UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

MARTY JOE BANGHART, Petitioner, vs. DARIN YOUNG, Warden and the Attorney General of the State of South Dakota, Respondents.	4:21-CV-04066-KES ORDER FOR SERVICE

Petitioner, Marty Joe Banghart, has filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The court directs the petition in this case be served and that a response be filed.

Mr. Banghart has also filed a motion for appointment of counsel. Docket No. 2. There is no recognized constitutional right under the Sixth Amendment for the appointment of counsel in habeas corpus cases. Hoggard v. Purkett, 29 F.3d 469, 471 (8th Cir. 1994). Habeas actions are civil in nature, so the Sixth Amendment right to counsel applicable in criminal proceedings does not apply. Id. The court does, however, have discretion to appoint counsel if the interests of justice so require or if an evidentiary hearing will be held. See 18 U.S.C. § 3006A(a)(2)(B). The court will not appoint counsel at this juncture of the proceedings. This case is not legally or factually complex and the court is confident petitioner can present his issues himself at this point. Should an evidentiary hearing become necessary, the court will appoint counsel.

Based upon the record,

IT IS ORDERED that:

(1) the Clerk of Court is directed to serve upon the respondents and the Attorney General of the State of South Dakota a copy of the petition and this Order;

(2) respondents will file and serve a response to the petition within thirty (30) days after receipt of this Order;

(3) petitioner may file a reply within fourteen (14) days after service of the respondent's answer/response;

(4) respondents shall cause to be filed all pertinent state court records, including any trial transcripts; and

(5) petitioner's motion for appointment of counsel (Doc. 2) is denied.

DATED this 15th day of April, 2021.

BY THE COURT:

Veronica L. Duffy

VERONICA L. DUFFY
United States Magistrate Judge

U.S. District Court

District of South Dakota

Notice of Electronic Filing

The following transaction was entered on 7/28/2021 at 12:57 PM CST and filed on 7/28/2021
Case Name: Banghart v. Young et al
Case Number: 4:21-cv-04066-KES
Filer:
Document Number: 14(No document attached)

Docket Text:
ORDER denying [13] Motion to Compel. Mr. Banghart states that part of his request is motivated by a desire to ensure this court is fully informed of the proceedings in state court. This court will take judicial notice of all proceedings in state court and will review the same. Furthermore, Mr. Banghart's reliance on Rule 5(c) of the Rules Governing 2254 Habeas Petitions does not apply here. The respondent has not filed an "answer" as required to trigger the requirements of Rule 5(c), but rather has filed a motion to dismiss pursuant to Fed. R. Civ. P. 12. Should the court deny respondent's motion to dismiss, Mr. Banghart can renew his request for discovery at that time. Signed by US Magistrate Judge Veronica L. Duffy on 07/28/2021. (Duffy, Veronica)

4:21-cv-04066-KES Notice has been electronically mailed to:

Jennifer M. Jorgenson jenny.jorgenson@state.sd.us, atgservice@state.sd.us, janet.waldron@state.sd.us, lynell.erickson@state.sd.us

4:21-cv-04066-KES This document must be sent in hard copy to:

Marty Joe Banghart
41058
MIKE DURFEE STATE PRISON
1412 Wood Street
Springfield, SD 57062

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UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

MARTY JOE BANGHART, Petitioner, vs. DOUG CLARK[1], ACTING WARDEN; and the ATTORNEY GENERAL OF THE STATE OF SOUTH DAKOTA, Respondent.	4:21-CV-04066-KES REPORT AND RECOMMENDATION

INTRODUCTION

This matter is before the court on the *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 of Marty Joe Banghart, a person incarcerated at the South Dakota State Penitentiary. See Docket No. 1. Now pending are petitioner's motion for summary judgment and respondents' motion to dismiss Mr. Banghart's petition without holding an evidentiary hearing. See Docket Nos. 5 & 9. Mr. Banghart opposes the motion to dismiss, Docket Nos. 17 & 18, and respondents oppose the motion for summary judgment, Docket No. 10. This matter was referred to this magistrate judge for a recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and the

[1] Mr. Banghart originally named Darin Young, former warden of the South Dakota State Penitentiary, as a respondent. Mr. Young has been separated from that office. According to Federal Rule of Civil Procedure 25(d), the court substitutes Mr. Clark in his place.

October 16, 2014, standing order of the Honorable Karen E. Schreier, United States District Judge.

FACTS

A. Underlying Criminal Case and Conviction

On November 17, 2014, Mr. Banghart was indicted by a Lincoln County, South Dakota, grand jury on six counts: two counts of first-degree rape, — domestic, in violation of SDCL § 22-22-1(1) and SDCL § 25-10-1; one count of fourth-degree rapedomestic, in violation of SDCL § 22-22-1(5) and SDCL § 25-10-1; and three counts of sexual contact with a child under the age of 16,domestic, in violation of SDCL § 22-22-7 and SDCL § 25-10-1. See Docket No. 10-1, p. 1.

A jury trial commenced on October 30, 2015. See State v. Banghart, 41CRI14-000648 at p. 586 (Vol. II Jury Trial Transcript ("JT") at p. 1); Docket No. 10-1, p. 2. During trial, the state offered evidence from Anna Eidem, a counselor at Tea Area Schools. Id. at p. 610 (Vol. II JT at p. 25). Ms. Eidem testified that in January 2013, S.B. ("victim") disclosed to her that she was being sexually abused by her father, Mr. Banghart. Id. at pp. 612, 617 (Vol. II JT at pp. 27, 32). Additionally, the state offered evidence from an interview Mr. Banghart had with South Dakota Division of Criminal Investigation ("DCI") Special Agent Jessica Page. Id. at p. 621 (Vol. II JT at p. 36). During that recorded interview, Mr. Banghart admitted to touching the victim's vagina. Id. at p. 630 (Vol. II JT at p. 45).

The victim testified that the first sexual contact from Mr. Banghart occurred in October 2009, when she was in the sixth grade. Id. at p. 660 (Vol. II JT at p. 75). The victim testified that this occurred at least once a month until January 2013. Id. at p. 663 (Vol. II JT at p. 78). During the time of sexual abuse, the victim testified that Mr. Banghart shaved her pubic area. Id. at p. 667 (Vol. II JT at p. 82). The victim testified that Mr. Banghart said he had to do it, otherwise he would bring the victim to the doctor to get shots; the victim testified that she was terrified of needles so she complied. Id. at p. 669 (Vol. II JT at p. 84).

On November 3, 2015, the jury returned a verdict of guilty on count 1, first-degree rape,domestic. State v. Banghart, 41CRI14-000648 at pp. 137-39; Docket No. 10-1, p. 2. A sentencing hearing was held on January 15, 2016, at which time the Honorable Jon Sogn, Second Judicial Circuit Court Judge, sentenced Mr. Banghart to 25 years' imprisonment in the South Dakota State Penitentiary, with 10 years suspended upon conditions to be determined by the Board of Pardons and Parole, with credit for 73 days previously served in jail. Docket No. 10-1, p. 3.

B. State Procedural History

Mr. Banghart is currently in the custody of the South Dakota Department of Corrections pursuant to a judgment and sentence entered by the Honorable Jon Sogn in South Dakota state court on January 28, 2016. See Docket No. 10-1. During his trial, Mr. Banghart was represented by two attorneys, Paul Henry and Cynthia Berreau. Docket No. 1, p. 3.

Mr. Banghart appealed his conviction by filing a Notice of Appeal with the Supreme Court of South Dakota on February 11, 2016. See Docket No. 10-2. However, on August 11, 2016, Mr. Banghart filed a Motion to Dismiss Appeal and an Affidavit of Appeallant, stating, "no issues exist that could have the prospect of being successfully pursued on direct appeal". See Docket Nos. 10-3, 10-4. The same day, the Supreme Court of South Dakota then entered an order dismissing Mr. Banghart's appeal. See Docket No. 10-5.

While Mr. Banghart did not seek a writ of certiorari with the United States Supreme Court, Mr. Banghart, represented by attorney Steven R. Binger, filed an Application for Writ of Habeas Corpus in state court on February 23, 2017. Banghart v. Young, 41CIV17-000100 (2d Jud. Cir.); See Docket No. 10-6. In his petition, Mr. Banghart claimed that his trial counsel, provided ineffective assistance of counsel in violation of the Fourth and Sixth Amendments. Id. Mr. Banghart alleged that trial counsel's performance was deficient because they:

1. Failed to object to inadmissible testimony offered, or, in the alternative, failed to request any form of cautionary or limiting instruction regaring an incident wherein petitioner shaved the victim's pubic area with a razor;

2. Failed to object, permitted and solicited the opinion of the state's chief investigator that the testimony of the alleged victim was true, and that she believed and "knew" that the defendant was guilty of the offense;

3. Failed to object to testimony presented by an expert witness called by the state, and failed to consult with or present testimony from an expert to counter or rebut said testimony;

4. Failed to conduct a proper investigation of facts that would have demonstrated that the claims of the alleged victims were false.

Docket No. 10-6, pp. 3-5. In response, Darin Young, former warden of the South Dakota State Penitentiary, filed a Return to Provisional Writ of Habeas Corpus on March 16, 2017, denying all of Mr. Banghart's claims that he received ineffective assistance of counsel. See Docket No. 10-8.

More than two years later, Mr. Banghart filed an Amended Application for Writ of Habeas Corpus on August 26, 2019. See Docket No. 10-7. The amended application raised the same four claims of ineffective assistance of counsel as the original application, along with some additional language for claim three. Mr. Banghart's amended claim three stated:

> Counsel failed to object to testimony presented by an expert witness called by the State, and failed to consult with or present testimony from an expert to counter or rebut said testimony. Defense counsel further failed to present expert testimony showing that the proper procedures for conducting a forensic interview of the alleged child victim were not followed, and that the investigators' use of the alleged child victim in attempting to elicit incriminating statements from the petitioner served to improperly influence and reinforce the memory of a child witness.

Docket No. 10-7, p. 5.

The Honorable Sandra H. Hanson, Second Judicial Circuit Court Judge, held evidentiary hearings on August 2, 2019, and February 14, 2020. Docket No. 10-9, p. 1. Following the hearings, Judge Hanson issued a memorandum opinion denying habeas relief. Judge Hanson indicated in her opinion that Mr. Banghart only advanced the first two of his four claims of ineffective assistance of counsel at the evidentiary hearing and in post-hearing briefs: the alleged failures of trial counsel to (i) object to testimony by the state's expert or consult with or present a defense expert witness and (ii) object to evidence regarding Mr. Banghart shaving the victim's pubic area. Docket No. 10-9.

Thus, Judge Hanson found that, while Mr. Banghart raised the other two issues in his petition, "it appears he has abandoned them because he did not address them at the evidentiary hearing or in his post-hearing briefs. No evidence was provided to establish ineffective assistance of counsel with respect to these claims. Acorrdingly, the Court denies habeas relief with respect to them." Docket No. 10-9, pp. 16-17.

Judge Hanson entered an order dismissing the case and separately filed written findings of fact and conclusions of law on July 21, 2020. See Docket Nos. 10-10, 10-11. First, Judge Hanson held that Mr. Banghart failed to show that his trial counsel's performance was constitutionally deficient for failing to object to the admission of evidence regarding the shaving incident with the victim or that their trial strategy was deficient because, even if they had objected, Mr. Banghart failed to show the evidence was inadmissible in light of SDCL §§ 19-19-801(d)(2), 19-19-401, 19-19-402, and 19-19-403. Docket No. 10-10, pp. 9-10. Also, Judge Hanson held that Mr. Banghart failed to meet his burden of showing he was prejudiced by any action or inaction of trial counsels' strategy relating to expert witnesses. Id. Ultimately, Judge Hanson concluded that Mr. Banghart failed to satisfy the standards set by Strickland v. Washington, 466 U.S. 668 (1984), to prove he was denied his constitutional right to counsel during the underlying criminal case, and, thus, his claim for habeas relief was denied. Docket No. 10-10, p. 11.

On August 17, 2020, Mr. Banghart filed a Motion for Certificate of Probable Cause seeking permission to appeal to the Supreme Court of South

Dakota. See Docket No. 10-12. In his motion, Mr. Banghart requested to appeal the issues of ineffective assistance of counsel for:

1. Failure to consult with or call a rebuttal expert witness, which manifested itself as follows:
    a. Failure to challenge the credentials of the state's witness;
    b. Failure to present expert testimony showing that the theories behind the state's expert's testimony were flawed and discredited by established scientific research;
    c. Failure to present expert testimony showing that the lack of a forensic interview tainted the investigation and lessened the reliability of claims made by the state's witness;
    d. Failure to present expert testimony showing that the late and inconsistent statements of the victim were suggestive of a motive to falsify.
2. Failure to object to the razor/shaving evidence

Docket No. 10-12, p. 3. Judge Hanson denied Mr. Banghart's motion on August 19, 2020. See Docket No. 10-13.

On September 8, 2020, Mr. Banghart filed another Certificate of Probable Cause with the Supreme Court of South Dakota. See Docket No. 10-14. Mr. Banghart sought permission to appeal the same issues of ineffective assistance of counsel that he had requested in his previously filed Certificate of Probable Cause. Compare Docket No. 10-12, p. 3, with Docket No. 10-14, p. 3. The Supreme Court of South Dakota denied Mr. Banghart's request on February 26, 2021. See Docket No. 10-15.

C. Federal Habeas Petition

On April 15, 2021, Mr. Banghart filed his Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 with this court. See Docket No. 1. In his

petition, Mr. Banghart raises two grounds alleging ineffective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution. Docket No. 1, p. 4, 6. Within both grounds, Mr. Banghart alleges the same four claims of ineffective assistance of counsel:

1. Trial counsel's performance was deficient in that they failed to object to inadmissible testimony offered, or, in the alternative, failed to request any form of cautionary or limiting instruction regarding an incident wherein Mr. Banghart shaved the victims pubic area with a razor;

2. Trial counsel's performance was deficient in that they failed to object, permitted and solicited the opinion of the state's chief investigator that the testimony of the alleged victim was true, and that she believed and "knew" that Mr. Banghart was guilty of the offense;

3. Defense counsel failed to object to testimony presented by an expert witness called by the State and failed to consult with or present testimony from an expert to counter or rebut said testimony. Defense counsel further failed to present expert testimony showing that the proper procedures for conducting a forensic interview of the allged child victim were not followed and that the investigator's use of the victim in attempting to elicit incriminating statements from Mr. Banghart served to improperly influence and reinforce the memory of a child witness;

4. Defense counsel failed to properly investigate facts that would have demonstrated that the victim's claims were false.

Docket No. 1, p. 5-6. On April 15, 2021, after preliminary review of the petition, this court entered an Order for Service requiring the respondents to file and serve a response to the petition within thirty days after receipt of this order. See Docket No. 4.

After not receiving a response from the respondents, Mr. Banghart filed a Motion for Summary Judgment on June 28, 2021. See Docket No. 5. Respondents argue that on or about June 30, 2021, they received the

summary judgment motion but were unaware of Mr. Banghart's petition at that time. Docket No. 10, p. 2. Respondents contacted the District of South Dakota clerk's office[2] and discovered that a technical defect caused respondents to not receive the April 15 order. Id. Eventually, respondents filed their motion to Dismiss on July 19, 2021. See Docket No. 9. This matter is now fully briefed and ripe for decision. Not Response to Court order as Doc 10 shows

DISCUSSION

A. Petitioner's Motion for Summary Judgment

Mr. Banghart filed a motion for summary judgment with this court on June 28, 2021. See Docket No. 5. Under Rule 56(a) of the Federal Rules of Civil Procedure, summary judgment is appropriate where the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A court should grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c).

Generally, the court must view the facts, and inferences from those facts, in the light most favorable to the nonmoving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986) (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)); Helton v. Southland Racing

[2] Respondents contacted Summer Wakefield, United States District Court for the District of South Dakota Supervisory Deputy Clerk, by phone.

Corp., 600 F.3d 954, 957 (8th Cir. 2010) (per curiam). Summary judgment will not lie if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Allison v. Flexway Trucking, Inc., 28 F.3d 64, 66-67 (8th Cir. 1994).

The burden is placed on the moving party to establish both the absence of any genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). Once the movant has met its burden, the nonmoving party may not simply rest on the allegations in the pleadings, but must set forth specific facts, by affidavit or other evidence, showing that a genuine issue of material fact exists. Anderson, 477 U.S. at 256; FED. R. CIV. P. 56(e) (each party must properly support its own assertions of fact and properly address the opposing party's assertions of fact, as required by Rule 56(c)).

The underlying substantive law identifies which facts are "material" for purposes of a motion for summary judgment. Anderson, 477 U.S. at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Id. (citing 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2725, at 93-95 (3d ed. 1983)). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Id. at 247-48.

Essentially, the availability of summary judgment turns on whether a proper jury question is presented: "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Id. at 250.

Here, Mr. Barghart argues he is entitled to summary judgment due to "Respondents failure to abide by the Courts Order in any manner for 'Months' after service of order lends to the 'Fact' that the Respondent has no 'Genuine Dispute' to any 'Material Fact' . . . ." See Docket No. 6, p. 2. The facts allged in Mr. Banghart's Local Rule 56.1 statement of materials facts relate only to respondents' failure to timely respond. Docket No. 7. Mr. Banghart's sole contention in favor of summary judgment is that respondents' response to his habeas petition is untimely.

Regardless of whether respondents' response was timely, Mr. Banghart has not met his burden of establishing there are no genuine disputes of material fact. See FED. R. CIV. P. 56(a). The party moving for summary judgment bears the initial responsibility of informing the district court of the basis of its motion and identifying the portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Grp. Health Plan, Inc. v. Philip Morris USA, Inc., 344 F.3d 753, 763 (8th Cir. 2003). Mr. Banghart has

not directed the court to the portions of the record that demonstrate the absence of a genuine issue of material fact *related to his claims of ineffective assistance of counsel.*

Alleging that respondents' response was untimely is not enough for Mr. Banghart to meet his burden under Rule 56; he was required to inform the court how the record establishes the absence of genuine issues of material fact related to the claims in his § 2255 petition. This he did not do. Accordingly, Mr. Banghart's motion for summary judgment should be denied, and the court moves on to respondents' motion to dismiss.

B. Scope of a § 2254 Petition

A state prisoner who believes he is incarcerated in violation of the Constitution or laws of the United States may file a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") constrains federal courts to exercise only a "limited and deferential review of underlying state court decisions." Osborne v. Purkett, 411 F.3d 911, 914 (8th Cir. 2005) (quoting Lomholt v. Iowa, 327 F.3d 748, 751 (8th Cir. 2003)). A federal court may not grant a writ of habeas corpus unless the state court's adjudication of a claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). A state court decision is "contrary to" clearly established federal law if it "applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of th[e] Court and nevertheless

arrives at a result different from [the Court's] precedent." Williams v. Taylor, 529 U.S. 362, 405-06 (2000) (O'Connor, J., concurring). A federal habeas court may not issue the writ merely because it concludes the state court applied the clearly established federal law erroneously or incorrectly. Id. at 411. "Rather, that application must also be *unreasonable*." Id. (emphasis added). See also Finch v. Payne, 983 F.3d 973, 979 (8th Cir. 2020).

The state court's factual findings are presumed to be correct, and a federal habeas court may not disregard the presumption unless specific statutory exceptions are met. Thatsaphone v. Weber, 137 F.3d 1041, 1046 (8th Cir. 1998); 28 U.S.C. § 2254(e). A federal habeas court must "more than simply disagree with the state court before rejecting its factual determinations. Instead, it must conclude that the state court's findings lacked even fair support in the record." Marshall v. Lonberger, 459 U.S. 422, 432 (1983) (quotation omitted); see also Thatsaphone, 137 F.3d at 1046.

C. Mr. Banghart's § 2254 Petition Is Timely Under the AEDPA Statute of Limitations

AEDPA contains a one-year statute of limitations. Specifically, 28 U.S.C. § 2244(d) provides in relevant part:

> **(d)** **(1)** A 1-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.

See 28 U.S.C. § 2244(d)(1) and (2).

A judgment or state conviction is final, for purposes of commencing the statute of limitation period, at "either (i) the conclusion of all direct criminal appeals in the state system, followed by either the completion or denial of certiorari proceedings before the United States Supreme Court; or (ii) if certiorari was not sought, then by the conclusion of all direct criminal appeals in the state system followed by the expiration of the time allotted for filing a petition for the writ." Smith v. Bowersox, 159 F.3d 345, 348 (8th Cir. 1998). The time allotted for filing a petition for writ of certiorari with the Supreme Court is ninety days. Jihad v. Hvass, 267 F.3d 803, 804 (8th Cir. 2001). If a petitioner does not timely seek an appeal of his judgment to the state's highest court, the judgment becomes final when his time for seeking review with the state's highest court expired. Gonzalez v. Thaler, 565 U.S. 134, 150 (2012).

The limitations period for § 2254 petitions is subject to statutory tolling. See 28 U.S.C. § 2244(d)(2). This one-year statute of limitation period is tolled, or does not include, the time during which a properly filed application for state post-conviction relief or other collateral review is pending in state court. Faulks v. Weber, 459 F.3d 871, 873 (8th Cir. 2006); 28 U.S.C. § 2244(d)(2). The phrase "post-conviction or other collateral review" in § 2254's tolling provision encompasses the "diverse terminology that different States employ to represent the different forms of collateral review that are available after a conviction." Duncan v. Walker, 533 U.S. 167, 177 (2001). Thus, § 2254's tolling provision "applies to all types of state collateral review available after a conviction." Id.

State collateral or post-conviction proceedings "are 'pending' for the period between the trial court's denial of the [post-conviction relief] and the timely filing of an appeal from it." Maghee v. Ault, 410 F.3d 473, 475 (8th Cir. 2005) (citing Peterson v. Gammon, 200 F.3d 1202, 1203 (8th Cir. 2000)); see also Johnson v. Kemna, 451 F.3d 938, 939 (8th Cir. 2006) (an application for state post-conviction review is pending until a mandate is issued).

However, state proceedings are not pending for the ninety-day period "following the final denial of state post-conviction relief, the period during which an unsuccessful state court petitioner may seek a writ of certiorari from the United States Supreme Court." Jihad, 267 F.3d at 805. Additionally, "[s]tate proceedings are not pending during the time between the end of direct review and the date an application for state [post-conviction relief] is filed."

Maghee, 410 F.3d at 475 (citing Painter v. Iowa, 247 F.3d 1255, 1256 (8th Cir. 2001)). In short, the one-year statute of limitations begins to run after the state conviction is final, is tolled while state habeas proceedings are pending, and then begins running again when state habeas proceedings become final. Curtiss v. Mount Pleasant Corr. Facility, 338 F.3d 851, 853 (8th Cir. 2003).

Applying these principles to Mr. Banghart's case, his federal habeas petition is timely under the one-year statute of limitations. Mr. Banghart's judgment of conviction was filed on January 28, 2016. He filed a direct appeal but later voluntarily dismissed it. The South Dakota Supreme Court entered its order dismissing the appeal on August 11, 2016. Therefore, assuming without so holding, Mr. Banghart's conviction would have become final ninety days later, on November 9, 2016.[3] The AEDPA limitations period ran from the next day, November 10, 2016, to February 23, 2017, when Mr. Banghart initiated his state-court habeas action—a total of 133 days. The AEDPA

[3] The Eighth Circuit has not addressed the issue of the date a conviction becomes final when a direct appeal is voluntarily dismissed. The court assumes, without so holding, that under these facts Mr. Banghart is entitled to tolling for the ninety-day period during which he could have, but did not, petition for certiorari to the United States Supreme Court. See Dumarce v. Weber, 4:16-CV-04034-KES, 2016 WL 4249780, at *3 n.3 (D.S.D. July 15, 2016), report and recommendation adopted, 2016 WL 425054 (D.S.D. Aug. 10, 2016), denying cert. of appealability, 2016 WL 9526512 (8th Cir. Dec. 12, 2016). Accord Chapman v. McNeill, No. 3:08cv5/LAC/EMT, 2008 WL 2225659, at *3 (N.D. Fla. May 28, 2008) (concluding a state conviction becomes final, for AEDPA purposes, ninety days after the state appellate court grants a motion for voluntary dismissal of the appeal). But see Paiz v. Hoshino, No. CV 12-5770-VAP (SP), 2013 WL 1935468, at *2 (C.D. Cal. Apr. 2, 2013) (state prisoner's conviction became final when appellate court granted request to voluntarily dismiss direct appeal)

limitations period was tolled while his state habeas action was pending—from February 23, 2017, to February 26, 2021, when the South Dakota Supreme Court denied Mr. Banghart's motion for a certificate of probable cause. Therefore, by filing this federal habeas petition on April 15, 2021, Mr. Banghart still had 184 days left of the one-year statute of limitations.[4] Accordingly, Mr. Banghart's petition is timely under AEDPA.

D. Rule 12(b)(6) Standard

Respondents' motion to dismiss is based on Federal Rule of Civil Procedure 12(b)(6), which allows dismissal if the petitioner has failed to state a claim upon which relief can be granted. Petitioners must plead "enough facts to state a claim to relief that is *plausible* on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) (emphasis added).

Under Federal Rule of Civil Procedure 8(a)(2), a petitioner must plead only "a short and plain statement of the claim showing that the pleader is entitled to relief." Id. at 554-55 (quoting FED. R. CIV. P. 8(a)(2)). A petition does not need "detailed factual allegations" to survive a motion to dismiss, but a petitioner must provide the grounds for his entitlement to relief and cannot merely recite the elements of his cause of action. Id. at 555 (citing Conley v. Gibson, 355 U.S. 41, 47 (1957); Sanjuan v. Am. Bd. of Psychiatry and Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994); Papasan v. Allain, 478 U.S.

[4] Thus, even without the benefit of the 90 days to file a petition for certiorari Mr. Banghart's petition would still be timely. Without the benefit of that 90-day period, Mr. Banghart's petition would still have been filed with 94 days to spare on the one-year AEDPA limitations period.

265, 286 (1986)). There is also a "plausibility standard" which "requires a complaint with enough factual matter (taken as true)" to support the conclusion that the petitioner has a valid claim. Id. at 556. The petitioner's complaint must contain sufficiently specific factual allegations in order to cross the line between "possibility" and "plausibility" of entitlement to relief. Id.

There are two "working principles" that apply to Rule 12(b)(6) motions. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). First, courts are not required to accept as true legal conclusions "couched as . . . factual allegation[s]" contained in a complaint. Id. (citing Twombly, 550 U.S. at 555). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. (quoting Twombly, 550 U.S. at 555). Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." Id. at 678-79.

Second, the plausibility standard is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 679 (quoting decision below, Iqbal v. Hasty, 490 F.3d 143, 157-158 (2d Cir. 2007)). Where the petitioner's allegations are merely conclusory, the court may not infer more than the mere possibility of misconduct, and the petition has *alleged* "but it has not 'show[n]' " that he is entitled to relief as required by Rule 8(a)(2). Iqbal, 556 U.S. at 679 (emphasis added).

The Court explained that a reviewing court should begin by identifying statements in the complaint that are conclusory and therefore not entitled to the presumption of truth. Id. at 679-80. Legal conclusions must be supported

by factual allegations demonstrating the grounds for a petitioner's entitlement to relief. Id. at 679; Twombly, 550 U.S. at 555; FED. R. CIV. P. 8(a)(2). A court should assume the truth only of "well-pleaded factual allegations," and then may proceed to determine whether the allegations "plausibly give rise to an entitlement to relief." Iqbal, 556 U.S. at 679.

Although a Rule 12(b)(6) motion challenges the sufficiency of a petitioner's pleading, courts evaluating a Rule 12(b)(6) motion are not strictly limited to evaluating only the petition. Dittmer Props., L.P. v. F.D.I.C., 708 F.3d 1011, 1021 (8th Cir. 2013). They may consider "matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned." Id. (quoting Miller v. Redwood Toxicology Lab., Inc., 688 F.3d 928, 931 n.3 (8th Cir. 2012) (quoting 5B Charles A. Wright & Arthur R. Miller, Fed. Practice & Procedure § 1357 (3d ed. 2004))). In a habeas action, it is appropriate for the court to take judicial notice of the settled record in the underlying criminal proceedings when evaluating a motion to dismiss. See Hood v. United States, 152 F.2d 431 (8th Cir. 1946) (federal district court may take judicial notice of proceedings from another federal district court); Matter of Phillips, 593 F.2d 356 (8th Cir. 1979) (proper for federal court to take judicial notice of state court pleadings); Green v. White, 616 F.2d 1054 (8th Cir. 1980) (court of appeals may take judicial notice of district court filings). This court has taken judicial notice of Mr. Banghart's criminal circuit court file, his direct appeal file, and his state

habeas files at the circuit and supreme court levels. These are the principles guiding the court's evaluation of respondents' motion.

E. Mr. Banghart's Unexhausted Procedurally Defaulted Claims

1. State Court Exhaustion Requirement

Respondents argue that two of Mr. Banghart's claims of ineffective assistance of counsel, specifically claims two and four of grounds I and II, are unexhausted. Docket No. 10, p. 18. Under AEDPA, federal habeas review of state court convictions is limited to claims the petitioner previously presented to the state courts for consideration:

> (b)(1) An application for a writ of habeas corpus on behalf of person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B) (i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> * * *
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

See 28 U.S.C. § 2254(b) and (c). The above codifies what was previously a judicial doctrine of exhaustion.

A federal court may not consider a claim for relief in a habeas corpus petition if the petitioner has not exhausted his state remedies. See 28 U.S.C.

§ 2254(b). "[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). If a ground for relief in the petitioner's claim makes factual or legal arguments that were not present in the petitioner's state claim, then the ground is not exhausted. Kenley v. Armontrout, 937 F.2d 1298, 1302 (8th Cir. 1991). The exhaustion doctrine protects the state courts' role in enforcing federal law and prevents the disruption of state judicial proceedings. Rose v. Lundy, 455 U.S. 509, 518 (1982). The Supreme Court has stated:

> Because it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation, federal courts apply the doctrine of comity, which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.

Rose, 455 U.S. at 518 (quotations omitted), superseded by AEDPA as noted in Rhines v. Weber, 544 U.S. 269, 273-75 (2005).

The exhaustion rule requires state prisoners to seek complete relief on all claims in state court prior to filing a writ of habeas corpus in federal court. Federal courts should, therefore, dismiss a petition for a writ of habeas corpus that contains claims that the petitioner did not exhaust at the state level. See 28 U.S.C. § 2254(b) & (c); Rose, 455 U.S. at 522. A petitioner's procedurally defaulted claims are barred from federal review unless there is a showing of either cause and prejudice or actual innocence. Bousley v. United States, 523 U.S. 614, 622 (1998).

A prisoner must complete the entire state court post-conviction process—a habeas proceeding in circuit court and an appeal to the Supreme Court of South Dakota—on each of his claims before he can raise them in federal court. O'Sullivan, 526 U.S. at 845; Tripp v. Dooley, No. 4:20-cv-04177-LLP, 2020 WL 8483823, at *1 (D.S.D. Dec. 17, 2020). He "must 'present the same facts and legal theories to the state court that he later presents to the federal courts.'" Stephen v. Smith, 963 F.3d 795, 801 (8th Cir. 2020) (quoting Jones v. Jerrison, 20 F.3d 849, 854 (8th Cir. 1994)).

A federal court must determine whether the petitioner fairly presented an 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. (citation omitted). "[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appeallate review process." O'Sullivan, 526 U.S. at 845. "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) (citation omitted).

a. Did Mr. Banghart Present His Federal Habeas Corpus Claims to the State Courts?

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 v. Connor, 404 U.S. 270, 276 (1971). It is also not enough for the petitioner 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) (citation omitted).

"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 (quoting Kelly v. Trickey, 844 F.2d 557, 558 (8th Cir. 1988)). This does not, however, require petitioner to cite "book and verse on the federal constitution." Picard, 404 U.S. at 278 (citing Daugharty v. Gladden, 257 F.2d 750, 758 (9th Cir. 1958)). The petitioner must simply make apparent the constitutional substance of the claim. Satter, 977 F.2d at 1262.

Respondent argues that two of Mr. Banghart's claims, claims two and four, are improperly exhausted and there are no non-futile state remedies that he could pursue to properly exhaust those claims. See Docket No. 10, pp. 20-22. Mr. Banghart opposes this, arguing that "[a]ll claims were submitted to State Court on Petition, testimony was taken and Judge Hanson ruled on all 4 claims." Docket No. 18, p. 3.

In both ground I (Sixth Amendment ineffective assistance) and ground II (Fourteenth Amendment ineffective assistance), Mr. Banghart raises four identical claims; the court will address the two grounds together and assess each claim in turn. Mr. Banghart's first claim is that trial counsel were ineffective for failing to object to evidence regarding an incident where Mr. Banghart shaved the victim's pubic area with a razor. Docket No. 1, pp. 4-6. According to the record, Mr. Banghart raised this claim in his state habeas petition (Docket No. 10-7, p. 3), presented evidence to support his argument (Docket No. 10-9, pp. 14-16), and raised this claim in his motion for certificate of probable cause to the Supreme Court of South Dakota after the habeas court denied relief (Docket No. 10-12, p. 3). Therefore, claim one was properly exhausted, and, thus, Mr. Banghart can raise it with this court.

Mr. Banghart's third claim is that trial counsel were ineffective in their handling of the state's expert witness. Docket No. 1, pp. 4-6. Specifically, Mr. Banghart contends that trial counsel: (1) failed to object to testimony presented by an expert witness called by the state; (2) failed to consult with or present testimony from an expert to counter or rebut said testimony; and (3) failed to present expert testimony showing that the proper procedures for conducting a forensic interview of the alleged child victim were not followed and that the investigators' use of the allged child victim in attempting to elicit incriminating statements from the petitioner served to improperly influence and reinforce the memory of a child witness. Id. According to the record, Mr. Banghart raised this claim in his state habeas petition (Docket No. 10-7,

p. 5), presented evidence to support his argument (Docket No. 10-9, pp. 5-14), and raised this claim in his motion for certificate of probable cause to the Supreme Court of South Dakota after the habeas court denied relief (Docket No. 10-12, p. 3). Therefore, the court holds that claim three was properly exhausted, and, thus, Mr. Banghart can raise it with this court.

However, Mr. Banghart's second and fourth claims are unexhausted. First, looking to the South Dakota Circuit Court's opinion denying Mr. Banghart habeas relief, the court stated, "Petitioner raised issues three and four[5] in his Petition, but it appears he has abandoned them because he did not address them at the evidentiary hearing or in his post-hearing briefs. No evidence was provided to establish ineffective assistance of counsel with respect to these claims." Docket No. 10-9, p. 17. Second, Mr. Banghart abandoned these claims in his motion for certificate of probable cause to the Supreme Court of South Dakota after his habeas relief was denied. See Docket No. 10-12, p. 3.

By abandoning these claims, Mr. Banghart left " 'an unresolved question of fact . . . [that has] an important bearing' on [his] federal habeas claim." King v. Kemna, 266 F.3d 816, 822 (8th Cir. 2001) (quoting Granberry v. Greer, 481 U.S. 129, 134-35 (1987)). "Where a prisioner deliberately bypasses an adequate state remedy, or purposefully withholds or withdraws a known claim from a prior application for federal relief, that may be deemed a waiver of any

[5] Issues three and four that the state circuit judge referenced are similar to claims two and four in grounds I and II.

right to a subsequent hearing on the claim." Wilwording v. Swenson, 502 F.2d 844, 849 (8th Cir. 1974). Here, because Mr. Banghart abandoned claims two and four midstream in his state habeas action, in his post-hearing briefs, and in his certificate of probable cause to the South Dakota Supreme Court, Mr. Banghart deprived those courts of the first chance to decide his claims. See Rose, 455 U.S. at 518. Therefore, Mr. Banghart's claims two and four of grounds I and II for habeas relief are not exhausted.

b. Are There Available, Non-Futile State Remedies?

The next question the court must analyze is whether it would serve any purpose to dismiss Mr. Banghart's unexhausted claims without prejudice so that he can return to state court to present those claims. Put another way, if the court did so order, are there any currently available non-futile state remedies for Mr. Banghart? Unfortunately, the answer is "no."

South Dakota law provides as follows for second or successive state habeas petitions:

> A claim presented in a second or subsequent habeas corpus application under this chapter that was presented in a prior application under this chapter or otherwise to the courts of this state by the same applicant shall be dismissed.
>
> Before a second or subsequent application for a writ of habeas corpus may be filed, the applicant shall move in the circuit court of appropriate jurisdiction for an order authorizing the applicant to file the application.
>
> The assigned judge shall enter an order denying leave to file a second or successive application for a writ of habeas corpus unless:
>
> > (1) The applicant identifies newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would

> be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found the applicant guilty of the underlying offense; or
>
> (2) The application raises a new rule of constitutional law, made retroactive to cases on collateral review by the United States Supreme Court and the South Dakota Supreme Court, that was previously unavailable. The grant or denial of an authorization by the circuit court to file a second or subsequent application shall not be appealable.

See SDCL § 21-27-5.1. The court finds that Mr. Banghart cannot satisfy these exceptions.

Here, Mr. Banghart's claims all arise out of alleged ineffective assistance provided by his two trial attorneys. Mr. Banghart has been aware of the facts surrounding his trial and trial counsel's handling of his case since his trial's conclusion, and he has not alleged any newly discovered evidence.

Likewise, all four of Mr. Banghart's claims, arising out of his trial attorney's ineffective assistance, are well established through Supreme Court precedent in Strickland. Since 1984, Strickland has been the landmark case used by federal and state courts across the country in determining ineffective assistance of counsel. Therefore, Mr. Banghart cannot argue that his claims are based on a new, and retroactively applied, rule of constitutional law. Thus, Mr. Banghart does not enjoy any non-futile state avenue for pursuing exhaustion of state remedies.

2. Procedural Default

Closely related to the doctrine of state court exhaustion is the doctrine of procedural default. Both doctrines are animated by the same principals of comity—that is, in our dual system of government, federal courts should defer

action on habeas matters before them when to act on those petitions would undermine the authority of state courts, which have equal obligations to uphold the constitution. See Coleman v. Thompson, 501 U.S. 722, 731 (1991) (quoting Rose, 455 U.S. at 518). If a petitioner has failed to exhaust administrative remedies, and further non-futile remedies are still available to him in state court, then the federal court dismisses the federal petition without prejudice, allowing the petitioner to exhaust his state court remedies. Carmichael v. White, 163 F.3d 1044, 1045 (8th Cir. 1998). Where the petitioner has no further state remedies available to him, analysis of the procedural default doctrine is the next step.

Procedural default is sometimes called the "adequate and independent state ground" doctrine. A federal habeas petitioner who has defaulted his federal claims in state court by failing to meet the state's procedural rules for presenting those claims has committed "procedural default." Coleman, 501 U.S. at 731-32, 735 n.1. If federal courts allowed such claims to be heard in federal court, they would be allowing habeas petitioners to perform an "end run" around state procedural rules. Id. However, where no further non-futile remedy exists in state court, it is not feasible to require the petitioner to return to state court as would be the case in a dismissal for failure to exhaust state remedies.

In the Coleman case, the habeas petitioner, Coleman, had defaulted all of his federal claims by filing his notice of appeal from the state trial court three days late. Coleman, 501 U.S. at 727-28, 749. The state appellate court then

refused to hear Coleman's appeal based on his late filing of his notice of appeal. Id. at 740. The Court held "[i]n 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 unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice."[6] Id. at 750. See also Ruiz v. Norris, 71 F.3d 1404, 1409 (8th Cir. 1995) ("A district court need not consider the merits of a procedurally defaulted claim.") (citation omitted).

"A state procedural default bars federal habeas review unless the petitioner can demonstrate cause for the default *and* actual prejudice as a result of the alleged violation of federal law." Maynard v. Lockhart, 981 F.2d 981, 984 (8th Cir. 1992) (quotation omitted, emphasis added). If no "cause" is found, the court need not consider whether actual prejudice occurred. Id. at 985; Wyldes v. Hundley, 69 F.3d 247, 253 (8th Cir. 1995) (citations omitted).

"The requirement of cause . . . is based on the principle that petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief . . . ." Cornman v. Armontrout, 959 F.2d

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[6] To fit within the fundamental miscarriage of justice exception, the petitioner must make a showing of actual innocence. Schlup v. Delo, 513 U.S. 298, 321 (1995), superseded on other grounds by statute as stated in Rivas v. Fischer, 687 F.3d 514, 541 n.36 (2d Cir. 2012). A successful claim of actual innocence requires the petitioner to support his allegations with new, reliable evidence. Weeks v. Bowersox, 119 F.3d 1342, 1351 (8th Cir. 1997).

727, 729 (8th Cir. 1992) (quotation omitted). The habeas petitioner must show that "some objective fator *external to* [*petitioner*] impeded [his] efforts." Id. (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986) (emphasis added)).

A petitioner may show cause by demonstrating that the factual or legal basis for a claim was not reasonably available to the petitioner at the time or that there was interference by officials which prevented the petitioner from exhausting his state remedies. Murray, 477 U.S. at 488. A petitioner's lay status, *pro se* status, and lack of education are not sufficient cause to excuse a procedural lapse in failing to pursue state court remedies. See Stewart v. Nix, 31 F.3d 741, 743 (8th Cir. 1994); Smittie, 843 F.2d at 298. Illiteracy or low intelligence are also not enough to demonstrate cause. See Criswell v. United States, 108 F.3d 1381, *1 (8th Cir. 1997) (per curiam) (unpub'd); Cornman, 959 F.2d at 729. Finally, neither is ignorance of the law. Maxie v. Webster, No. 91-3292, 1992 WL 302247, at *1, 978 F.2d 1264 (table) (8th Cir. Oct. 26, 1992). Here, Mr. Banghart's two claims that are facing procedural default are claims two and four of grounds I and II.

Mr. Banghart argues that claims two and four of ground I and II are properly exhausted and not procedurally defaulted because, "All Claims were submitted to State Court on Petition, testimony was taken and Judge Hanson ruled on all 4 claims." Docket No. 18, p. 3. Essentially, Mr. Banghart is arguring that he did present these two claims at the state habeas hearings and Judge Hanson ruled on all four of his claims. This is incorrect.

While Mr. Banghart did submit all four claims to state court in his habeas petition, no evidence was presented for claims two and four of grounds I and II. For claim two, at the state habeas proceedings, Mr. Binger was asked about testimony regarding the credibility of the chief investigator. See Banghart v. Darin Young, Civ 17-100 at pp. 247-48 (Habeas Hearing Transcript ("HT") at pp. 79-80). Mr. Binger responded, "That argument or that one subsection of our petition claiming that the defense attorney had elicited damaging statements from the agent page, that's just one subsection of our petition and we'll withdraw it." Id. at 248 (HT at p. 80).

For claim four, at the state habeas proceedings, Mr. Binger stated, "And Number 4[7] I will concede that we started this case in 2017 believing that there would be new evidence that we could produce. We did not for various reasons, so I think her point about Number 4 is probably valid. We're not really going to end up having an argument on that point." Id. at p. 94 (HT at p. 57). Judge Hanson then asked, "And item 4, the petitioner does not have evidence or further information other than perhaps any relation to the transcript that they would offer at this point," to which Mr. Binger responded in the affirmative. Id. at 94-95 (HT at p. 57-58). Clearly, these statements by Mr. Binger show that Mr. Banghart's claims two and four were abandoned at the state habeas hearing.

Additionally, Mr. Banghart's argument that Judge Hanson ruled on all four claims is misplaced. In her memorandum opinion denying habeas relief,

[7] Number 4 refers to Mr. Banghart's fourth claim in his habeas petition.

Judge Hanson correctly concluded that issues three and four, or claims two and four in Mr. Banghart's federal habeas petition, were abandoned at the hearings and no evidence was provided to establish ineffective assistance of counsel with respect to them. See Docket No. 10-9, p. 17. Judge Hanson did not address the merits of claims two and four when making her ruling, but rather ruled that these claim were, in effect, defaulted. Therefore, Mr. Banghart's argument that claims two and four of his habeas petition were properly presented in the state habeas proceedings fails to pass muster.

Thus, unless Mr. Banghart argues that Mr. Binger's failure to present claims two and four at the state habeas hearing was ineffective assistance of counsel and constitutes "cause" to excuse him from procedural default, then these two claims are procedurally defaulted. Mr. Banghart never makes such an argument. In fact, Mr. Banghart never alleges that his state habeas counsel, Mr. Binger, was ineffective at all—rather, Mr. Banghart's claims stem solely from his trial counsel's performance. See Docket No. 1, p. 5-6. However, for purposes of this report and recommendation, the court will address the issues of cause and actual prejudice.

If Mr. Banghart were to have made the assertion that Mr. Binger was ineffective at the habeas level and that this ineffectiveness constitutes cause, he still would have failed to establish cause for the default *and* actual prejudice as a result of the alleged violation of federal law. Here, Mr. Banghart's state habeas attorney, Mr. Binger, raised all four claims under ground I and II of ineffective assistance of counsel. See Docket No. 10-7. On behalf of Mr.

Banghart, Mr. Binger acted reasonably by focusing his attention in the state evidentiary hearings on trial counsels' handling of expert witnesses and the shaving incident (claims one and three) and abandoning the claims related to the handling of the state's chief investigator and failure to conduct an investigation (claims two and four).

The Supreme Court has long held that counsel need only raise those arguments that are likely to succeed. See Davila v. Davis, 137 S. Ct. 2058, 2067 (2017) (citing Smith v. Murray, 477 U.S. 527, 536 (1986); Jones v. Barnes, 463 U.S. 745, 751-53 (1983)). "Reasonable . . . strategy requires an attorney to limit the appeal to those issues which he determines to have the highest likelihood of success. To perform competently under the Sixth Amendment, counsel is neither required nor even advised to raise every conceivable issue." Parker v. Bowersox, 94 F.3d 458, 462 (8th Cir. 1996). The decision to pursue some arguments and abandon others is only deficient performance if the abandoned claim "was plainly stronger than those actually presented." Davila, 137 S. Ct. at 2067.

Here, it was reasonable for Mr. Binger to abandon claims two and four of grounds I and II. Further, Mr. Banghart has made no assertion that these two abandoned claims—trial counsel's failure in handling the state's chief investigator and failure to investigate the victim's claims—were "plainly stronger than those [claims] actually presented." Id. What Mr. Banghart has effectively done is re-alleged all four claims that he initially presented in his state habeas petition without asserting why foregoing claims two and four

during the state proceedings was improper (or even acknowledging that these claims *were* waived). This falls far short of his burden to demonstrate cause. Therefore, Mr. Banghart has failed to show cause exists to excuse his procedural default of those claims.

Because Mr. Banghart has failed to show cause, the court need not reach the question of actual prejudice. Wyldes v. Hundley, 69 F.3d 247, 253 (8th Cir. 1995); Oglesby v. Bowersox, 592 F.3d 922, 926 (8th Cir. 2010). However, for purposes of this report and recommendation, the court will address the issue of whether Mr. Banghart was prejudiced by his default. In order to properly allege actual prejudice, Mr. Banghart must demonstrate that there was a reasonable probability that, due to the decisions by Mr. Binger, the result of the state habeas proceedings would have been different. Strickland, 466 U.S. at 689. Furthermore, Mr. Banghart must demonstrate not merely that the errors in his proceedings constituted a possibility of prejudice, but that the errors worked to his actual and substantial disadvantage, infecting his entire state habeas action. United States v. Frady, 456 U.S. 152, 170 (1982); Correll v. Stewart, 137 F.3d 1404, 1416 (9th Cir. 1998). The court finds that Mr. Banghart has not demonstrated any actual prejudice. In his reply to respondents' motion to dismiss, Mr. Banghart merely denied the reasoning made throughout the motion to dismiss without alleging any facts or making any argument to support his denials. See Docket No. 18, p. 6-7.

Mr. Banghart has also failed to plead a fundamental miscarriage of justice or actual innocence. A successful claim of actual innocence requires

the petitioner to support his allegations with new, reliable evidence. Weeks v. Bowersox, 119 F.3d 1342, 1351 (8th Cir. 1997). Mr. Banghart "must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt.'" House v. Bell, 547 U.S. 518, 536-37 (2006) (quoting Schlup, 513 U.S. at 327). Here, Mr. Banghart has presented no new evidence to prove his claims of ineffective assistance of counsel. In fact, Mr. Banghart continues to assert the same four claims of ineffective assistance of counsel that he initially alleged in his state habeas petition back in 2017 and 2019. See Docket No. 10-7.

Therefore, Mr. Banghart has failed to meet his burden of proving both cause *and* actual prejudice to allow consideration of his procedurally defaulted claims, and has failed to show actual innocence. Thus, this court finds that claims two and four of grounds I and II should be dismissed with prejudice. See Armstrong v. Iowa, 418 F.3d 924, 926-27 (8th Cir. 2005) (dismissal with prejudice is appropriate when petitioner has procedurally defaulted).

F. Mr. Banghart's Properly Exhausted Claims

Mr. Banghart has properly presented two claims of ineffective assistance of counsel to the state courts—claims that trial counsel were ineffective for failing to object to evidence regarding the shaving incident and in their handling of the state's expert witness. Because these two claims are properly exhausted and are not procedurally defaulted, the court addresses the merits of claims one and three of grounds I and II.

1. Standards Applicable to Mr. Banghart's Ineffective Assistance Claims

The Sixth Amendment of the Constitution of the United States affords a criminal defendant with the right to assistance of counsel. U.S. Const. amend. VI. The Supreme Court "has recognized that 'the right to counsel is the right to the effective assistance of counsel.' " Strickland v. Washington, 466 U.S. 668, 686 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771, n.14 (1970)). Strickland is the benchmark case for determining if counsel's assistance was so defective as to violate a criminal defendant's Sixth Amendment rights and require reversal of a conviction. Id. at 687.

"When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-88. The defendant must also show that counsel's unreasonable errors or deficiencies prejudiced the defense and affected the judgment. Id. at 691. The defendant must show "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 695. In sum, a defendant must satisfy the following two-prong test. Id. at 687.

> 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. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence

> resulted from a breakdown in the adversary process that renders the result unreliable.

Id.

"There is a presumption that any challenged action was sound trial strategy and that counsel rendered adequate assistance and made all significant decisions in the exercise of professional judgment." Hall v. Luebbers, 296 F.3d 685, 692 (8th Cir. 2002) (quotations omitted). It is the petitioner's burden to overcome this presumption, and a "petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test." Id.

Counsel's conduct must be judged by the standards for legal representation which existed at the time of the representation, not by standards promulgated after the representation. Bobby v. Van Hook, 558 U.S. 4, 7-9 (2009). American Bar Association standards and similar directives to lawyers are only guides as to the reasonableness of counsel's conduct; they are not its definitive definition. Id.

The Supreme Court distinguishes between those cases in which the new evidence "would barely have altered the sentencing profile presented to the sentencing judge," and those that would have had a reasonable probability of changing the result. Porter v. McCollum, 558 U.S. 30, 41 (2009) (quotation omitted). In assessing the prejudice prong, it is important for courts to consider "the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweigh it against the evidence in aggravation." Id. at 40-41 (internal quotation omitted,

cleaned up). It is not necessary for the petitioner to show "that counsel's deficient conduct more likely than altered the outcome" of his case, only that there is "a probability sufficient to undermine confidence in [that] outcome." Id. at 44 (quotation omitted).

Finally, "[i]neffective assistance of counsel is a mixed question of law and fact and thus on habeas review a federal court is not bound by a state court's conclusion that counsel was effective." Whitehead v. Dormire, 340 F.3d 532, 537 (8th Cir. 2003). However, " 'state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of §2254(d).' " Id. (citing Strickland, 466 U.S. at 698). That is, "[a] state court's findings of fact are entitled to a presumption of correctness." Miller v. Dormire, 310 F.3d 600 (8th Cir. 2002). Additionally, judicial scrutiny of attorney performance is highly deferential, with a strong presumption that counsel's conduct falls within the range of reasonable professional conduct. Strickland, 466 U.S. at 698.

Where a claim of ineffective assistance of counsel is made in a § 2254 petition, the already deferential standard of review of counsel's conduct is paired with the extremely deferential standard of review applicable to federal court review of a state court's rejection of a habeas claim to make the federal court's "highly deferential" review "doubly" so. Harrington v. Richter, 562 U.S. 86, 105 (2011). "Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d)." Id. The inquiry when a Strickland claim is raised in a § 2254

petition is "whether there is any reasonable argument that counsel satisfied Stickland's deferential standard." Id. The court now turns to each of Mr. Banghart's assertions that counsel was ineffective.

2. Failure to Object to Evidence of Shaving Incident

First, Mr. Banghart asserts in claim one of grounds I and II that "Trial Counsels' performance was deficient in that they failed to object to inadmissible testimony offered, or, in the alternative, failed to request any form of cautionary or limiting instruction regarding an incident wherein Petitioner shaved the victims pubic area with a razor." Docket No. 1, pp. 5-6.

Under Strickland, strategic decisions such as when to object and how to handle a witness are "virtually unchallengable." 466 U.S. at 690. Further, the Eighth Circuit has made it clear that trial counsel does not provide deficient performance when they choose not to raise a frivolous or futile motion or objection. Anderson v. United States, 762 F.3d 787, 794 (8th Cir. 2014) ("Counsel is not ineffective for failing to pursue a motion to suppress that he reasonably believes would be futile.") (citations omitted); Garrett v. United States, 78 F.3d 1296, 1303 n.11 (8th Cir. 1996) ("Ineffective assistance should not be found under Strickland when counsel fails to perform those acts which clearly appear to be futile or fruitless at the time the decision must be made."); Hale v. Lockhart, 903 F.2d 545, 549-50 (8th Cir. 1990) ("[W]e therefore hold that the decision of Hale's counsel not to file a futile motion to transfer was neither deficient performance on his part nor prejudicial to Hale.").

Here, during a recorded conversation between the victim and Mr. Banghart, the victim told Mr. Banghart that she did not like they way he touched her and her brother. Docket No. 10-9, p. 15. Mr. Banghart responded to the victim by stating the only touching that occurred was involving the shaving incident. Id. Later on, Mr. Banghart mentioned the shaving incident to law enforcement, who subsequently confirmed with the victim that Mr. Banghart shaved her pubic area when she was twelve years old. Id. When told by law enforcement that the victim was alleging sexual abuse, Mr. Banghart indicated that he had not realized the victim's allegations were sexual in nature. Id. He later admitted during an interview with law enforcement that he had touched the victim's vaginal area during the shaving incident in question. Id.; see also State v. Banghart, 41CRI14-000648 at p. 630 (Vol. II JT at p. 45).

Given these facts, any objection by trial counsel would have been futile because this testimony regarding the shaving incident would be admissible evidence as an opposing party statement, or party admission. Under SDCL § 19-19-801(d)(2), an opposing party statement is a statement that is offered against an opposing party and: (A) was made by the party in an individual or representative capacity; (B) is one the party manifested that it adopted or believed to be true; (C) was made by a person whom the party authorized to make a statement on the subject; (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or (E) was made by the party's coconspirator during and in furtherance of the

conspiracy. SDCL § 19-19-801(d)(2)(A-E); see also FED. R. EVID. 801(d)(2)(A-E). Here, clearly Mr. Banghart's admission to law enforcement that he had touched the victim's vaginal area during the shaving incident was a statement made by Mr. Banghart and offered against him at trial. Thus, any objection to this evidence would have been overruled by the trial judge as an opposing party statement pursuant to SDCL § 19-19-801(d)(2)(A).

Also, this evidence is highly relevant to the credibility of Mr. Banghart and the victim, whether these assaults actually occurred, as well as the circumstances out of which the original criminal charges arose, and Mr. Banghart presents no arguments to contest it. The probative value of this evidence is not substantially outweighed by the danger of unfair prejudice to Mr. Banghart, and, thus, any objection by trial counsel would have been futile. See SDCL § 19-19-403; FED. R. EVID. 403.

Mr. Banghart has not shownthat his trial counsel's performance was constitutionally deficient under the standards imposed by Strickland. Further, Mr. Banghart has failed to demonstrate how he was prejudiced by his trial counsel's strategy and their failure to object because, even if they had objected to the evidence, Mr. Banghart fails to show how the evidence was inadmissible in light of SDCL §§ 19-19-801(d)(2) and 19-19-403.

Mr. Banghart asserts, alternatively, trial counsel "failed to request any form of cautionary or limiting instruction . . ." Docket No. 1, pp. 5-6. However, this claim fails as well. In Berghuis v. Thompkins, the court held that defense counsel's failure, in a prosecution for murder and assault, to request a limiting

instruction did not amount to ineffective assistance. 560 U.S. 370, 389-90 (2010). The Court further reasoned that even if the failure to request a limiting instruction was deficient performance, there was no prejudice to the defendant in light of other evidence of his guilt. Id. Here, trial counsel's decision to not seek a limiting instruction did not amount to ineffective assistance. As discussed previously, any attempt to limit the testimony evidence would have been futile as the evidence was clearly admissible as an opposing party statement and its probative value is not substantially outweighed by the dangers of unfair prejudice.

Therefore, the court finds that Mr. Banghart has failed to demonstrate that his trial counsel's performance was constitutionally deficient for failing to object or request a limiting instruction to evidence surrounding the shaving incident and has failed to demonstrate how that failure has prejudiced his defense. Thus, claim one of grounds I and II for habeas relief should be denied because the state court's determination of this claim was not an unreasonable application of Strickland and thus does not warrant federal habeas relief.

3. Trial Counsel's Ineffective Handling of State's Expert Witness

Mr. Banghart asserts in claim three of ground I and II that "Defense Counsel failed to object to testimony presented by an expert witness called by the State, and failed to consult with or present testimony from an expert to counter or rebut said testimony. Defense Counsel further failed to present expert testimony showing that the proper procedures for conducting a forensic interview of the alleged child victim were not followed, and that the

investigator's use of the alleged child victim in attempting to elicit incriminiating statements from the Peititoner served to improperly influence and reinforce the memory of a child witness." Docket No. 1, pp. 5-6.

At trial, the state called Krista Heeren-Graber, the executive director of the South Dakota Network Against Family Violence and Sexual Assault, to testify as an expert. Docket No. 10-10, p. 2. Ms. Heeren-Graber testified generally about the reasons and ways a victim may or may not disclose abuse and common reactions of a victim of sexual abuse. Id. In South Dakota child sexual abuse cases, qualified experts can inform the jury of characteristics in sexually abused children and describe the characteristics the child exhibits. See State v. Buchholtz, 841 N.W.2d 449, 459 (S.D. 2013).

Mr. Banghart first argues that trial counsel failed to raise objections to Ms. Heeren-Graber's testimony. Again, under Strickland, strategic decisions such as when to object and how to handle a witness are "virtually unchallengable." 466 U.S. at 690. According to the record, as the state was examining Ms. Heeren-Graber to establish her qualifications as an expert, trial counsel *did* object, challenging her experience with victims of sexual assault, and was permitted to conduct a voir dire examination of Ms. Heeren-Graber. Docket No. 10-10, p. 2. After the voir dire examination of Ms. Heeren-Graber by Mr. Banghart's trial counsel, the trial court overruled the objection, noted it, and permitted the state to proceed with its examination. Id. Any further objection by Mr. Banghart's trial counsel would have been futile. Mr. Banghart has not shown he was prejudiced by trial counsel's strategy and their failure to

object because, even if they had further objected to Ms. Heeren-Graber's testimony, Mr. Banghart has failed to show that the testimony was inadmissible. Indeed, Mr. Banghart has not identified any specific testimony which he believes was inadmissible. Therefore, Mr. Banghart's trial counsel was not constitutionally deficient, and Mr. Banghart has not demonstrated prejudice from trial counsel's decision to forego further objection to Ms. Heeren-Graber's testimony as an expert witness.

Next, Mr. Banghart argues that trial counsel's performance was deficient because they failed to call their own expert to challenge the credentials of Ms. Heeren-Graber, to address the proper procedures of conducting a forensic interview of a child sexual assault victim, and to counter the investigator's use of the alleged child victim in attempting to elicit incriminiating statements from him.

However, Mr. Banghart does not support this criticism with specific testimony or opinions which he alleges would have had a reasonable probability of changing the outcome of his trial. See Ashker v. Class, 152 F.3d 863, 876 (8th Cir. 1998) (rejecting ineffective assistance claim grounded in failure to present an expert witness because habeas petitioner made no showing of relevant, exculpatory information an expert would have provided); Ellefson v. Hopkins, 5 F.3d 1149, 1150-51 (8th Cir. 1993) (trial counsel's strategy to forego calling expert and rely on cross-examination of prosecution expert deemed not ineffective assistance of counse). See also Wildman v. Johnson, 261 F.3d 832, 839 (9th Cir. 2001) (petitioner failed to show ineffective

assistance because he did not demonstrate how his case was prejudiced by not retaining an expert; "[petitioner] offered no evidence that an . . . expert would have testified on his behalf at trial. He merely speculates that such an expert could be found. Such speculation, however, is insufficient to establish prejudice. . . . [S]peculating as to what [an] expert would say is not enough to establish prejudice.") (citation omitted).

"[A] meaningful opportunity to present a complete defense does not translate into the right of a defendant to present any evidence he may deem important to his defense." Strickland v. Lee, 471 F. Supp. 2d 557, 617 (W.D.N.C. 2007) (citation and quotation omitted). Instead, to prove prejudice, Mr. Banghart must show the proposed uncalled witness would have testified in his defense, that his testimony would have been favorable, and that his testimony "would have probably changed the outcome of the trial." See Lawrence v. Armontrout, 900 F.2d 127, 130 (8th Cir. 1990); Stewart v. Nix, 31 F.3d 741, 744 (8th Cir. 1994). The court "should avoid the distorting effects of hindsight and try to evaluate counsel's conduct by looking at the circumstances as they must have appeared to counsel at the time." Rodela-Aguilar v. United States, 596 F.3d 457, 461 (8th Cir. 2010) (quotation omitted). "[C]omplaints of uncalled witnesses are not favored . . . because allegations of what the witness would have testified [to] are largely speculative." Evans v. Cockrell, 285 F.3d 370, 377 (5th Cir. 2002) (citation omitted). "[T]he petitioner ordinarily should . . . demonstrate, with some precision, the content of the

testimony they would have given at trial." Lawrence, 900 F.2d at 130 (quotation omitted).

Without identifying who could have been called as an expert, if that expert would actually agree to testify on Mr. Banghart's behalf, or what exactly the expert would have testified about, Mr. Banghart merely postulates that such an expert exists. Mr. Banghart has failed to show that calling an expert witness would have favorably influenced and/or changed the jury's verdict or the sentence imposed by the trial judge. Lawrence, 900 F.2d at 130. Trial counsel made the strategic decision to challenge Ms. Heeren-Graber's credentials not by calling another expert, but through cross-examination. See Docket No. 10-9, p. 7. On cross-examination, trial counsel adequately challenged Ms. Herren-Graber's background, training, education, and experience with sexual assault victims, statistics, and delayed reporting of sexual assault. Docket No. 10-10, pp. 2-3. The Eighth Circuit has held that this strategy is not deemed ineffective assistance of counsel. See Ellefson, 5 F.3d at 1150-51.

Mr. Banghart, therefore, failed to carry his burden to show the use an expert witness (1) would have been willing to testify on his behalf; (2) what specifically their testimony would have been or, most importantly; (3) that such testimony would have a reasonable probability of changing the trial's outcome. Thus, the court finds that Mr. Banghart has failed to demonstrate that his trial counsel's performance was constitutionally deficient in dealing with the state's expert and not calling their own expert and has failed to demonstrate how that

failure has prejudiced his defense. Claim three of grounds I and II for habeas relief should be denied because the state court's determination of this claim was not an unreasonable application of Strickland and thus does not warrant federal habeas relief.

CONCLUSION

Based on the foregoing facts, law, and analysis, this magistrate judge respectfully recommends that Mr. Banghart's motion for summary judgment (Docket No. 5) be DENIED, respondents' motion to dismiss (Docket No. 9) be GRANTED in its entirety, and that Mr. Banghart's habeas petition (Docket No. 1) be dismissed with prejudice.

NOTICE TO PARTIES

The parties have fourteen (14) days after service of this report and recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained. Failure to file timely objections will result in the waiver of the right to appeal questions of fact. Objections must be timely and specific in order to require *de novo* review by the district court. Thompson v. Nix, 897 F.2d 356 (8th Cir. 1990); Nash v. Black, 781 F.2d 665 (8th Cir. 1986).

DATED this 13th day of December, 2021.

BY THE COURT:

Veronica L. Duffy

VERONICA L. DUFFY
United States Magistrate Judge

U.S. District Court

District of South Dakota

Notice of Electronic Filing

The following transaction was entered on 1/7/2022 at 5:09 PM CST and filed on 1/7/2022
Case Name: Banghart v. Clark et al
Case Number: 4:21-cv-04066-KES
Filer:
Document Number: 23(No document attached)

Docket Text:
ORDER denying [22] Motion to Compel. Mr. Banghart filed a motion to compel asking the court to order defendant to provide to him transcripts of the court proceedings and other hearings from his state court conviction. He cites Rule 5(c) of the Rules Governing Section 2254 Cases as authority for his request. Rule 6, however, is the Rule that addresses discovery that is available to the petitioner. Under Rule 6(a), good cause has to be shown before discovery will be authorized. Because an evidentiary hearing has not been scheduled, the court finds that Banghart has not shown good cause sufficient to justify the authorization of discovery. Thus, the motion to compel is denied. Signed by U.S. District Judge Karen E. Schreier on January 7, 2022. (Schreier, Karen)

4:21-cv-04066-KES Notice has been electronically mailed to:

Jennifer M. Jorgenson jenny.jorgenson@state.sd.us, lynell.erickson@state.sd.us

4:21-cv-04066-KES This document must be sent in hard copy to:

Marty Joe Banghart
41058
MIKE DURFEE STATE PRISON
1412 Wood Street
Springfield, SD 57062

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-1200

Marty Joe Banghart

Petitioner - Appellant

v.

Doug Clark, Acting Warden, South Dakota State Penitentiary; Attorney General of the State of South Dakota

Respondents - Appellees

Appeal from U.S. District Court for the District of South Dakota - Southern
(4:21-cv-04066-KES)

JUDGMENT

Before BENTON, ERICKSON, and KOBES, Circuit Judges.

The court has carefully reviewed the original file of the United States District Court and orders that this appeal be dismissed for lack of jurisdiction because the district court has not yet issued a final ruling.

February 01, 2022

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

MARTY JOE BANGHART, Petitioner, vs. DOUG CLARK, ACTING WARDEN; and the ATTORNEY GENERAL OF THE STATE OF SOUTH DAKOTA, Respondents.	4:21-CV-04066-KES ORDER ADOPTING REPORT AND RECOMMENDATION AND DISMISSING PETITION

Movant, Marty Joe Banghart, filed a pro se petition for writ of habeas corpus under 28 U.S.C. § 2254 alleging that his trial counsel was ineffective for multiple reasons. Docket 1. Now pending are petitioner's motion for summary judgment and respondents' motion to dismiss Banghart's petition without holding an evidentiary hearing. Dockets 5 & 9. The matter was referred to United States Magistrate Judge Veronica L. Duffy under 28 U.S.C. § 636(b)(1)(B) and this court's October 16, 2014 standing order. Magistrate Judge Duffy recommends that Banghart's motion for summary judgment be denied, respondents' motion to dismiss be granted in its entirety, and Banghart's habeas petition be dismissed with prejudice. Docket 20 at 47. Banghart timely filed objections to the report and recommendation. Docket 29. For the following reasons, the court adopts Magistrate Judge Duffy's report and recommendation in full and dismisses Banghart's petition.

STANDARD OF REVIEW

The court's review of a magistrate judge's report and recommendation is governed by 28 U.S.C. § 636 and Rule 72 of the Federal Rules of Civil Procedure. The court reviews de novo any objections to the magistrate judge's recommendations as to dispositive matters that are timely made and specific. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). In conducting its de novo review, this court may then "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1); *United States v. Craft*, 30 F.3d 1044, 1045 (8th Cir. 1994). Magistrate Judge Duffy provided a full, complete and well-analyzed report and recommendation addressing all the issues raised by Banghart. The court adopts the recommendations in full and addresses briefly the issues raised by Banghart in his objections.

FACTUAL BACKGROUND

A full factual and procedural background was provided by the magistrate judge in her report and recommendation. Docket 20 at 2-9. Banghart states that he objects to the facts in the report and recommendation, but he does not identify any specific facts that were in error. *See* Docket 29 at 1. This court has reviewed the facts and finds that they are all supported by the record. Thus, the full factual and procedural background as set forth in the report and recommendation is adopted.

DISCUSSION

In his objections, Banghart alleges that because he was denied a copy of his complete case file, he is unable to show prejudice—as is necessary for him to establish ineffective assistance of counsel. *Id.* at 2. He alleges that he was unable to file an informed response with the court because he was not provided the required records. *Id.* He states that prejudice is shown because Magistrate Judge Duffy stated that "speculation, however, is insufficient to establish prejudice." *Id.* (quoting Docket 20 at 45). Banghart argues that without the record, he is unable to identify evidence within the record that support his claim and he is left with mere speculation. *Id.*

In the portion of the report and recommendation that is referenced by Banghart, Magistrate Judge Duffy was discussing the alleged failure of trial counsel "to call their own expert to challenge the credentials of [the State's expert], to address the proper procedures of conducting a forensic interview of a child sexual assault victim, and to counter the investigator's use of the alleged child victim in attempting to elicit incriminating statement from him." Docket 20 at 44. She noted that Banghart does not identify specific testimony or opinions which would have had a reasonable probability of changing the outcome of his trial. *Id.* Instead, she states that Banghart merely speculates that such an expert could be found. *Id.* at 46.

Banghart argues that because he was not provided with a copy of the trial court record, all he could do was speculate. Docket 29 at 2. But as Magistrate Judge Duffy notes, there is nothing in the trial record to support

Banghart's claim. Docket 20 at 46. At no time has Banghart identified an expert who would testify that the State's expert was not qualified to give an opinion, challenge the forensic interview procedures that were used, or counter the investigator's use of the alleged child victim in attempting to elicit incriminating statements from Banghart. *Id.* Because a defense expert was not identified either now or at the trial level, a copy of the record from below would not assist Banghart in being able to show prejudice.

To establish ineffective assistance of counsel, a petitioner must meet the two-pronged standard articulated by the United States Supreme Court in *Strickland v. Washington. See* 466 U.S. 668, 687 (1984). "First, the [petitioner] must show that counsel's performance was deficient." *Id.* This "performance prong" requires the petitioner to show that counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688. To show deficiency, the petitioner must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. This court must assess "whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688.

There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged

conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. Ordinarily, the Eighth Circuit "consider[s] strategic decisions to be virtually unchallengeable unless they are based on deficient investigation[.]" *Link v. Luebbers*, 469 F.3d 1197, 1204 (8th Cir. 2006).

"Second, the [petitioner] must show that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. This "prejudice prong" requires the petitioner to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* In other words, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Thus, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691.

As the report and recommendation notes, Banghart has failed to show that "an expert witness (1) would have been willing to testify on his behalf; (2) what specifically their testimony would have been or, most importantly; (3) that such testimony would have a reasonable probability of changing the trial's outcome." Docket 20 at 46. Even if Banghart had received a copy of the state court record, it does not include this information. Because Banghart has not shown that his trial counsel's performance was constitutionally deficient in dealing with the State's expert and not calling their own expert and has failed

to demonstrate how that failure has prejudiced his defendant, he is not entitled to federal habeas relief.

Here, an evidentiary hearing is not required because Banghart failed to demonstrate both prongs of the *Strickland* test for his claims. Thus, Banghart's request for an evidentiary hearing is denied.

CERTIFICATE OF APPEALABILITY

When a district court denies a petitioner's § 2254 motion, the petitioner must first obtain a certificate of appealability before an appeal of that denial may be entertained. *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). This certificate may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A "substantial showing" is one that proves "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Stated differently, "[a] substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997). Banghart has not made a substantial showing that his claims are debatable among reasonable jurists, that another court could resolve the issues raised in his claims differently, or that a question raised by his claims deserves additional proceedings. Thus, a certificate of appealability is not issued.

CONCLUSION

It is ORDERED:

1. Banghart's objections to the report and recommendation (Docket 29) are overruled.
2. The report and recommendation (Docket 20) is adopted.
3. Respondents' motion to dismiss (Docket 9) is granted. Banghart's habeas petition (Docket 1) is dismissed with prejudice.
4. Banghart's motion for summary judgment (Docket 5) is denied.
5. A certificate of appealability is denied.

Dated February 23, 2022.

BY THE COURT:

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

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

MARTY JOE BANGHART, Petitioner, vs. DOUG CLARK, ACTING WARDEN; and the ATTORNEY GENERAL OF THE STATE OF SOUTH DAKOTA, Respondents.	4:21-CV-04066-KES JUDGMENT

Under the Order Adopting Report and Recommendation and Dismissing Petition, it is

ORDERED, ADJUDGED, AND DECREED that judgment is entered in favor of respondents and against petitioner, Marty Joe Banghart.

Dated February 23, 2022.

BY THE COURT:

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

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-1633

Marty Joe Banghart

Petitioner - Appellant

v.

Doug Clark, Acting Warden, South Dakota State Penitentiary; Attorney General of the State of South Dakota

Respondents - Appellees

Appeal from U.S. District Court for the District of South Dakota - Southern
(4:21-cv-04066-KES)

JUDGMENT

Before GRUENDER, STRAS, and KOBES, 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. The appeal is dismissed.

July 07, 2022

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

/s/ Michael E. Gans

USCS Fed Rules Civ Proc R 1

Rule 1. Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

USCS Fed Rules Civ Proc R 81

Rule 81. Applicability of the Rules in General; Removed Actions

(a) Applicability to Particular Proceedings

(1) Prize Proceedings. These rules do not apply to prize proceedings in admiralty governed by 10 USC § 7651-7681.

(2) Bankruptcy. These rules apply to bankruptcy proceedings to the extent provided by the Federal Rules of Bankruptcy Procedure.

(3) Citizenship. These rules apply to proceedings for admission to citizenship to the extent that the practice in those proceedings is not specified in Federal statutes and has previously conformed to the practice in civil actions. The provisions of 8 USC § 1451 for service by publication and for answer apply in proceedings to cancel citizenship certificates.

(4) Special Writs. These rules apply to proceedings for habeas corpus and for quo warranto to the extent that the practice in those proceedings:

(A) is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Cases; and

(B) has previously conformed to the practice in civil actions.

(5) Proceedings Involving a Subpoena. These rules apply to proceedings to compel testimony or the production of documents through a subpoena issued by a United States officer or agency under a Federal Statute, except as otherwise provided by statute, by local rule, or by court order in the proceedings.

(6) Other Proceedings. These rules, to the extent applicable, govern proceedings under the following laws, except as these laws provide other procedures:
(A) 7 U.S.C. § 292, 499g(c), for reviewing an order of the Secretary of Agriculture;
(B) 9 U.S.C., relating to arbitration;
(C) 15 U.S.C. § 522 for reviewing an order of the Secretary of the Interior;
(D) 15 U.S.C. § 715d(c) for reviewing an order denying a certificate of clearance;
(E) 29 U.S.C. §§ 159, 160, for enforcing an order of the National Labor Relations Board;
(F) 33 U.S.C. §§ 918, 921, for enforcing or reviewing a compensation order under Longshore and Harbor Worker's Compensation Act; and
(G) 45 U.S.C. § 159, for reviewing an arbitration award in a railway-labor dispute.

(b) Scire Facias and Mandamus. The writs of Scire Facias and Mandamus are abolished. Relief previously available through them may be obtained by appropriate action or motion under these rules.

(c) Removed Actions
(1) Applicability. These rules apply to a civil action after it is removed from a state court.
(2) Further Pleading. After removal, repleading is unnecessary unless the Court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods:
(A) 21 days after receiving — through service or otherwise — a copy of the initial pleading stating the claim for relief;
(B) 21 days after being served with the summons for an

initial pleading on file at the time of service; or

(C) 7 days after the notice of removal is filed.

(3) Demand for a Jury Trial.

(A) As Affected by State Law. A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.

(B) Under Rule 38. If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 14 days after:

(i) it files notice of removal; or

(ii) it is served with a notice of removal filed by another party.

(d) Law Applicable.

(1) "State Law" Defined. When these rules refer to state law, the term "law" includes the state's statutes and the state's judicial decisions.

(2) "State" Defined. The term "State" includes, where appropriate, the District of Columbia and any United States commonwealth or territory.

(3) "Federal Statute" Defined in the District of Columbia. In the United States District Court for the District of Columbia, the term "federal statute" includes any Act of Congress that applies locally to the District.

Rule 5. The Answer and the Reply

(a) When Required. The respondent is not required to answer petition unless a judge so orders.

(b) Contents: addressing the allegations; stating a bar. The answer must address the allegations in the petition. In addition, it must state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statue of limitations.

(c) Contents & Transcripts. The answer must also indicate what transcripts (of pretrial, trial, sentencing, or post-conviction proceedings) are available, when they can be furnished, and what proceedings have been recorded but not transcribed. The respondent must attach to the answer, parts of the transcript that the respondent considers relevant. The judge may order that the respondent furnish other parts of existing transcripts or that parts of untranscribed recordings be transcribed and furnished. If a transcript cannot be obtained, the respondent may submit a narrative summary of the evidence.

(d) Contents: briefs on appeal and opinions. The respondent must also file with the answer a copy of:

(1) any brief that the petitioner submitted in an appellate court contesting the conviction or sentence, or contesting an adverse judgment or order in a post-conviction proceeding.

(2) any brief that the prosecution submitted in an appellate court relating to the conviction or sentence; and

(3) the opinions and dispositive orders of the appellate court relating to the conviction or the sentence.

(e) Reply. The petitioner may file a reply to the respondent's answer or other pleadings. The judge must set the time to file unless the time is already set by local rule.

USCS Sec. 2254 Cases R6

Rule 6. Discovery

(a) Leave of Court required. A Judge for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of Discovery. If Necessary for effective discovery the judge must appoint an attorney for a petitioner who qualifies to have Counsel appointed under 18 U.S.C. § 3006 Ae

(b) Requesting discovery. A party requesting discovery Must provide reasons for the request. The request Must include any proposed interrogatories and requests for admission, and Must specify any requested documents.

(c) Deposition Expenses. If respondent is granted leave to take a deposition, the judge may require the respondent to pay the travel expenses, subsistence expenses, and fees of the petitioner's attorney to attend the deposition.

USCS Sec. 2254 Cases R12

Rule 12. Applicability of the Federal Rules of Civil procedure.

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any Statutory provisions of these rules, May be applied to a proceeding under these rules.

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USCS Fed Rules Civ Proc R5

Rule 5. Serving and Filing Pleadings and Other Papers

(a) Service: When Required

(1) In General. Unless these rules provide otherwise, each of the following papers must be served on every party:

(A) an order stating that service is required;

(B) a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants;

(C) a discovery paper required to be served on a party, unless the court orders otherwise;

(D) a written motion, except one that may be heard ex parte; and

(E) a written notice, appearance, demand, or offer of judgment, or any similar paper.

(2) If a party fails to appear. No service is required on a party who is in default for failing to appear. But a pleading that asserts a new claim for relief against such a party must be served on that party under Rule 4.

(3) Seizing Property. If an action is begun by seizing property and no person is or need be named as a defendant, any service required before the filing of an appearance, answer, or claim must be made on the person who had custody or possession of the property when it was seized.

(b) Service: How Made.

(1) Serving an Attorney. If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) Service in General. A paper is served under this rule by:

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(A) handing it to the person;
(B) leaving it:
(i) at the person's office with a clerk or other person in charge or, if no one is in charge in a conspicuous place in the office; or
(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;
(C) mailing it to the person's last known address — in which event service is complete upon mailing;
(D) leaving it with the court clerk if the person has no known address;
(E) sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means that the person consented to in writing — in either of which events service is complete upon filing or sending, but is not effective if the filer or sender learns that it did not reach the person to be served; or
(F) delivering it by any other means that the person consented to in writing — in which event service is complete when the person making service delivers it to the agency designated to make delivery.
(3) Using Court Facilities. [Abrogated (April 26, 2018, eff. Dec. 1, 2018.)]
(c) Serving Numerous Defendants.
(1) In General. If an action involves an unusually large number of defendants, the court may, on motion or on its own, order that:
(A) defendants' pleadings and replies to them need not be served on other defendants;
(B) any crossclaim, counterclaim, avoidance, or

Affirmative defense in those pleadings and replies to them will be treated as denied or avoided by all other parties; and

(C) filing any such pleading and serving it on the plaintiff constitutes notice of the pleading to all parties.

(2) Notifying Parties. A copy of every such order must be served on the parties as the court directs.

(d) Filing.

(1) Required Filings; Certificate of Service.

(A) Papers after the Complaint. Any paper after the complaint that is required to be served must be filed no later than a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, request for documents or tangible things or to permit entry onto land, and requests for admission.

(B) Certificate of Service. No certificate of service is required when a paper is served by filing it with the Court's electronic-filing system. When a paper that is required to be served is served by other means:

(i) if the paper is filed, a certificate of service must be filed with it or within a reasonable time after service; and

(ii) if the paper is not filed, a certificate of service need not be filed unless filing is required by court order or by local rule.

(2) Non electronic filing. A paper not filed electronically is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) Electronic Filing and Signing.

(A) By a Represented Person - Generally Required; Exceptions. A person represented by an attorney must file electronically, unless non electronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) By an Unrepresented Person - When allowed or Required. A person not represented by an attorney:

(i) may file electronically only if allowed by court order or by local rule; and

(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(C) Signing. A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.

(D) Same as a Written Paper. A paper filed electronically is a written paper for purposes of these rules.

(4) Acceptance by the Clerk. The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

USCS Fed Rules Civ Proc R 7

Rule 7. Pleadings Allowed; Form of Motions and Other Papers.

(a) Pleadings. Only these pleadings are allowed:

(1) a complaint;

(2) an answer to a complaint;

(3) an answer to a counterclaim designated as a counterclaim;

(4) an answer to a crossclaim;

(5) a third-party complaint;

(6) an answer to a third-party complaint; and

(7) if the court orders one, a reply to an answer.

(b) Motions and Other Papers.

(1) In General. A request for a court order must be made by motion. The motion must:

(A) be in writing unless made during a hearing or trial;

(B) state with particularity the grounds for seeking the order; and

(C) state the relief sought.

(2) Form. The rules governing captions and other matters of form in pleadings apply to motions and other papers.

USCS Fed Rules Civ Proc R 10

Rule 10. Form of Pleadings

(a) Caption; Names of Parties. Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation. The title of the complaint must name all the parties; the title of other pleadings, after naming the first party on each side, may refer generally to other parties.

(b) Paragraphs; Separate Statements. A party must state its claim's or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity; each claim founded on a seperate transaction or occurence - and each defense other than a denial - must be stated in a seperate count or defense.

(c) Adoption by Reference; Exhibits. A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or Motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.

USCS Supreme Ct R 10

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States of appeals has decided an important question of federal law that

has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Due Process Clause:

USCS Const. Amend. 14, Part 1 of 15

Sec. 1. (citizens of the United States) All persons born or naturalized in the United States, and subject to the jurisdiction there of, are citizens of the United States and of the State where in they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the United States; Nor shall any State deprive any person of life, liberty, or property, without due process of law; Nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

MARTY JOE BANGHART,
Petitioner,

VS.

DARIN YOUNG, Warden and the Attorney General of the State of South Dakota,
Respondents.

4:21-CV-04066-KES

Motion to: Compel Discovery From Respondent

Page 1 of 4

I, Marty Joe Banghart, Petitioner hereby come before this Court with this Motion to Compel the following list of Discovery documents from Respondent. I also certify that I do not have copies of the documents requested and cannot acquire them without great financial burden.

1.- Full and Complete Transcript of Jury Trial Case# 41CRI 14-000648

2.- Full and Complete Transcript of Part#1 State Habeas Corpus Hearing Case# 17-100

3.- Full and Complete Transcript of Part#2 State Habeas Corpus Hearing Case# 17-100

Justification for Requests 1, 2 and 3 above: It is clear that Respondent has based some of their Answer off of Judge Hanson's (State Habeas Judge) Opinion which is based on Jury Trial Transcript and Habeas Hearing Transcripts Part 1 and 2. Yet the Respondent failed to attach any relevant portions of any Transcript to their Answer, which is required under Habeas Rule 5(c). The Respondent has also used a "Judicial Notice Request" to the Court in Motion to Dismiss, to enlist the Clerk of this Court to provide Transcript Copies to the Court only. These methods leave the Petitioner no other option than

UNITED STATES DISTRICT COURT

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to issue this Motion for these documents to be able to Reply to Respondents Answer and Motion. Petitioner fully intends to make a Reply once Discovery Documents are received.

4.- If not included in Transcript of Habeas Case 17-100, Petitioner is requesting that the Petitioners Copy of Motion for Correction of Record be provided with all attachments.

Justification for request: Petitioner must prepare that the Courts review may be based on 28 USC 2254, Section 2254 (d)(2) due to Respondents Motion to Dismiss based on Merits.

5.- If not included in Transcript Request of Habeas Case 17-100 (Part 1 and 2) Petitioner requests all Respondents and all Petitioners Briefs from Habeas Case 17-100 and Supreme Court Case 29405, Not already submitted with Respondents Answer.

Justification: This request will provide the Court Information needed for a Full and Fair review as well as allowing the Petitioner the information needed to form a Reply to Respondents Answer.

6.- If not included in Transcript request of Habeas Case 17-100: Petitioners version of "Findings of Fact and Conclusion of Law".

Justification: To decide this Fully and Fairly this Court needs to see the differing interpitation and conclusion by Petitioner to be

UNITED STATES DISTRICT COURT
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able to ensure that state Court made a reasonable determination of the Facts presented.

7.- If not included in Transcript request of Case 41-CRI-000648: All interviews conducted by Law Enforcement that were submitted at Jury Trial. Paper Copies Please as Petitioner has no access for electronic versions.

Justification: These interviews have been referenced in Jury Trial, Habeas Hearings and now Respondents Answer. The Court should most definitely have these made available for review to be able to confirm a referenced Fact.

8.- Request for Law Enforcement Final reports from the 2 agents that conducted Petitioner's Pre Trial Interview.

Justification: These items will lend to the review of Failing to Consult an Expert Witness, where testimony was given by Dr Ertz in relation to the interviewing process.

- If the Court rejects any of these request individually, Please have Clerk notify Petitioner of all other Approved requests.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

MARTY JOE BANGHART, Petitioner, vs. DARIN YOUNG, Warden and the Attorney General of the State of South Dakota, Respondents.	4:21-CV-04066-KES Motion to: Compel Discovery from Respondent. "Signature Page Only"

Date: 07/26/2021

Marty Joe Banghart

Marty Bgt

Petitioner, Pro se

United States District Court
District of South Dakota
Southern Division

Marty Joe Banghart
Petitioner,
vs.
Doug Clark Acting Warden and the Attorney General of the State of South Dakota,
Respondents

4:21-CV-04066-KES

Motion To: Renew Denied "Motion to Compel Discovery (Docket #13)"

Here now comes Petitioner Marty Joe Banghart in front of This Court with a Motion to Renew denied "Motion to Compel Discover (Docket #13). Due to this court tying the denial to its decision on Respondents Motion to Dismiss, I am now within the timeframe to Contest This Courts decision to "Deny Petitioners Motion to Compel Discovery" (Docket #14)

This Court stated in its Order Denying Motion (Docket #14) that Petitioners reliance on Rule 5(c) of the Rules Governing 2254 Habeas Petitions, does not apply here. Courts Justification was that "The Respondent has not filed an "Answer" as required to Trigger the requirements of Rule 5(c), but rather has filed a Motion to Dismiss → Page 1 of 4

← Pursuant to Fed. R. Civ. P. 12. Petitioner now presents the following Case Law and Rule #1 of Federal Rules of Civil Procedure to show This Court errored in this decision.

Fed. R. Civ. P. 12(b)(6) – Page 11 of Docket #10.
In Respondents own Case Law from Franklin V. Dooley No. 4:15-CV-04149-LLP, 2015 WL 9608750, at *2 (D.S.D. Nov 23, 2015. Under Discussion, As standard applicable to Rule 12(b)(6) Motions. Last Paragraph states: When a Respondent files a response to a 2254 action, whether it be an Answer or a Motion to Dismiss, the Respondent is directed to attach any Transcripts or other parts of the Underlying State Court Records the Respondent Considers to be relevant. See Governing Rule 5(c). In (Franklin V Dooley) this Case the Respondent supplied all 5(c) required documents.

Sizemore V. District Court, 50th Judicial District, 735 F. 2d 204. States: However it is obvious that the Mandatory language of Rule 5 places the burden on the State to Identify any available Transcripts and to attach all relevant sections to its answer.

USCS Fed. Rules Civ Proc. R 81
HN 8 – The Federal Rules of Civil Procedure apply in Habeas proceedings only" to the extent that the Practice is not set forth in Statues of the United States. (Browder V. Director, Dept of Corrections, 434 U.S. 257)

Rule #1 of the Federal Rules of Civil Procedure provides that: These Rules Govern the procedures in the United States District Courts in → Page 2 of 4

← all suits of a Civil Nature, with the Exceptions stated in Rule 81, Rule 81(a)(2) provided in Relevant part that the rules were not Applicable in Habeas Corpus "Except to the extent that the practice in such proceedings is not set Forth in Statues of the United States and has here to Fore conformed to the practice in Actions at Law or suits in Equity.

Conclusion:

Petitioner hereby requests that This Court Renew Motion to Compel Discovery (Docket #13). Petitioner feels he has been Severely Prejudiced by This Courts Denial of Motion to Compel Discovery (Docket #13) as the Courts have the Records, the Respondent has the records yet the Petitioner has No Access to any of these records and has been required to submit an uninformed response to Respondents Motion to Dismiss. Petitioner has now provided over-whelming proof that no Motion that is a "Response" is excluded from Habeas Rule requirements. Discovery seems to be more important than ever as This Court has addressed Issues that are part of the State Habeas Record and also the Trial Record that could possibly show that the Proposed Report and Recommendation be reversed and a Writ be issued. I will need the documents listed in original Motion (Docket #13) to be able to make my informed Objection to Report and Recommendation of the Magistrate Judge. It seems that almost the entire Report is based on Records I dont have access to. I also believe This Court has not Fully reviewed the Habeas Record or the Trial Record and would like to offer Specific page and lines not a general uninformed Response which I was required to do in my response to "Respondents Motion to Dismiss" that is now being used against me as not being Specific enough.

United States District Court
District of South Dakota
Southern Division

Marty Joe Banghart
Petitioner,
VS.
Doug Clark Acting Warden and the Attorney General of the State of South Dakota,
Respondents

4:21-CV-04066-KES

Motion to: Renew Denied "Motion to Compel Discovery (Docket #13)

Date: 28th Day of December 2022

Marty Joe Banghart

Petitioner, Pro se

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Marty Joe Banghart Petitioner / Appellant Vs. Doug Clark, Acting Warden and the Attorney General of the State of South Dakota. Respondent's / Appellee's	4:21-cv-04066-KES Motion For: Certificate of Appealability and Certificate of Service.

Comes Now Marty Joe Banghart, Petitioner / Appellant and respectfully moves the 8th Ciruit Court of Appeals for its Order issuing a Certificate of Appealability (COA) to allow an Appeal of the U.S. District Court, District of South Dakota courts final Order denying relief in this habeas proceedings. The District Court denied Banghart's request for habeas relief and Certificate of Appealability (COA) by its Order filed February 23, 2022 and Signed by U.S. District Judge Karen E. Schreier (Doc 30). In support of this Motion, Banghart states as follows:

(1) Standards for Issuance of COA

Appeals in habeas corpus proceedings are discretionary, and may be taken only when a Certificate of Appealability (COA) is issued pursuant to Fed. R. App. P. 22(b) and. USCS SEC 2254 Cases R 11.

Under these standards, both the Petitioner's/Appellants Motion and the Courts COA must contain a substantial showing of the denial of a Constitutional Right.

"A" substantial showing "is" a showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v McDaniel, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 1603-04, 146 L.Ed. 2d 542 (2000) (quoting Barefoot, 463 U.S. at 893 N.4, 103 S.Ct. at 3394 N.4). The applicant bears the burden of proof, and ultimately "Must Demonstrate that reasonable jurists would find the [habeas] court's assessment of the constitutional claims debatable or wrong." Miller-El, 537 U.S. at 338, 123 S. Ct. at 1040 351 (quoting Slack, 529 U.S. at 484, 120 S. Ct. at 1604)."

In a more detailed description, the Supreme Court explained:

A prisoner seeking a [certificate] must prove" something more than the absence of "frivolity" or the existence of mere "good faith" on his or her part. Barefoot, supra, U.S. at 893, 103 S. Ct. 3383. We do not require petitioner to prove, before the issuance of a [certificate] that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the [certificate] has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in Slack, where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straight forward:

The petitioner must demonstrate that reasonable jurists would find the district Court's assessment of the Constitutional claims debatable or wrong. "[Slack, supra,] 529 U.S., at 484, 120 S. Ct 1595." The U.S. Supreme Court's definition of the probable cause required to warrant the certificate was stated as follows:

"In requiring a question of some substance, or a substantial showing of the denial of a Constitutional right, obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issue's are debatable among jurists of reason; that a court could resolve the issue's [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further."

Barefoot v. Estelle, 463 U.S. 880, 893 N.4 (1983) (italic's in original).

As the above makes clear, Petitioner's showing does not need to convince this Court that the lower Court's decision was wrong, or that it is likely that petitioner will prevail on Appeal. Rather, "to obtain a certificate of appealability, a prisoner must demonstrate that jurists of reason could disagree with the district Court's resolution of his Constitutional claims or that jurists could conclude the issue's presented are adequate to deserve encouragement to proceed further. "Banks v. Dretke", 540 U.S. 668, 705, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004). All doubts as to whether to issue a certificate should be resolved in favor of the petitioner. Penry v. Johnson, 215 F. 3d 504, 507 (5th Cir. 2000); Lambright v. Stewart, 220 F. 3d 1022, 1025 (9th Cir. 2000) (stating that this position is required by Barefoot).

(2) Issues to be Appealed

Petitioner/appellant requests that -

the COA authorize appeal of the following issues, which allege the ineffective assistance of Banghart's counsel at trial and District Courts denial of Banghart's right under the 14th Amendment of the Constitution of the United States, to Full and Fair opportunity to respond to the legal and factual matters at hand.

(1) Failure to consult with or call a rebuttal expert witness, which manifested itself as follows:

A. Failure to challenge the credentials of the State's witness;

B. Failure to present expert testimony showing that the theories behind the State's experts testimony were flawed and discredited by established scientific research;

C. Failure to present expert testimony showing that the lack of a forensic interview tainted the investigation and lessened the reliability of claims made by the State's witness;

D. Failure to present expert testimony showing that the late and inconsistent statements of the victim were suggestive of a motive to falsify.

(2) Failure to object to evidence that Banghart had shaved the alleged victim's pubic area.

(3) District Courts Failure to Act on Fed Rules of Civ Proc. when Respondent/Appellee filed Response 95 days after Courts Order was served requiring a 30 day deadline.

(4) District Courts Failure to address Respondents/Appellee's Motion as incomplete as no Transcripts were attached to Banghart's Copy of Respondents/Appellee's Response and District Court denied Banghart's Motions to Compel improperly.

(3) Why this Certificate Should be Granted)

Petitioner/Appellant was charged with three counts of rape and 3 counts of sexual contact with a minor based on allegations made by his daughter that Banghart had digitally penetrated her in their home. Her initial Complaint was made roughly 3 years after the alleged abuse began, and at the same time that she had become estranged from her

Father and was actively seeking to leave his custody. There was no independent corroboration of her allegations in the form of eyewitness testimony or forensic evidence. It is undisputed that the trial was essentially a credibility contest between the witnesses. The jury acquitted Banghart on 5 of the 6 charged counts.

Banghart raised 2 main issues in this proceeding, (1) the failure of defense counsel to consult with or call a rebuttal expert, and (2) the failure of counsel to object to evidence that Banghart had shaved S. B.'s pubic area. After the case had been pending on the docket for several months, the State gave notice 22 days before the trial was scheduled to commence that it intended to call Krista Heeren-Graber of Childs Voice in Sioux Falls as its expert witness. Despite the late notice, defense counsel did not request a continuance, did not consult an expert in preparing cross examination, did not research the case law on these issues and only did some cursory internet research in the limited time they had to prepare (Transcript of habeas hearing, Feb. 14, 2020, pp 21-24; Exhibit 2). The circuit court held that counsel's actions were a reasonable strategy in that cross examination of the expert was adequate and that the testimony at the habeas hearing was not sufficient to overcome the strong presumption of effective assistance (Memorandum Opinion, p. 8; Courts Conclusions of Law ¶¶ 16-18). However, existing caselaw from the Eighth Circuit and other appellate courts holds that counsel who fail to diligently investigate the facts and who are unprepared may not later claim their actions were the product of a reasoned strategy, See Foster v. Lockhart, 9 F3d 722 (8th Cir., 1993). The failure to exercise the customary due diligence in investigating a claim causes the presumption of effectiveness to disappear, Driscoll v. Delo, 71 F.3d 701 (8th Cir. 1995). The failure of defense counsel to consult with an expert forfeited that presumption, and one of the defense attorneys admitted that counsel should have enlisted the assistance of an expert. (Transcript of habeas hearing, Feb 14, 2020 p. 25). In addition, other courts

have rejected the notion that cross examination of a prosecution expert is sufficient without consultation with an independent expert, and that the failure of counsel to consult with an expert of their own effectively hampers the ability of counsel to impeach the prosecution's witnesses, Spalding v. Larson, 202 F. Supp. 3rd 737 (E.D. Mich. 2016). Other authorities to that effect are cited in section 1C of this Motion, infra. The U.S. Supreme Court held in Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 788 (2011) that criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence. These contrary authorities show that other courts' holdings on this issue are not consistent with District Courts decision. For those reasons, the claim of ineffective assistance of counsel by their failure to consult with or call a rebuttal expert is a debatable one and worthy of appellate review. Banghart's claims manifest themselves in the following specific ways.

Issue 1A: Failure to challenge the Credentials of the States Witness

With 22 days to go before trial, the State elected to enlist and call an expert witness from Childs Voice, Krista Heeren-Graber, who has regularly appeared as its witness in similar cases on many occasions. The Courts have held that in child sex abuse cases, the testimony of an expert witness is of great relevance and importance (State v. Koepsell, 508 N.W. 2d 591, 594 (SD 1993). See also State v. Cates 2001 SD 99, 632 N.W. 2d 28 (2001). It is axiomatic that when confronted by such an expert witness, defense counsel should avail themselves of any opportunity to research, and if appropriate, challenge the credentials of such an expert. At the habeas hearing, Banghart presented the Testimony of Dr. Dewey Ertz. Expert testimony could have been presented challenging the qualifications and background of the State's witness on several levels cited in Dr. Ertz's testimony (Court's Finding of Fact #13). In its ruling, the circuit court did not

directly address the issue regarding Heeren-Graber's qualifications but instead the court held that Heeren-Graber's testimony was only general in nature, and that the differences between the testimony of Heeren-Graber and Dr Ertz were not that significant (Courts Memorandum Opinion, pp. 9-11). This issue is debatable for a number of reasons. Heeren-Graber asserted that late and inconsistent reports are common, and can be explained by many factors that do not impact the credibility of the statements made. Dr Ertz contradicted this point by stating that late and inconsistent statements can demonstrate a lack of credibility, cannot be explained by any discernable pattern of reporting, and can be motivated by intra-Family visitation or custody disputes, or by outside coaching from Family Members. (Petitioner's Proposed Findings of Fact #39-42). In the present case, there was undisputed evidence that S.B. was not getting along with her Father, had made recent contact with her mother on the eve of her eventual report to the School Counselor, and had not reported any abuse to a police officer the night before making the report. (Trial transcript, pp. 290-298; Petitioner's Proposed Findings of Fact #17-19). Reasonable minds could differ on the issues whether Heeren-Graber gave only general information to educate the jury (as claimed by the State), or whether her testimony was designed to negate or minimize the attacks on her credibility. It does not appear that this Court has ever decided any case involving the failure of defense counsel to challenge the credentials or testimony of a Childs Voice expert in a child Sex abuse case. This issue affords the Court the opportunity to pass on the obligations of defense counsel under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed 2d 674 (1984), to counter and rebut the State's expert, an issue which is likely to affect future prosecutions. Because these issues are legitimate and relate to a form of expert evidence already deemed by the Courts to be critical in cases of this Nature, Bangharts claim deserves

encouragement to proceed further, and the COA should be granted under the standards for issuance.

Issue I.B: Failure to present expert testimony showing that the theories behind the State's expert testimony were flawed and discredited by established scientific research.

In this case, the alleged victim reported the abuse more than 3 years after she said it first happened. Her initial report was sketchy, and it changed over time. The defense strategy was to attack her credibility based on these and other facts. At trial, the State's expert explained away these concerns, and she testified as to various reasons why a child victim of sexual abuse would late report, i.e. fear of retaliation, fear that they wont be believed, or fear that they will be blamed (Trial transcript, p. 312). The State's expert further testified that sometimes victims delay reporting for fear of getting a family member in trouble (Trial transcript, p. 313). Defense counsel could have presented expert testimony showing that the opinions expressed by the State's expert were based on a flawed theory, The Child Abuse Accommodation Syndrome (CAAS), that has been discredited by subsequent scientific research. The circuit court held that the opinions of the State's expert were not necessarily based on the Child Abuse Accommodation Syndrome (Court's Memorandum Opinion, Page 11; Courts Findings of Fact #18-19), but the defense expert testified that they were (Transcript of habeas hearing, August 2, 2019, p. 32; 35; Petitioners proposed Finding of Fact #39).

Defense counsel admitted that he was not aware that Heeren-Graber's testimony was arguably based on the Child Abuse Accommodation Syndrome. He further admitted that he thought CAAS was generally accepted in the scientific community. Had counsel consulted with an expert, he would have known to challenge this point. The lack of preparation--which defense counsel in this case admitted--results in a lack of familiarity with sexual abuse studies and

hamstrings effective cross examination, Lindstadt v. Keane, 239 F3d 191, 202 (2nd Cir. 2001).

The Circuit Court held that calling an expert to contradict Heeren-Graber was not of great importance, and that the lack of a rebuttal expert witness did not result in an unfair trial. Banghart respectfully submits that reasonable jurists could and have disagreed. In State v. Wills, 2018 S.D. 21 ¶¶ 25-27, 908 N.W.2d 757, the State called an expert witness in a sex abuse case to testify about the report made by a child witness and the forensic interview conducted as part of the investigation. The defense attempted to call its own expert, but this was denied by the trial court. The S.D. Supreme Court held that the refusal to permit the defense expert's testimony was prejudicial error and that in the context of that case, the outcome of the trial was dependent on the weight to be given to witness testimony and expert opinions. In a sex abuse trial not involving physical or forensic evidence, the importance of expert testimony -- not a simple reliance on cross examination -- has been emphasized by the Courts on multiple occasions. Although the lower court did not rule in Banghart's favor, other courts have ruled on multiple occasions that the failure to consult with or present expert rebuttal testimony in a sexual abuse case constituted ineffective assistance of counsel. In Michigan v. Ackley, 870 N.W.2d 858 (2015), the Supreme Court of Michigan held that the failure to consult an independent expert prior to trial prevented the defense from presenting testimonial support for its defense theory and from effectively challenging the State's case, could not be a reasonable strategy, and amounted to ineffective assistance of counsel. There are other authorities consistent with this viewpoint, see Lindstadt v. Keane, 239 F3d 191, 202 (2nd Cir. 2001) (Counsel's lack of familiarity with pertinent sexual abuse studies and failure to conduct any relevant research "hamstrung" his effort to effectively cross examine the Prosecution's expert witness), and

Holsombach v. White, 133 F3d 1382, 1387-1389 (CA 11 1998), (counsels failure to conduct an adequate investigation into medical evidence of sexual abuse was ineffective). Under the standards for issuance of a COA these issues are debatable and worthy of review. For this reason, the COA should be granted.

Issue 1C: Failure to present expert testimony showing that the lack of a forensic interview tainted the investigation and lessened the reliability of claims made by the States witness

Contrary to established and customary procedure, law enforcement did not proceed with a forensic interview of the child witness through Child's Voice. Instead, law enforcement conducted an investigative interview and enlisted the child to assist in seeking incriminating admissions from Banghart by making a secretly recorded phone call. Counsel could have called an expert to testify that this procedure violated established protocols and tainted the interview process, but failed to do so. The State's own expert at the habeas hearing also attested to the importance of a forensic interview conducted by persons specially trained to ask questions in a neutral manner (Petitioner's Proposed Findings of Fact # 68-72).

In its Memorandum Opinion, the circuit court did not dispute that the lack of a forensic interview was unusual and that it violated normal protocols. Instead, the court held that Dr. Ertz did not specifically opine that the victim actually had false memories caused or created by the lack of a forensic interview (Memorandum Opinion, at page 12). However, as the lower court's opinion also noted, the opinion of an expert that a victim was actually abused or that the victim's testimony was actually true is not allowed (Memorandum Opinion, p. 5, citing: State v. Buchholtz, 2013 S.D. 96). An expert is generally allowed to testify as to general factors or characteristics that can affect

the truthfulness of an allegation, but is not allowed to say that a particular victim either was or was not being truthful. Existing case authorities support the argument that forensic interview techniques employed today are accepted among experts and that they minimize the risk of false allegations of abuse that result from a child's vulnerability to suggestion and coaching. State v. Maday, 892 N. W. 2d 611 (Wisc. 2017). Existing case authorities also support the argument that Conducting an investigative interview of a child can be coercive or suggestive, thus undermining the reliability of the child's responses as an accurate recollection of events, State v. Michaels, 642 A. 2d 1372 (N. J. 1994). These authorities support the notion that the failure of defense counsel to pursue these issue's before the jury constituted ineffective assistance of counsel. For that reason, although the lower court held otherwise, this issue is debatable and reasonable jurists could disagree as to its merits. This is sufficient to show a "substantial showing" of the denial of a constitutional right, and warrants the issuance of a COA. In view of the substantial deviation from normal procedure by law enforcement in its interview of a child witness, and existing caselaw which does support Banghart's claims, this is an issue that is "adequate to deserve encouragement to proceed further" under the standards for Issuance of a COA and Banghart should be afforded the right to appeal this issue.

Issue I D: Failure to present expert testimony showing that the late and inconsistent statements of the victim were suggestive of a Motive to Falsify.

The circuit court noted in its Memorandum Opinion that when compared, the testimony of Heeren-Graber and Dr Ertz were not substantially different or inconsistent (Memorandum Opinion, pp. 9-10). However, Dr Ertz testified that many factors can influence whether a child is truthfully or untruthfully relaying

the facts when making an allegation of abuse. Some of those factors are whether the child is embroiled in a visitation or custody dispute, has been coached by other family members, or has a motive to relocate with another parent. All of these factors were present in this case, but none of them were mentioned by Hecren-Graber, and Banghart's claim is that the failure to present such evidence constituted ineffective assistance. Banghart's defense was that S.B. did not report truthfully because she reported late only after speaking to her mother the night before, that her initial report was incomplete and inconsistent, that she had not been getting along with her father for months, had a history of dishonesty, and that she desired to relocate and had attempted to do so multiple times in the paste. Whether these ~~issued~~ issues should have been explained to the jury by an expert is a subject of legitimate debate and disagreement, thus satisfying the "substantial showing" requirement under the Standards for Issuance of a COA.

In its Memorandum Opinion, the Circuit Court addressed the decision of the court in Gersten v. Senkowski, 426 F. 3d 588 (2nd Cir., 2005) (Courts Memorandum Opinion, pp. 11-12). Gersten held that the failure of defense counsel to consult with or call an expert to rebut the State's witness in a child sexual abuse case was ineffective assistance of counsel. The circuit court rejected the holding in Gersten, noting that other courts had disagreed with its holding (Court's Conclusion of Law, ¶ 23). By definition, the fact that there is conflicting authority on this point shows that the issue is debatable, and that reasonable jurists can and have had differing opinions as to its merits. Other authorities support the argument that the failure to consult with or call a rebuttal expert is ineffective assistance, see Pavel v. Hollins, 261 F. 3d 210 (2nd Cir., 2001), Knott v. Mabry, 671 F. 2d. 1208 (8th Cir., 1982) and Burch v. Millas, 663 F. Supp. 2d 151 (2nd Cir., 2009).

The fact that there is a difference in views among various jurisdictions in their holdings regarding this issue -- and that substantial authority exists conflicting with the lower court's holding -- demonstrates that "reasonable jurists would find [the court's] assessment of the constitutional claims debatable or wrong." El-Miller v. Cockrell, 537 U.S. 322, 338 (2003). This justifies the issuance of the COA under existing precedent.

Issue 2: Failure to object to evidence that Banghart had shaved the victim's pubic area.

At trial S.B. testified without objection that Banghart had shaved her pubic area on some occasions. The trial record demonstrates that the testimony of S.B. regarding the shaving incident was never linked in time or by a common scheme to an act of sexual penetration. Defense counsel failed to object to the evidence either before or during trial. Banghart claims that the prejudicial effect of the evidence, suggesting that Banghart had a depraved character and engaged in inappropriate behavior, substantially outweighed any probative effect. The circuit court held that the testimony was admissible as a voluntary admission of a party (Court's Conclusion of Law ¶ 14), that the testimony was relevant (Court's Conclusion of Law ¶ 16), and that Banghart's explanation of the shaving was part of his defense strategy (Memorandum Opinion, page 15).

Reasonable legal minds could legitimately differ as to whether any nexus was established between the shaving incidents and an act of sexual penetration. S.B. herself never said that the shaving resulted in penetration, and she did not testify that the shaving was in any way a prelude to a later act of penetration (Trial transcript, pp. 276-280; Petitioner's Proposed Findings of Fact, ¶¶ 88-89). Reasonable legal minds could also legitimately differ as to whether the prejudicial effect of this evidence substantially outweighed any

probative value, and defense counsel himself conceded that the evidence was horribly damaging to Banghart (Transcript of habeas hearing, February 14, 2020, pp. 29-30). This was a serious issue directly affecting the fairness of Banghart's trial, and is "adequate to deserve encouragement to proceed further" under the standards for issuance of a COA.

SubNote: Once again the Court's have asked me to supply to the court's a Motion to ensure I dont lose my right's to continue to be able to Move my case forward. Yet as of the writing of this "Motion for: COA" I have yet to have any transcript and related documents provided to me as required by Statute. So the only document that I have available to me is the "Respondents Memorandum in Support re 9 Motion to Dismiss (Doc 10)" which included Exhibit #14 "Petitioner's Motion for Certificate of Probable Cause" from South Dakota Supreme Court. With ony this document (Doc 10-14) available I provided as complete of a response as possible to the Issue's of Merit in Issue 1 and 2 above. Issue's 1 and 2 above also include reference's to transcripts which I included, with great reservation from (Doc 10-14) as I have no way to validate that information.

Issue 3: District Courts Failure to Act on Federal Rules of Civ. Proc. when Respondent/Appellee Filed response 95 days after Court's Order was served requiring a 30 day deadline.

On 4/15/21, District Court issued order to Respondent/Appellee to file response to 2254 Petition (Doc 4) in 30 days. Clerk sent electronic service to 5 State addresses including Respondent. Respondent/Appelle clearly outlines Date of District Court's Order and requirements of that order along with the statement "On June 30, 2021, Respondents "Counsel received a copy of the Order". Page 14 of 20

(Doc 10 page 2)

Respondent/Appellee continues to "opine" that they (state) didnt know a case existed until on or about June 30, 2021. Counsel, instead of submitting a Motion to the Court as clearly outlined in USCS Fed. Rules Civ. Proc. Rule 6(b).

Rule 6(b)(1)(A) - with or without Motion or Notice if the Court acts, or if a request is made, before the original time or its extension expires;

or

Rule 6(b)(1)(B) - on Motion made after the time has expired if the party failed to act because of "Excusable Neglect".

Instead of Counsel following the rules as outlined above, Counsel "alleges" that she contacted District Courts Supervisory Deputy Clerk by phone on or about June 30, 2021 and that Clerk Wakefield in conversation discovered that a "technical defect" caused all 5 listed Contacts (Doc 4) including Respondent Young, not to receive the 4/15/21 District Courts Order. If Respondent or other 4 listed individuals truly did not receive the order then under USCS Fed Rule 6(b)(1)(B) would most certainly have met the "excusable neglect". Yet the evidence doesn't support Respondent's/Appellee's claims: 1. There was no Motion to Extend, 2. There is no Docket entry stating order was resent and deadline to respond was extended. 3. District Court has refused to address this issue. 4. I have a letter from Matthew W. Thelen, Clerk of Court, District Court, Dated August 02, 2021 stating that "there are no additional staff Notes on your Case File. (Exhibit AA).

— Davis v. Vilsack, 880 F. Supp. 2d 156 (US. District Court for the District of Columbia, 2012), Clearly outlines what is expected by the Court as far as time deadlines. HN8 - Courts Apply time deadlines strictly and will dismiss a suit for missing the deadline by even one day.

also Federal Habeas Corpus Practice and Procedure 16.1, Note 20, 502 U.S. 1110 (1992). (District Court did not err in granting State's Motion For Summary Judgment without first obtaining answer, Petitioner had "Ample Notice" of Summary Judgment Motion and "Failed to Respond" -- within the "Allowed time" or For several months there after).

The Motion (Doc 9) and related (Doc 10) were filed with the Court 95 days after the service of (Doc 4) District Courts Order.

The District Court has never addressed this issue even though it was clearly outlined in Petitioners "Reply to Motion Response re 5 Motion For Summary Judgment" (Doc 16) Filed on 8/12/21. Banghart was certainly prejudiced by the District Court not addressing an issue outlined under Rule 6 and allowing both parties an opportunity to Fully and Fairly Litigate this issue.

This issue clearly outlines that District Courts decision not to address the issue presented to them directly affected the Fairness of District Courts Final Decision and infringes on Banghart's Due-Process Rights. This issue is "adequate to deserve encouragement to proceed further" under the Standards For issuance of a COA.

Issue 4: District Courts failure to address Respondent's/Appellee's Motion as incomplete as no Transcripts were attached to Banghart's Copy of Respondent's/Appellee's Response and District Court denied Banghart's Motion's to Compel improperly.

After giving District Court ample time to review Respondent's/Appellee's "Motion to Dismiss" (Doc 9) and "Memorandum in support re 9" (Doc 10). Banghart on 7/28/21 Filed a Motion to Compel: Discovery (Doc 13), due to the Fact that Respondent/Appellee had Failed to attach "any" State Court Records as required by Habeas Rule 5c with Banghart's served Copy of the State's Response.

This is clearly outlined in (Doc 13) and according to Doc 10 page 3, Respondent/Appellee explains that the District Court's Order also required Respondents to cause to be filed all "pertinent" State Court Records. Respondent's / Appellee's Counsel contacted Matthew W. Thelen U.S. District Court Clerk, by phone on July 6, 2021. From this contact it appears Respondent's Counsel identified the "Pertinent" State Court Records to Mr Thelen who Counsel alleges, informed Counsel he would obtain the following State Court Records and make the same available for the "Courts Review."

- State v. Banghart 41CR 114-000648
- State v. Banghart 27757
- Banghart v. Young 41Civ 17-000100
- Banghart v. Young 29405

Respondent notes at bottom of Doc 10 page 3 that Court May take Judicial Notice of the above records.

7/12/21 - District Court Received Minnehaha Cases CR 12-6886 and Civ-15-792. Received S.D Supreme Court Cases 27757 and 29405 (No Docket entry number)

7/13/21 - District Court received Lincoln County Cases CR 114-648 and Civ 17-100. (No Docket entry number).

As of 7/13/21 - The Court has all identified judicial Notice "Pertinent" State Court Records and the State also has all "Pertinent" State Court Records which leave Banghart, the only Party in this action, that has "Absolutely NO" "Pertinent State Court Records." This statement in itself Makes all District Courts Actions Tantamount to an Ex Parte Action which is Strictly Forbiden in Multiple party actions.

On 07/28/21 District Court filed order (Doc 14) denying 13 Motion to Compel. District Court goes on to state, "Banghart's reliance on Rule 5 c of the rules governing 2254 Habeas Petitions does not apply here. The

respondent has not filed an "Answer" as required to trigger the requirements of Rule 5c but rather has filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12".

Banghart's Doc 13 Motion was the 1st attempt to resolve a serious abuse of discretion by District Court. District Court had Respondent's/Appellee's Doc 10 page 3 which clearly identifies this document as the Response/Answer as required by District Court. District Court also has access to Fed. R. Civ. P. 12, which under Rule 12(b) at bottom, it clearly states: "A Motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed". Which in itself makes Respondents 12(b)(6) Motion "Only and Wholly" a responsive pleading, subject to the Courts Order of a response under Fed. Habeas Corpus Practice and Procedure § 16.1 (b) Answer Generally. District Court also had been presented with: Franklin v. Dooley, No. 4:15-CV-04149-LLP, 2015 WL 9608750, at *2 (D.S.D. Nov 23, 2015), report and recommendation adopted, 2016 WL 67695 (D.S.D. Jan. 5, 2016) (Doc 10 page 11). This case was presided over by Judge DUFFY and under Discussion A, paragraph 9, it clearly outlines the requirements of a 12(b)(6) Motion used in a response to a 2254 action. "When a respondent files a response to a § 2254 action, whether it be an answer or a Motion to Dismiss, the respondent is directed to attach any transcripts or other parts of the underlying State Court records the Respondent considers to be relevant to See Governing Rule 5c". This information was also submitted to District Court on 1/5/22 in Banghart's Motion to: Renew denied Motion to Compel Doc 13, (Doc 22) along with additional: Case law, 45 CS Fed. Rules Civ. Proc. Rule 81 and Rule 1 of Fed Rules of Civ P.

Doc 22 was now the 2nd time Banghart tried to resolve the issue of the District Court Failing to enforce a Statutory Rule which does not allow for Judicial Discretion, Just Judicial Mis conduct as Page 8 of 20

in this Case.

On 1/7/22 Judge Schreier issued order (Doc 23) denying 22 Motion to Compel; Judge Schreier had Doc 22, Doc 13 and Doc 14 available to review and find that Banghart was contesting a violation of Habeas Rule 5C for not having received any of the required State Records that are required under Rule 5C. I am not sure what "This Court" requires for "good Cause" but I like to think when a party files 2 Motions outlining a Statutory Rule Violation (Rule 5C) requiring records to be provided that should be the best "Good Cause" statement there could be.

Banghart then attempted for the 3rd time to resolve this issue by filing an Interlocutory Appeal of Doc 23 to the 8th Circuit Court of Appeals (Doc 25) which the Appeals Court decided not to take appeal based on the fact District Court had not issued a "Final Order" on Case 4:21-CV-04066-KES.

Dated 2/23/22 and signed by Judge Schreier, District Court has now entered the Final Order (Doc 30) Dismissing 2254 Petition and also has denied COA at the District Court Level. As Final order has been entered, it now transfers Jurisdiction to the 8th Circuit Court of Appeals for filing of this request for a COA to the 8th Circuit Court of Appeals.

This issue clearly outlines that District Court has seriously deprived Banghart of a Constitutional Right and is adequate to "deserve encouragement to proceed further" under the standards for issuance of a COA.

(4) Conclusion

Petitioner/Appellant need not show likelihood that he will prevail on appeal. He need only show that the issues for which he seeks review are not frivolous — that they are debatable and subject to legitimate disagreement by reasonable jurists.

Any doubts as to whether to issue the COA should be resolved in Favor of the Petitioner/Appellant. Banghart's arguments in support of Habeas Relief are supported by existing case authorities from both State and Federal Courts and are worthy of Appellate review.

Banghart respectfully requests that This Court issue its Certificate of Appealability covering all of the above requested appeal issues.

Marty for Banghart
Petitioner/Appellant, Pro se
Date: 17th Day of March, 2022

U.S. District Court

District of South Dakota

Notice of Electronic Filing

The following transaction was entered on 7/28/2021 at 12:57 PM CST and filed on 7/28/2021
Case Name: Banghart v. Young et al
Case Number: 4:21-cv-04066-KES
Filer:
Document Number: 14(No document attached)

Docket Text:
ORDER denying [13] Motion to Compel. Mr. Banghart states that part of his request is motivated by a desire to ensure this court is fully informed of the proceedings in state court. This court will take judicial notice of all proceedings in state court and will review the same. Furthermore, Mr. Banghart's reliance on Rule 5(c) of the Rules Governing 2254 Habeas Petitions does not apply here. The respondent has not filed an "answer" as required to trigger the requirements of Rule 5(c), but rather has filed a motion to dismiss pursuant to Fed. R. Civ. P. 12. Should the court deny respondent's motion to dismiss, Mr. Banghart can renew his request for discovery at that time. Signed by US Magistrate Judge Veronica L. Duffy on 07/28/2021. (Duffy, Veronica)

4:21-cv-04066-KES Notice has been electronically mailed to:

Jennifer M. Jorgenson jenny.jorgenson@state.sd.us, atgservice@state.sd.us, janet.waldron@state.sd.us, lynell.erickson@state.sd.us

4:21-cv-04066-KES This document must be sent in hard copy to:

Marty Joe Banghart
41058
MIKE DURFEE STATE PRISON
1412 Wood Street
Springfield, SD 57062

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CERTIFICATE OF SERVICE
FOR PRO SE DOCUMENTS

On the 13th day of September, 2022, the undersigned party served the following document or documents (list documents):

1. Motion and Affidavit for Permission to Appeal in Forma Pauperis for Documents and Fees.
2. Prisoner Trust Account Report and Attachments
3. Petition For Writ of Certiorari and all required Documents.

on (list names and addresses of parties or attorneys):

Jennifer M. Jorgenson, Assistant Attorney General for the State of South Dakota, at 1302 E. Highway 14, Suite 1, Pierre S.D. 57501-8501

by delivering a copy by (state how you served the document, such as U.S. Mail):

The Mike Durfee State Prison Legal Mail system as attested to by the Notary Stamp.

(Signature)

Marty Banghart, Pro se
(Print or Type Name)
1412 Wood St
Springfield SD 57062

Subscribed and sworn to me this 13 day of September, 2022

My Commission Expires Apr. 4, 2024

TIFFANY VOIGT
NOTARY PUBLIC
SOUTH DAKOTA
SEAL SEAL

RECEIVED
SEP 20 2022
OFFICE OF THE CLERK
SUPREME COURT, U.S.