who may used my laptop to call them to the witness stand to prove my points, he did not call only one and the state called my roommate as them witness. If he called all the witnesses it would change the line of my court, other witnesses I wanted him to call, my English teacher, my co-worker, and supervisor in work, but he did nothing.

TWENTY-SECOND GROUND:

Now, talking about the state "evidences", and how my attorney acts.. First my attorney as I mansion to you never showed to me or discuss any of them, the only thing he showed to me was that "CD record in our apartment", which it contain a lot of problems.. Also if my attorney contact the phone company of my roommate to obtain the phone records it would show exactly which time they called us which it would added to our evidences to find the real time for how long they stayed and talked withy us, but, he did nothing.

TWENTY-THIRD GROUND:

The state should show all them "evidences" and I have the right to see them. During my trail the state "passes" the "evidences" only to the juries without show what is contain, one of them was a "CD record" created by the detective, the state said its show how the detective was downloading from "my apartment IP" not from "my laptop" which later he admitted that "he did not found the items that he downloaded inside my laptop or the external hard drive". The state have to show it in the court room and to answer all the questions about it specially its have a lot of technical information created by experts labs using tools not available for the public.

TWENTY-FOURTH GROUND:

The other "evidence" they brought was my laptop and the external hard drive which it is an outsider part, removable, easy to connected to any computer by a cable usually come with it, both were unprotected by any password and it's easy to access to any of them. The state only just passed them to the juries, no body know what's in there, they never show what's inside any of them, the detective admitted that "the items he found in the external hard drive did not come from my laptop". When my attorney asked to show what is inside them, the state "refused" and said "the juries will see them only...". Sirs, that's not fair, they need to show what's inside my laptop and the external hard drive and to answer all the questions about them.

Sirs, if an American citizen treated like that in an Iraqi court, I'm wondering what you will say? I lost my chance to have a family and children and going to be deported to be killed in Iraq by some terrorists' hands for crimes I have no idea about them.

TWENTY-FIFTH GROUND:

Also, during my trail there were an other prove how my attorney make a big mistake by not calling for a computer expert when the detective was talking about the date of "December, 8th 2009" when he create his downloading CD from my apartment IP, that software "Limewire" was deleted completely from my laptop in "October 2009", I told them that and in the court also, but there were no computer expert for me. If that CD was true, that's mean the detective was downloading from the person who put me in this trouble.

TWENTY-SIXTH GROUND:

As about me going to the stand, I told my attorney many times that I'm a stranger from the US, have no idea about the court or any details about the case except for the "CD audio record in our apartment" and its have many issues, he never told me or teach me about that, he never told me before my trail that he is willing to call me to the stand, I told him many times that if he is willing to call me to the stand he have to teach me and explain to me every thing, I'm just a new arrival, an Iraqi refugee which his life threaten in his country and the US is his last hope to live safe and secured and never been in any part of my life or any of my family in prison or jail, he never teach me or explain to me ant thing about that, all the witnesses in my case except me know before they will be on the stand and ready, prepared for that, also the other issue and rear for me was the interpreter who don't speak my language.

TWENTY-SEVENTH GROUND:

I went to the stand and my attorney started to ask me questions that I believe were about my personal life, It was like 15 minutes divided between me, my attorney and the non Iraqi speaker interpreter in talking when the state attorney make an "objection", he did not want the juries to

know who I'm, what kind of life of life I grow up with in time a sanctions from the "UN" was on Iraq and how was not allowed to Iraq to buy computers or even that books, he did not want the juries to know what kind of cultural, tradition and community I grow up in, he did not want the juries to know that the life in Iraq is different from the life in the US.

In a very strange action, my attorney agreed with him, he did not argue that issue, in a case like mine specially it could be cause of my death and taking all my rights to have family the juries have to know all the details about my life. Also, because I'm a stranger from the US, it's my right to be well known to the juries, I wanted to explain more to the juries about the Iraqi community and which kind of traditions and values we have about the family life, I wanted to explain how it's the Iraqi community clean from the sex crimes specially against children and because of that and my believe as a Muslim and the great values for the family life I would never think about children in such like way.

TWENTY-EIGHTH GROUND:

At that time, in my second day of trail while the state attorney was questioning me, he show clearly his true prejudice, discrimination and racial against my religion when he connect between my religion and the "child pornography", that was in front of the judge, the juries, my attorney, and all who were inside the court room. At that moment the judge sent the juries out of the court and told the state attorney that " his act was against the Supreme Court Law" and he showed him which part of the law that he break from a book with him. My attorney at this point should ask for mistrial and to drop all the charges for that violation, but in a very strange act he did not say a word. I'm wondering what any attorney may need more to ask for a mistrial?

TWENTY-NINTH GROUND:

In the third day of my trail, the state attorney with the detective told the court that "they pulled out last night "new evidences", my attorney told the judge that "he have no knowledge at all about those "new evidences" and the state never showed or acknowledge him in any time before about them.

THIRTIETH GROUND:

One of them was a resume the state never showed the date when it's created for an "unknown reason" written for me by the help of the Lutheran Social Services because we never use those in Iraq and have no knowledge how to make them or what to write. When I was on the stand I mansion the name of the person who helped me doing it. The state never print it for me to read it, the resume is an unprotected digital document, any one can have access to it, and its don't have my signature or my hand writing and not printed to me to review it, the immigration office told us the people here in the US usually over skill themselves to have a job.

THIRTY-FIRST GROUND:

The other "evidence" of that day was a "folder" the state said when it's transferred from the "laptop" to the "external hard drive" it was contain "3 images of child pornography", no body know how they came to that folder.

That folder have many issues I told my attorney about them, and there were an other important thing the judge make a rule over it, on of the images the state was talk about was about child wearing swimming bikini, the judge make a rule to the state to remove it from them "evidences", he told them that before the juries come to the court room, but the state refused to do the judge

rule as you can see from the court documents, my attorney also never say a word about that case of mistrial.

THIRTY-SECOND GROUND:

An other document the state brought it last day, it's the document which no body read it for me or explain it to me what's contain or translated it for me, the detective ordered me to sign it and I did it under the fear of the gun as I told you.

An other "evidence" in the last day, it was a "CD" the state said it's prove that my laptop have a "password", no body saw that "CD" contain, the state just "passed" it to the juries, they never answered any question about it or explain to the court the technical information inside that "CD". Sirs, my laptop was not protected by any password, when the detective came it was "ON", any one can use it because it was not protected by a "password", if my attorney have an expert he would prove what I said is truth.

THIRTY-THIRD GROUND:

For all those "new evidences" the judge gave us only "3 hours" to deal with them, that's including leaving the court, going to the office of the state attorney or the detective, getting copy of those "new evidences", then going back to the office of the attorney. While that I was calling him to his office because he did not tell me what's going on and that he is going to the office of the state till finally I found him in his office. It was almost noon, the lunch time, we didn't have time to talk and have to go back to the court.

THIRTY-FOURTH GROUND:

My attorney did not show to me any of those "new evidences" except a paper printed in it some names and dates, he never shoed to me any of the other "evidences".

Sirs, is that fair? Evidences in a case may cause the death for me and its require a computer expert for evaluation and all what I have only "3 hours". If an American citizen treated like that in an Iraqi court, I'm wondering what are you going to say?

My attorney should make a real argument to ask for days for the evaluation of the "new evidences" and to call for witnesses, but he did nothing as he didn't care.

THIRTY-FIFTH GROUND:

An other argument I wanted my attorney to make it, it is about the state misled the court and the juries by trying to say that searching for adult porn is illegal and to connect the porn for the people over 18 and the child pornography, the sate was confusing the juries by giving them wrong information. I wanted from my attorney to mansion that just inside Sioux Falls there are stores sell porn materials and movies and they even that have studios to make porn pictures for couples, and if the state have problem with the porn materials they have to discuss that with the city council out of my court and if the state believe that the people who watch porn from those stores which sold there are connected to the child pornography they have to keep a police car in front of those stores and to arrest any one who may shopping from them. My attorney failed completely in this point.

THIRTY-SIXTH GROUND:
Other issue I had no knowledge at all about, the instructions that given to the juries he never discuss them with me at any time, there were many issues about them and other items I believe should be add and others need to be re-written, also the judge did not read all of them in the court and I never got any copy of them.. My attorney should never approve them before he let me know about them and to discuss them with me.

THIRTY-SEVENTH GROUND:
The other issue my attorney never say any thing about was when the judge said "This court will not go for tomorrow..." every body was there when he said that. A trail court that may take some one life, cause the death for him, and take all his rights to have a family for all his life should take as long as it is need, also all the "new evidences" need for a computer expert for evaluation beside all the old ones. I need to prove all my points and how I'm right in all of what I said.

THIRTY-EIGHTH GROUND:
The other issue is when the juries went for deliberation in the late afternoon of my last day of trail, few hours later at that night they sent a message to the judge. They were saying that they were breaking among each other and cannot reach to a verdict. The judge said again and clearly "The court will not go for tomorrow and the juries will not go home till they said them deliberation..." He sent a notice for them after the state attorney add other things to it, while my attorney never add a word to the judge notice. At that point the interpreter told the judge that he have an other job and he cannot stay all the night in the court. Very shortly after the juries got the judge notice and "they will not go home till they reach them decide" it's either stay all the night and even that without a dinner break - "I never heard that while they were in the deliberation room got a break for dinner"- or just said them verdict against that "Iraqi refugee" and leave home.

THIRTY-NINTH GROUND:
After the juries said them deliberation, the state attorney said a statement to the court about me. He said" Look at him, he looks really weird, he is 36 years old, he is not married and have no "girlfriend" or kids, people like him should not let them walk free in streets..." Sirs, is that really the state consider any one who is 36 and have no "girlfriend" or wife or children should not walk free in streets? I'm wondering what a state attorney lived all his life in South Dakota may know about my life which I lost it in my country and lost my chance to get married and have children due to my help to his country in Iraq in fighting terrorists? What he know about an Iraqi guy find himself have to work day and night to help his family pay for them medication and hospital? I sacrificed with all that and lived as a refugee in a country like Syria to make the US government succeed in my country. My attorney knows that very well but he said no word. Now, I'm a weird person in the eyes of the state of South Dakota because I'm single.

FORTIETH GROUND:
The other thing is when I'm arrested I would like to know why no body told me about my rights? When I went to the police office no body told me any of my rights. Only two police officers came and took me to the jail, I told my attorney about that. I told him that" I was feel

like a cattle who is taken to his slaughter, he don't know what's going on and don't know that he is going to die". My attorney had no action about that.

FORTY-FIRST GROUND:

Now about my sentencing, my parents sent a letter through my attorney to be attached to my PSI, that letter should go to the court for translation because it's written in my language. The letter never been read in front of the judge during my sentencing and till now I have no knowledge if it's in my PSI or not, I've asked also many times my appeal attorney but had no answers from her at all about that.

FORTY-SECOND GROUND:

An important issue during my sentencing, my attorney never make any action about, while the state attorney was talking he said and very clearly that in the "second day" of my trail he "talked to a woman from the juries" and she told him "She throw up after she saw the evidences". I believe we have cases of mistrial here, one about the talking with the juries before the trail is finished, and..

FORTY-THIRD GROUND:

The second is about that woman who she "throw up", she made her verdict before the trail end, it's a clear case of prejudice, and no body know her medical issues. It's a case would decided if I'm going to be killed or not, my life is not a simple thing.

We have cases of "juror misconduct", also no body know what's the wrong with her health, she could be a pregnant or have blood pressure or any heart issues, I'm wondering about the possibility of some one who throw up and can focus on a trail case that it may take a human life. I know if I were throwing up I would lay down and keep any noise away from me. That woman should be called for questioning for many reasons by the court. She also could be sexually abused in her childhood like the other two women among the total number of the juries. It's a clear case of mistrial. My attorney had no any action about those issues.

FORTY-FOURTH GROUND:

Also in my sentencing day, the state attorney brought a paper he called it an "evidence" against me, that's new evidence as he said was a letter written to him by a girl sexually abused by her father and he want the judge to sentence me like that "father" of that girl. The judge asked my attorney if he have any objections, my attorney in a very strange behave even without read it or pass it to me so the interpreter may help me to know what's going on, he answered "NO"

Sirs, honestly I have the same question for you: If an American citizen treated like that way in an Iraq court, I'm wondering what you will say about that? will you call it a fair trail? I don't think so.

Now I would like to write about my public defender that did my appeal "Nicole Laughlin":

FORTY-FIFTH GROUND:
From the first day she was appointed for me to help me doing my appeal I was asking her to visit me in prison to discuss all the issues of my trail to put them with the evidences which would support me in my appeal because she wasn't with me in the court. She was my attorney for almost one year. I was in need to know what's she's going to write in my appeal before she submit it to the Supreme Court, but she never make any visit for me. Simply her act called "ignoring", "neglecting", or may be "careless". It's a case would cause the death for me but she just didn't care. I never stopped writing to her about my case and I wanted from her to take a legal actions but she almost never response to my concerns.

FORTY-SIXTH GROUND:
I asked from her to file for a juror misconduct and also for a mistrial because the state attorney talked with the jury before my trail over, also the woman who "throw up" made her rule based on what she saw of the state images before the trail finish, also she need to be questioning about her medical issues, we need to know why she did not response to the judge when he talked to the juries about what the state going to show in the court and why she did not report her medical issues to the court, also to know if she sexually abused like the other two women which were among the total number of the juries. She refuses to do that.

FORTY-SEVENTH GROUND:
Also to know the juries if any of them have a friend or any family member have injury or killed during the war, also to know if they ever discuss my country and religion among them, I also asked from her to talk to the judge to rule to prevent any kind of contacts by any how or any mean between the state and the juries till finishing questioning, also to write to the Supreme Court. Simply she refused to do any of those actions.

FORTY-EIGHTH GROUND:
As for the state attorney talking with the woman who told him that she "throw up", she told me in one of her letters that "he talked to her in the third day..." Sirs, I know the different between the "second" and "third", the state attorney clearly said "in the second day". I told her to go back to the voice record of the trail because her source gave her wrong information. She refused, she also never discuss with me the issue of that woman. I also told her to ask the judge and the interpreter, but she just ignored my request.

FORTH-NINTH GROUND:
I also wanted her to talk to the Supreme Court about that software "LimeWire" to draw them attention about the convection of it's owner and how it have been disabled and there was some thing wrong with it and about my case. She never discusses that with me.

FIFTIETH GROUND:
I also told her about what happen in the second day of my trail and what the judge told the state attorney of his breaking to the Supreme Court Law and which part. She just ignored my request, never discussed that with me, or even wrote to the court about that.

FIFTY-FIRST GROUND:
Also about the last day "state new evidences" and how it's very important to write to the Supreme Court about them specially the "3 hours" which the judge gave us was not enough at all to discuss them specially my attorney have no knowledge about them at all. Also the state did not gave him all the "evidences" which they have and how it's very important to be evaluated by a computer expert specially in a case like mine it may decided if I would die or would never have a family, she never wrote a word about that to the Supreme Court.

FIFTY-SECOND GROUND:
Also, all the issues of the transferred folder of the third day new evidences and I told her also about the picture of the child wearing bikini which the state brought at that time and the rule of the judge to be "not consider as evidence" and to remove it and how the state attorney did not flow the rule of the judge, she never wrote to the court about that or even to discuss that with me.

FIFTY-THIRD GROUND:
I told her about what the judge said in my last day of trail that "it will not go for tomorrow.." and "the juries will not go home till they said them deliberation" and how it was night time and it's seems they even did not eat them dinner. She answered me that the judge did not say that because the "transcript" again did not mansion it. Also the juries did not ask to eat dinner. Again I told her to review the voice record and also to ask the judge and the interpreter, but she kept refusing to do any action towards that.

FIFTY-FOURTH GROUND:
I told her about my right to have interpreter in the court that may speak my language and how they took my right to have an interpreter that I may understand his language and how they brought one do not speak my language. Also about the interpreter in that "CD record" and all it's details, but she refused to discuss that with me or to write about it to the Supreme Court.

FIFTY-FIFTH GROUND:
Also during my trail the state attorney admitted clearly "tampering with evidences", I told both "Mike Hanson" during my trail and "Nicole Laughlin" and I explained that the state removed the "Arabic-Iraqi language" from my laptop, and how I would never buy a laptop don't have my language. I told her to talk with the judge about that and to write to the Supreme Court also, and that's why they refused to show them in the court. She never discuss that with me, never talked to the judge about that, never wrote to the Supreme Court, also the same about my trail court attorney he refused to mansion that in my court.

FIFTY-SIXTH GROUND:
Also, other thing I draw attention of my appeal attorney about it and asked her to write to the Supreme Court about. That thing was if you read carefully the papers of my sentencing, you will find in what the judge wrote "An Indictment was return by the Minnehaha County Grand Jury on September 9, 2010, charging ..... on or about December 29, 2009 ....." that lead clearly that the state gave wrong information to the Grand Juries. The judge will not put the word "about" if he was talking about the date of when the detective comes to our apartment. The judge was giving the "dates" of what the state was talking about in my trail. If you review the dates that the state was talking about during my trail you will find them different. In that legal document which

signed by the judge you will find how the state misled the Grand Juries. I told her about that, but she never had any action or even to discuss that with me.

FIFTY-SEVENTH GROUND:

When she submitted my appeal she never sent a copy for me before she send it to the Supreme Court. She never discussed with me what she is going to write, never took my opinion. I told her many times based on many facts that the transcript was not correct and there were tampering with them specially it took almost "6 months" till it's done. I told her many times she was not in the court and it's not up to her to decide if the transcript is accrue or not and she have never talked with the judge or even that to the interpreter which was with me in the trail, she refused to have any action.

FIFTY-EIGHTH GROUND:

I asked her to send me a copy of the transcript also a full voice record for my trail and the sentencing, I wanted also the voice record to be checked by an Audio expert to find out all the voices and also to conform that there are no cut or add for any part. She told me in one of her letters "I have no evidence to believe that the transcript have been altered. The court reporters take their jobs very seriously and would not risk their career on changing the testimony one way or an other...." Sirs, honestly how she want to know the evidence if she don't want to talk with the judge to do an investigation and to compare the voice record with the transcript, and she was not in my trail court or the sentencing and she also don't want to listen to what I'm telling her. All what she was care about is the court reporters not losing them jobs.

FIFTY-NINTH GROUND:

She even that refused to send me a copy of the transcript, she was just trying to cover a possible criminals who work for the court. She even that might warn them now and not sending me a copy is a plan to make other changes.

SIXTIETH GROUND:

Beside of what I wrote to her about what the judge said and she did not found and what the state attorney said about his talking to that woman during my sentencing, I wrote to her other things after she sent me a copy of my appeal after she sent it to the Supreme Court I found them in her brief and also in the state brief:

* She mansion that I have a degree in "mechanical engineering" while my degree was in "materials engineering".
* The record was Audio in that CD in our apartment, not video as she wrote in her brief.
* The word "Shabab" which mean "Young" in English is changed in that transcript to be "Shabob" which have no meaning at all.
* The state in them brief to my appeal said that I brought the laptop in 2008 while I said and very clearly that T bought it about "10-14 days" before I leave Syria to the US in 2009.
* She mansion that my resume was among the folder that the state was talking about in the "last day evidences", while there were no talk at all like that in my trail.

These were some points and I'm sure you will find more difference in numbers and other details from what the state attorney and my attorney was talking in them briefs if you make that compare between the transcript and the voice record.

I asked her to talk with the judge and let him take the decide, but she keep refusing doing that.

SIXTY-FIRST GROUND:
Also, I told her about the FBI officer from the terrorists department and I wanted her to mansion that to the court but she never discuss or even to write to the Supreme Court.

SIXTY-SECOND GROUND:
I told her also about how they took me to the jail and I have no idea about any of my rights, again no any response from her.

SIXTY-THIRD GROUND:
I told her that many things need to be corrected in her brief and also many things need to be added to that brief starting from the CD record in our apartment ending with the sentencing day. Also, it's very important to send a response about the state's brief for my appeal. I also asked her again to visit me in prison to explain to me many other issues in her brief and the state's brief that were very hard for me to understand them, she refused to come in both the cases. I also wanted to discuss with her the problems in the transcript specially it was had a lot of incorrect, inaccurate information beside others removed. Again there was no visit from her.

SIXTY-FOURTH GROUND:
Other things I never heard about till I read about them in my appeal attorney brief and later in the state's brief about my case. It's about "the court will not rule on credibility of witness". Let's see, an Iraqi, stranger from the country, new arrival, the state with the cooperation of his own attorney did not allowed to him to be well known to the juries, it's believed that his people killing the Americans "as the TV channels says". In the other side an American officer, he said that that Iraqi refugee came to attack the community and to make the community not safe. It's also unknown if one or more of the juries have some one who might be killed or injury during the war, and the court will not rule on credibility on the witness. Sirs not ruling on witness credibility may work if both sides were equal. If you see the examples of the cases that both my attorney and the state's attorney attached to the briefs of my appeal you will find them all American citizens who know and understood every thing. In my case it's not the same. That rule come to the benefit of the state and both my trail attorney and appeal attorney failed to discuss that either with me or in the court.

SIXTY-FIFTH GROUND:
If you listen carefully to what the state attorney and the detective were talking about, you will find that they were not looking for the word "young movies", they know very well it's not related to any child pornography. The state going to add any words I may say to them words "little girls" even if I said "sky" or "mountains" or "desert" so they can use them weird "CD record" in our apartment in the court which it's full with a lot of wrong things as I wrote to you. The state cannot put words or add words to what I said. Sirs, in my case it was the witness of the state "the detective" who brought those images to the court, and the court cannot rule on his credibility. I tried to explain all those details to my appeal attorney, but she always never listen to me, and she never wrote my concerns to the Supreme Court.

SIXTY-SIXTH GROUND:

Also, the state did not show all the evidences in the court and I told her about that and how it's very important to tell the Supreme Court about that. In a case it would decide if I'm going to die or live without family or children I have all the rights to see and know all the "evidences". They need to show them in the court. One of them was a "CD" which the detective creates it in the state's labs and said it's a record from "my apartment IP". The detective have to play it in the court and to answer all the questions about it specially it's contain a lot of technical information and non of us who have been in the court was an expert in forensic evidences, and also specially that software "LimeWire" was not in my laptop when he create that CD. My appeal attorney never discuss that with me or even to write about it to the Supreme Court. The judge supposes not to support the state when they refused to show them and he should rule to show them in the court. My attorney did no action about that at all.

SIXTY-SEVENTH GROUND:

In my appeal papers both my attorney and the state's attorney misled the Supreme Court when they were talking as the state showed all the "evidences" in the court, while the truth is they did not show them in the court. The state passed them only to the juries without show them or answer the questions about them. If that "CD" which the detective create it in the state's labs have nothing wrong, then the state had to play it, but they did not.

SIXTY-EIGHTH GROUND:

Also, an "evidence" I never heard about it or had any knowledge till I read about it in the brief of the state in my appeal. The state wrote "It was determined that the operating system was placed on his computer on November 27, 2007. It was at that time the owner's name in its registry ..... as Haider ". Sirs, if I know that there were something like that in my trail I would bring my passport and I would show the juries which date I left Iraq to Syria, and I would show to the court how the state misled the court by them created evidences. I'm wondering if my attorney during the trail knows about that or not. I told my appeal attorney about that and asked from her to write to the Supreme Court about it. It's other thing kept hidden from me so the juries don't know all the facts.

SIXTY-NINTH GROUND:

Also, reading the brief of the state on my appeal would show an important facts, the state never gave any weight to the "Iraqi witnesses" which one of them was them witness "my roommate", I'm wondering if that was because of them nationality or there were other reasons.

SEVENTIETH GROUND:

The brief that the state sent about my appeal require from my attorney to send a replay. In fact there were many arguments should be included there, some of them about her brief. Again I asked from her to visit me but she did not. There were wrong information needs to be corrected and many other details should be added to my appeal, wrong things during my trail I wrote to you here some of them, facts and witnesses were not brought in front of the juries that it would change them verdict, but, in a very strange and shocking action from her she decided not to send a replay to the Supreme Court. Sirs, really I would like to know what you would call an attorney who choose not to say a closing argument in a court?

SEVENTY-FIRST GROUND:
I asked from her to send a notice to the Supreme Court that she did not did what I wanted from her to do and I want to re-write my appeal, but she refused and told me that my appeal will not re-written and will stay as it is. Also she told me that she is leaving the office. I asked from the attorney who does the appeals in the public defenders office who came after her she also refused to help me.

SEVENTY-SECOND GROUND:
I asked also from both of them and told them that if they refused to tell the Supreme Court about all the wrong things I can tell them by myself and I asked them to help me to talk to the Supreme Court judges, but they never helped me to do that.

SEVENTY-THIRD GROUND:
I asked from both of them to contact the director of the Public Defenders office and to tell him about all the arguments and I wanted to know his opinion about them refusing helping me, they never sent me any answers.

SEVENTY-FOURTH GROUND:
I told them many times that if they need for longer time they can ask from the court and hopefully the court will give the time that's need to do my appeal in the right way, but they never did that. The attorney who does the appeals for the Public Defenders office sent me a letter telling me that her office closed my case.

They were my only hope because I have no body to help me win my life again which in Iraq taken by the terrorists and in the United States by the state of South Dakota taken again for crimes I have no knowledge about them at all.

Sirs, I did not run away from Iraq to come to United States to download child pornography. I did not live in Syria as a refugee living in basements trying to hide from people who searching for Iraqis who worked for the United States to kill them to come to United States to download child pornography. I did not suffer all the pain and the tears of being away from my family and country, my parents who depend on me to give them the help and the medications and take them to hospitals to come to Unite States to download child pornography.

Now, I'm putting my life again between your hands to help me win my life again. I want to have a family who live a safe and secured life. I want to take care of my parents. I don't want or my family to be hurt again or our lives to be threaten.

Seventy Fifth Ground

Petitioner did not understand the interpreter during the jury trial because the interpreter spoke a different Arabic dialect.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

NO. 26274

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs.

HAIDER SALAH ABDULRAZZAK,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

HONORABLE PETER LIEBERMAN
Circuit Court Judge

APPELLANT'S BRIEF

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Appendix H
Exhibit 4

and

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Notice of Appeal Filed on February 14th, 2012

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PRELIMINARY STATEMENT

All references herein to the Settled Record are referred to as "SR". The transcript of the Jury Trial held June 28, 2011, through June 30, 2011, will be referred to as "JT" followed by the volume number. The transcript of the Sentencing Hearing on December 20, 2011, is referred to as "ST". All references will be followed by the appropriate page number.

JURISDICTIONAL STATEMENT

Defendant and Appellant, Haider Abdulrazzak, was charged by indictment with 14 counts of Possession of Child Pornography in violation of SDCL 22-24A-3. SR, p. 6. Circuit Court Judge Peter Lieberman presided over the

jury trial from June 28 through June 30, 2011. *See generally* JT. The jury found Mr. Abdulrazzak guilty of every charge in the indictment. JT 3, p. 103-04; SR, p. 87. On December 20, 2011, Judge Lieberman sentenced Mr. Abdulrazzak to 3 years in the state penitentiary for each count 1-7, consecutive, with 13 years suspended. ST, p. 29. Judge Lieberman did not impose a sentence on counts 8 through 14. ST, p. 29. Appellant now appeals this conviction. This Court has jurisdiction over the appeal pursuant to SDCL § 23A-32-2.

STATEMENT OF THE CASE

The State charged Defendant and Appellant, Haider Abdulrazzak, by indictment with 14 counts of possession of child pornography, in violation of SDCL 22-24A-3. SR, p. 6. Abdulrazzak pled not guilty to all counts at his arraignment. Judge Lieberman presided over the jury trial, which began on June 28, 2011. On June 30, 2011, the jury found Abdulrazzak guilty on all counts. JT 3, p. 103-04. At sentencing on December 20, 2011, Abdulrazzak received 3 years in the South Dakota State Penitentiary on each of the first 7 counts, consecutive, with 13 years suspended. ST, p. 29. Abdulrazzak was given credit for 180 days previously served. ST, p. 30.

STATEMENT OF LEGAL ISSUES

I. WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY VERDICT.

The jury found Abdulrazzak guilty of 14 counts of possession of child pornography.

State v. Moss, 2008 SD 64, 754 N.W.2d 626.

State v. Motzko, 2006 SD 13, 710 N.W.2d 433.

II. WHETHER THE SENTENCE IMPOSED BY THE TRIAL COURT VIOLATES APPELLANT'S EIGHTH AMENDMENT RIGHTS.

The trial court imposed 3 years consecutive for counts 1-7, for a total of 21 years. Thirteen of those years to be suspended.

State v. Bonner, 1998 S.D. 30, 577 N.W.2d 575.

State v. Bruce, 2011 S.D. 14, 796 N.W.2d 397.

U.S. CONST. amend. VIII

STATEMENT OF FACTS

Detective Derek Kuchenreuther is employed by the Minnehaha County Sheriff's Department as an Internet crimes detective. JT 1, p. 99. In the course of his duties, Detective Kuchenreuther routinely operates a program from his computer at the Law Enforcement Center, which is designed to investigate child pornography on the Internet. JT 1, p. 104-06, 115. The program searches the Internet for IP addresses[1] that are currently online using file sharing programs that are frequently used to share child pornography. JT 1, p. 113. On December 8, 2009, Detective Kuchenreuther came across an IP address with suspicious terms in some of the file names. JT 1, p. 114. Through forensic software the detective was able to access and download four files from the IP address. JT 1, p. 115. It was determined that two of the files contained suspected pornographic

[1] IP stands for Internet Protocol. A computer must have an IP address to access the internet. JT 1, p. 106-07.

images of children. JT 1, p. 115-16. Through his investigation, the detective was able to determine that the IP address was registered to Haider Abdulrazzak. JT 1, p. 117.

Haider Abdulrazzak is a 36 year old immigrant, who was born in Iraq. JT 2, p. 56. Abdulrazzak is a college educated mechanical engineer. JT 2, p. 57-58. While living in Iraq, he worked for a company that made irrigation machines. JT 2, p. 59. When the war began he lost his job and went to work for an American company, Halliburton. JT 2, p. 60. Working with the Americans put his life in jeopardy, so he eventually fled Iraq for Syria in 2008. JT 2, p. 61-62.

Defendant left Syria for the United States on June 30, 2009. JT 2, p. 62. He arrived in Sioux Falls on July 1, 2009. JT 2, p. 64. Upon arriving in the community, Lutheran Social Services assisted him in securing housing. JT 2, p. 64-65. Defendant was given an apartment at 600 West Bennett Street in Sioux Falls, and paired with a roommate who had also recently emigrated from Iraq, Akeel Abed. JT 2, p. 39, 64.

Detective Kuchenreuther secured a search warrant for Defendant's apartment. JT 1, p. 121. No one was home when the search warrant was executed on December 29, 2009, at 9:30 a.m. JT 1, p. 121-22. Defendant and his roommate were contacted by the police and told to come back to the apartment immediately, which they did. JT 2, p. 44. When they arrived home, Detective Kuchenreuther began questioning them about the suspected child pornography.

JT 1, p. 126. Within minutes the detective realized the defendant and his roommate were struggling with the English language. JT 1, p. 127. An interpreter was contacted over the phone to assist with the interrogation.[2] JT 1, p. 127.

Defendant's roommate had a desktop computer in his bedroom. JT 1, p. 123. It contained no suspicious files. JT 1, p. 123. Defendant's laptop and an external hard drive were located in Defendant's bedroom. JT 1, p. 123. There were also several CD's and DVD's found in Defendant's bedroom. JT 1, p. 123. Defendant admitted that he had used a popular file sharing program called Limewire to download movies, games and music. JT 1, p. 129. When asked what search terms he used, Defendant did not wait for the interpreter, and told the detective in English that he searched for "young movies." JT 1, p. 129; JT 3, p. 32. No arrests were made at the time the search warrant was executed, but the computer and external hard drive were seized. JT 1, p. 130.

It took two months for the detective to go through all of the data contained on the laptop and external hard drive using the forensic software. JT 1, p. 131-32. Both devices were connected to write blockers, which created copies of the information to be analyzed. JT 2, p. 19-21. A forensic report was generated that included the images, dates, times, locations and file paths. JT 1, p. 133. The detective was able to see the date and time that each file was placed on

[2] The defendant testified that he believed that he was questioned for two hours before an interpreter was contacted. JT 2, p. 80. However, the video recording of the interview was 46 minutes long, and appeared to conclusively refute that assertion. JT 3, p. 31.

the laptop or external hard drive, any time the file was modified, and the last time the file was accessed. JT 1, p. 134.

There were 34 pictures of prepubescent females purportedly found in the unallocated space of the laptop. JT 1, p. 132. (The unallocated space of the computer is where data goes when it is deleted, and it is not accessible, unless forensic software is used to recover it. JT 1, p. 133.) The external hard drive had 299 pictures and 8 videos stored on it, most of which were classified as suspected child pornography by the detective. JT 1 ,p. 136. The files on the external hard drive had not been deleted, and were located in 2-3 different folders. JT 1, p. 136-38.

As a result of the investigation the State charged Defendant with 14 counts of possession of child pornography. JT 1, p. 147. Of those counts, five were images from the unallocated space on the laptop. JT 1, p. 148, 165. The rest were pictures and videos from the external hard drive. JT 1, p. 167-88. The pictures and videos showed nude prepubescent girls in various sexual situations, including encounters with adults. JT 1, p. 167-88.

Defendant pled not guilty to the charges and a jury trial was held from June 28 through June 30, 2011. At trial, Defendant testified that he purchased both the laptop and external hard drive used, while he was still living in Syria. JT 2, p. 63. Defendant rarely used the external hard drive, and did not know that any illegal material was stored on it. JT 2, p. 68. There was also testimony

offered that Defendant and his roommate frequently entertained several guests at a time, many of whom were allowed to use Defendant's computer for internet access. JT 2, p. 40-43.

The State argued that Defendant was proficient enough in computers to know that the child pornography was on the computer. JT 3, p. 66. The detective testified that it was not "plausible" that an individual other than Defendant placed the child pornography on Defendant's laptop and external hard drive. JT 2, p. 10. He also stated that it was not "plausible" that the images were on the devices prior to Defendant's ownership. JT 1, p. 13.

The jury found Defendant guilty of all 14 counts. JT 3, p. 103-04. He was sentenced on December 20, 2011. ST. Judge Lieberman imposed 3 years for each of the counts 1-7, for a total of 21 years. ST, p. 29. The judge ordered that 13 of those years be suspended, and that Defendant receive credit for 180 days previously served. ST, p. 29-30.

LEGAL ANALYSIS

I. WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY VERDICT.

The sufficiency of the evidence in criminal convictions is reviewed de novo. *State v. Swan*, 2008 SD 58, ¶ 9, 753 N.W.2d 418, 420. "'In determining the sufficiency of the evidence on appeal in a criminal case, the issue before this Court is whether there is evidence in the record which, if believed by the jury, is sufficient to sustain a finding of guilt beyond a reasonable doubt.'" *State v. Moss*,

2008 SD 64, ¶ 9, 754 N.W.2d 626, 629 (quoting *State v. Bordeaux*, 2006 SD 12, ¶ 6, 710 N.W.2d 169, 172). The Court will not usurp the function of the jury. *Swan*, 2008 SD 58, ¶ 9, 753 N.W.2d at 420 (citing *State v. Pugh*, 2002 SD 16, ¶ 9, 640 N.W.2d 79, 82).

Accordingly, the Court will not review the credibility of the witnesses or resolve conflicts in evidence. *Bordeaux*, 2006 SD 12, ¶ 9, 710 N.W.2d at 172. "A guilty verdict will not be set aside if the state's evidence and all favorable inferences that can be drawn there-from support a rational theory of guilt." *State v. Motzko*, 2006 SD 13, ¶ 6, 710 N.W.2d 433, 437. Therefore, the evidence will be considered in "a light most favorable to the verdict." *State v. Amundson*, 2007 SD 99, ¶ 17, 738 N.W.2d 919, 924 (quoting *State v. Running Bird*, 2002 SD 86, ¶ 19, 649 N.W.2d 609, 613).

In this case, the State had the burden of proving that the defendant had knowledge that the illegal material was in his possession. SR, p. 6. However, the State failed to make any showing that the defendant had the requisite knowledge that any illegal material may have existed on either the laptop or the external hard drive. The defendant was adamant in his testimony that he did not place child pornography on his laptop or know of its existence on his hard drive. JT 2, p. 69. The State failed to prove beyond a reasonable doubt that this testimony was false.

When the detective was asked at trial whether it was possible that another

person put the images on Defendant's computer, he answered that it was "possible, but not plausible." JT 2, p. 10. However, this assessment is not supported by the evidence. There was uncontested testimony that it was not only possible, but probable that someone could have put the illegal files on Defendant's computer.

Defendant's apartment became a gathering place for local Iraqi's soon after he arrived in the United States. JT 2, p. 40-41, 54. Large groups of people would congregate at the apartment on a regular basis for religious and social interactions. JT 2, p. 40-41. The roommates would often allow guests to use their computers to go on the Internet. JT 2, p. 41, 43, 67. Guests were not monitored while borrowing their computers, both the defendant and his roommate testified that they respected their guest's privacy. JT 2, p. 41, 43, 67.

The State offered evidence that Defendant's laptop was password protected, inferring that it would be impossible for another person to operate his computer without his knowledge. JT 3, p. 9. The defendant denied that his laptop was password protected, but whether it was or not is irrelevant. JT 3, p. 49. The fact that various people had access to Defendant's computer created enough doubt that a reasonable juror could not properly conclude that his guilt had been proven by the burden required.

The State relied heavily on Defendant's statement to the detective that he searched for "young movies." However, three people, including the defendant,

testified at trial that in the Iraqi culture, young is synonymous with "shabob." JT 2, p. 45-46, 54-55, 71. The Arabic word "shabob" describes people who are generally between 18 and 40 years old. JT 2, p. 45, 54-55. It is simply not used to describe a child. JT 2, p. 45. When the defendant was asked at trial to characterize the individuals depicted in the exhibits he characterized them as "children" or "kids." JT 2, p. 72-73, 78.

The detective never asked what "young" meant to Defendant, or inquired as to what would constitute "young" in Arabic culture. JT 2, p. 37. In fact, the detective admitted that he had no knowledge of the term "shabob." JT 2, p. 18-19. At trial the State attempted to prove that the defendant knew that young meant child, by showing that Defendant was supposedly proficient in English.[3] JT 3, p. 11. However, the day the search warrant was served, the detective recognized within minutes that Defendant's English was not sufficient to answer simple questions without the aid of an interpreter. JT 1, p. 126. It is illogical to assert that the statement of the defendant that he searched for "young movies" is to be taken at face value when the defendant displayed obvious confusion in answering the detective's preliminary questions. JT 1, p. 126. When Defendant told the detective that he searched for young movies he spoke English, without waiting for the interpreter to translate the question. JT 1, p. 129; JT 2, p. 18-19; JT 3, p. 32.

[3] The detective testified that Defendant listed his English skills as "good" on a resume that was found on the laptop.

Additionally, Defendant demonstrated no knowledge of the terms and phrases used to search for child pornography, many of which were included in the file names found on his computer and external hard drive. JT 2, p. 11-12, 22, 74.. The terms described by the detective related to these particular images were specific, and would have been difficult for a non-English speaker to discern. When the defendant was questioned about specific child pornography terms, such as "Lolita" and "PTHC" he had no knowledge of them. JT 2, p. 22.

Defendant testified that he bought the computer and external hard drive used from an individual while he was in Syria. JT 2, p. 63. But, when the detective was asked at trial if it was possible that some of the child pornography was on the computer or external hard drive prior to Defendant's possession, he again answered that it was "possible, but not plausible." JT 2, p. 13. However, a review of the evidence again shows that it was both possible and plausible that child pornography was on the computer prior to Defendant's purchase.

None of the child pornography that was found on the unallocated space of the laptop was found on the external hard drive, or vice versa. JT 2, p. 12, 14. If Defendant was the one transferring and downloading these files, common sense dictates that at least some on the files on the external hard drive would have been in the unallocated space of the laptop. But the files had been kept completely separate. The only pornography on the laptop was in the unallocated space, in which the files were not accessible. The external hard drive, that the

defendant did not use often, had the bulk of the porn. The absence of duplicated files on the two devices supports the proposition that some of the child porn may have been placed on the laptop and external hard drive by an owner prior to Defendant's possession.

This proposition is further supported by the fact that Limewire was installed on the laptop prior to Defendant's ownership. JT 2, p. 63. At the time the laptop was forensically analyzed the program was not on the computer, but the detective testified that he saw "remnants" of the program, leading him to believe that the program had been deleted. JT 1, p. 124. When questioned about his use of Limewire, Defendant admitted that he used the program to download Arabic movies, music and games. JT 1, p. 129. He stated that he eventually deleted the program from his computer so that it would run faster. JT 2, p. 68. Defendant's testimony is corroborated by the fact that many of the CD's and DVD's found in Defendant's bedroom contained material that could have been downloaded from Limewire. However, none of the CD's or DVD's had any child pornography on them. JT 2, p. 16-17.

The State argued that Defendant had to know that child pornography was on his computer because they were transferred them at the same time that documents obviously belonging to Defendant were transferered. JT 3, p. 34-39. However, this is not dispositive of any wrongdoing. To the contrary, it was shown that the defendant's application for government assistance and resume

were transferred at the same time as the three questionable images in a mass file transfer. JT 3, p. 45. The transfer took place on December 27, 2009, two days before the search warrant was executed. JT 3, p. 42-43. The detective testified that the timing of the file transfers, mere seconds apart, was indicative that an entire folder of files was transferred to the external hard drive all at once. JT 3, p. 43-45. But, there is no evidence that Defendant went through every individual file and had the opportunity to take note of any lewd or obviously pornographic images of children that may have been on his computer.

There was no proof that the defendant in this case had the requisite knowledge to support of conviction of possession. Even when the evidence is viewed in the light most favorable to the State, there is insufficient evidence in the record to sustain a finding of guilt. Accordingly, Defendant's convictions must be reversed and remanded. *State v. Moss*, 2008 SD 64, ¶ 9, 754 N.W.2d 626, 629.

II. WHETHER THE SENTENCE IMPOSED BY THE TRIAL COURT VIOLATES APPELLANT'S EIGHTH AMENDMENT RIGHTS.

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment. U.S. Const. amend. VIII. This includes "extreme sentences that are 'grossly disproportionate' to the crime." *State v. Bonner*, 1998 SD 30, ¶ 15, 577 N.W.2d 575, 579 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991)); *Solem v. Helm*, 463 U.S. 277, 282-91 (1983).

When determining an appropriate sentence, the trial court must not only

review the conduct involved, but the attributes of the defendant. *State v. Bruce*, 2011 S.D. 14, ¶ 30, 796 N.W.2d 397, 406. "The Eighth Amendment reflects our nation's belief in the dignity of every human being and the view that legislative and judicial power to punish criminal conduct, though given high deference, is not absolute." *Bonner*, 1998 S.D. 30, ¶ 14, 577 N.W.2d at 579. Factors to be reviewed include the defendant's '"general moral character, mentality, habits, social environment, tendencies, age, aversion or inclination to commit crime, life, family, occupation, and previous criminal record' as well as rehabilitation prospects." *Bruce*, 2011 S.D. 14, ¶ 30, 796 N.W.2d at 406 (quoting *Bonner*, 1998 S.D. 30, ¶ 22, 577 N.W.2d at 581).

In *State v. Bruce*, the South Dakota Supreme Court adopted two additional factors when assessing the seriousness of child pornography offenses. 2011 S.D. 14, ¶ 32, 796 N.W.2d at 407. Courts must consider: "(1) the specific nature of the material, and (2) the extent to which the offender is involved with that material." *Id.* (quoting *State v. Blair*, 2006 S.D. 75, ¶ 83, 721 N.W.2d 55, 62 (Konenkamp, J. concurring in result)). "[T]he more depraved and invasive the abuse and the more involved the offender is with the material depicting it, the greater the seriousness of the offense." *Id.*

Although in the present case Defendant received a less severe sentence, the underlying facts are comparable to those in *Bruce*. The images and videos that Defendant was charged with possessing contained similar content to those

in *Bruce*. *Id.*, at ¶ 33, 407. Also similar to *Bruce*, in this case there was no evidence that the defendant sexually abused a child or played any role in the solicitation, manufacture or distribution of child pornography. *Id.* at ¶ 34, 407-08. The case against Defendant was "a case of simple possession of images." *Id.* at ¶ 34, 408.

At the time he was sentenced, Defendant was 36 years old, and had no criminal record.[4] ST, p. 7. He was college educated, and had a good job before his country became immersed in war. He was forced to flee his country because his cooperation with the American effort put his life at risk. When he got to the United States he was able to gain employment, and was attempting to become a productive member of his new community.

Because the defendant's case did not demonstrate the "most serious combination of criminal conduct and background of the offender," his incarceration for a period of 8 years, with an additional 13 suspended, violated his right to be protected from excessive punishment. *Id.* at ¶ 39, 409. Appellant urges this Court to reverse and remand with instructions to the trial court to impose a new sentence that is proportionate to the facts of the offense and the defendant.

[4] The trial court refused to speculate as to whether Defendant had a criminal history in another country. ST, p. 26.

CONCLUSION

For the aforementioned reasons, authorities cited, and upon the settled record, Appellant respectfully requests this Court reverse Appellant's conviction and remand this matter to the trial court for further proceedings.

REQUEST FOR ORAL ARGUMENT

The attorney for the Appellant, Haider Abdulrazzak, respectfully requests thirty (30) minutes for oral argument.

Respectfully submitted this 27 day of September, 2012.

Nicole J. Laughlin
Minnehaha County Public Defender
413 N. Main Avenue
Sioux Falls, South Dakota 57104
(605) 367- 4242

ATTORNEY for APPELLANT

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Book Antiqua typeface in 12 point type. Appellant's Brief contains 3,820 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2007.

Dated this 27th day of September, 2012.

Nicole J. Laughlin
Attorney for Appellant

APPENDIX

JAN 2 4 2012

STATE OF SOUTH DAKOTA) : SS COUNTY OF MINNEHAHA)		IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff,	+	SHR 200911733 CR. 49C10005422 A0
vs.	+	JUDGMENT & SENTENCE
HAIDER SALAH ABDULRAZZAK, Defendant.	+	

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

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

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

SENTENCE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ATTEST:
ANGELIA M. GRIES, Clerk
By _____ Deputy

BY THE COURT:

JUDGE PETER H. LIEBERMAN
Circuit Court Judge

A-3

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

May 23, 2022

Mr. Haider Salah Abdulrazzak
Prisoner ID #4373
220 North Weber Avenue
Sioux Falls, SD 57103

Re: Haider Salah Abdulrazzak
v. Brent Fluke, Warden, et al.
Application No. 21A737

Dear Mr. Abdulrazzak:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kavanaugh, who on May 23, 2022, extended the time to and including July 23, 2022.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Susan Frimpong
Case Analyst

Appendix I

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-3678

Haider Salah Abdulrazzak

Appellant

v.

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

Appellees

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

ORDER

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

August 13, 2020

Appendix J

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

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

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

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

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

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

Appendix K

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

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

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

DATED this 25th day of August, 2020.

BY THE COURT:

ROBERTO A. LANGE
CHIEF JUDGE

HABEAS,CLOSED,PROSE

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

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

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

Petitioner

Haider Salah Abdulrazzak

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

V.

Respondent

Brent Fluke

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

Respondent

Attorney General for the State of South Dakota

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

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

Appendix L

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

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

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

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

January 23, 2019

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

Dear Haider:

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

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

Sincerely,

Julie Hofer
Attorney

JAH

Appendix M

SCANNED

JAN 2 2 2019

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

JAN 1 8 2019

Clerk

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

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

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

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

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

BY THE COURT:

David Gilbertson, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

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