UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-1520

Rex Gard

Petitioner

v.

Warden Brent Fluke; Attorney General Jason Ravnsborg

Respondents

Appeal from U.S. District Court for the District of South Dakota - Western
(5:18-cv-05040-JLV)

JUDGMENT

Before LOKEN, SHEPHERD, and GRASZ, Circuit Judges.

The motion for authorization to file a successive habeas application in the district court is denied. Mandate shall issue forthwith.

July 10, 2020

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

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-2486

Rex Gard

Petitioner - Appellant

v.

Warden Brent Fluke, Mike Durfee State Prison; Attorney General Jason Ravnsborg

Respondents - Appellees

Appeal from U.S. District Court for the District of South Dakota - Rapid City
(5:18-cv-05040-JLV)

JUDGMENT

Before BENTON, ERICKSON, and STRAS, Circuit Judges.

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

The motion to proceed on appeal in forma pauperis filed by Appellant Mr. Rex Gard is denied as moot.

January 13, 2020

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

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 12-1780

Rex Gard

Petitioner - Appellant

v.

Douglas Weber, Warden, South Dakota State Penitentiary;
Marty J. Jackley, Attorney General of the State of South Dakota

Respondents - Appellees

Appeal from U.S. District Court for the District of South Dakota - Rapid City
(5:10-cv-05017-JLV)

JUDGMENT

Before BYE, MELLOY, SHEPHERD, 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.

September 04, 2012

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
WESTERN DIVISION

REX GARD, Petitioner, vs. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, and MARTY JACKLEY, Attorney General of the State of South Dakota, Respondents.	)	CIV. 10-5017-JLV ORDER DISMISSING CASE

INTRODUCTION

This matter is before the court pursuant to a petition for writ of habeas corpus under 28 U.S.C. § 2254 filed by petitioner Rex Gard on March 25, 2010. (Docket 1). The petition asserts two claims for relief: (1) the state court sentence constitutes cruel and unusual punishment under the Eighth Amendment; and (2) ineffective assistance of state trial counsel in violation of the Fifth, Sixth and Fourteenth Amendments. Id. Respondents Douglas Weber and Marty Jackley filed an answer requesting dismissal of the petition. (Docket 9). Following briefing by the parties, the matter is ripe for resolution.[1]

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[1]Petitioner filed motions to stay and remand (Dockets 24, 25, 27 & 29) after all briefing was complete. *Ex parte* motions regarding access to research materials (Docket 28) and a renewal of his earlier motion for appointment of counsel (Docket 33) were also filed. These motions will be addressed later in this decision.

FACTUAL AND PROCEDURAL BACKGROUND

A. TRIAL

The court will not describe the factual background leading to petitioner's state court conviction[2] but adopts by reference the synopsis set out in the decision of the South Dakota Supreme Court on November 14, 2007, which affirmed Gard's conviction. See State v. Gard, 2007 SD 117, 742 N.W.2d 257.

On October 18, 2005, Mr. Gard was convicted of thirteen counts of grand theft, six counts of forgery and one count of conspiracy to commit grand theft in Lawrence County Circuit Court, Fourth Judicial Circuit, in the state of South Dakota.[3] (Docket 1-2). At sentencing, which began on November 2, 2005, Mr. Gard admitted to the Part II Information that he was a habitual offender. Id. On the second day of sentencing, November 14, 2005, the trial court consolidated the thirteen counts of grand theft into one count. Id. The court sentenced Mr. Gard to fifteen years incarceration on the consolidated grand theft conviction, five years on the conspiracy conviction, and ten years on each of the forgery convictions. Id. The

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[2]State v. Gard, Lawrence County Criminal File No. 04-1202 is the state trial court record ("SCR"). The Lawrence County Clerk of Court did not separately index the documents contained in each file, so the court will refer generally to each particular document where pertinent.

[3]The South Dakota Supreme Court mistakenly reported the trial occurred in October of 2006. Gard, 2007 SD at ¶11, 742 N.W.2d at 260.

sentences were to run consecutively, except the conspiracy and one forgery count which were to be served concurrently. Id. The sentencing pronouncement resulted in a 65-year sentence. Id.; see also Gard, 2007 SD at ¶11, 742 N.W.2d at 260.

B. DIRECT APPEAL

Mr. Gard timely appealed his conviction to the South Dakota Supreme Court.[4] Id. On appeal, Mr. Gard asserted five issues which the court restated as:

1. Whether the circuit court erred by not dismissing the grand theft charges because Gard was an owner of Dakota Development and unable, as a matter of law, to steal from it.

2. Whether the circuit court erred by denying Gard's motion to consolidate the forgery charges.

3. Whether the circuit court erred by not dismissing the forgery charges because the element of intent was absent.

4. Whether the circuit court erred by not dismissing forgery counts 17 and 19 because all the elements of forgery were not established.

5. Whether Gard's sentence of 65 years in prison, effectively a life sentence, fails to consider the question of rehabilitation and constitutes cruel and unusual punishment.

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[4]State trial court counsel was appointed to handle Mr. Gard's direct appeal.

Id. On November 14, 2007, Mr. Gard's conviction was affirmed.[5] Id. at 2007 SD at ¶1, 742 N.W.2d at 258.

In reviewing Mr. Gard's sentence, the South Dakota Supreme Court used a "proportionality test to review a challenge to a sentence on Eighth Amendment cruel and unusual punishment grounds." Id. at 2007 SD at ¶ 44, 742 N.W.2d 265. The proportionality test has a limited focus.

> [T]o assess a challenge to proportionality we first determine whether the sentence appears grossly disproportionate. To accomplish this, we consider the conduct involved, and any relevant past conduct, with utmost deference to the Legislature and the sentencing court. If these circumstances fail to suggest gross disproportionality, our review ends.

Id. (citing State v. Bonner, 1998 SD 30, ¶ 17, 577 N.W.2d 575, 580 (citing Harmelin v. Michigan, 501 U.S. 957, 1000 (1991)).

In its analysis, the Supreme Court found the following information in the record pertinent:

> The sentencing court noted that Gard had two prior felonies for theft convictions and several other complaints had been lodged against Gard during the performance of his business. In Wyoming, Gard was being investigated for almost $300,000 in unaccounted money. He has a history of theft that spans twenty years. The court noted that he is the type of person that preys on other people. Gard stole money from his partners, one of whom was seriously ill with cancer and unable to look out for himself. At oral argument, Gard's counsel acknowledged Gard would be eligible for parole at age 70.

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[5]Issues 1, 2, 3 and 4 of the direct appeal are not relevant to this federal habeas proceeding.

Id. Based on this record, the South Dakota Supreme Court concluded "[g]iven the fact that Gard's sentences were within the statutory maximums, his history of prior theft convictions and other complaints, the sentence does not constitute gross disproportionality." Id. at 2007 SD at ¶ 45, 742 N.W.2d at 265-66.

Regarding Mr. Gard's claim the trial court did not consider rehabilitation, the court noted "our review does not address rehabilitation unless the sentence suggests gross disproportionality, which this sentence does not." Id. at 2007 SD at ¶ 46, 742 N.W.2d at 266. The court went on, however, to address rehabilitation. "[T]he sentencing court did consider rehabilitation when it said, 'You don't have much of a conscience. I'm satisfied that if you got out tomorrow, you'd probably be doing it again one of these days. Whether you ever grow out of it, I don't know. I hope you do.' Gard did not present any evidence that he could rehabilitate." Id. Denying Mr. Gard's claim, the court concluded "[g]iven the record, Gard has not demonstrated the sentence constitutes cruel and unusual punishment." Id.

C. STATE HABEAS PETITION

On October 27, 2008, Mr. Gard filed a *pro se* petition for state habeas relief. Lawrence County Civ. File No. 08 -704 is the state court habeas record ("SHR"). The *pro se* petition asserted 64 separate claims of ineffective assistance. Id. The state habeas court appointed new counsel to represent

Mr. Gard. On February 5, 2008, counsel filed an amended petition. The amended petition asserted two grounds: (1) ineffective assistance of trial counsel incorporating Mr. Gard's *pro se* claims; and (2) the sentence imposed was disproportionate to other sentences for like offenses in South Dakota, shocked the conscience and constituted cruel and unusual punishment under the Eighth Amendment. (SHR, Amended Petition for Writ of Habeas Corpus, February 4, 2009).

A hearing was held on March 11, 2009, at which Mr. Gard personally appeared. (SHR, Amended Memorandum Decision, dated August 21, 2009 ("AMD")). Post-hearing briefs were filed and the matter was ripe for decision on May 29, 2009. Id. at p. 1.

The state habeas court determined there were three issues to be resolved.[6] Id. at 3. Those issues were:

1. Whether trial counsel rendered ineffective assistance of counsel by failing to subpoena witnesses or by issuing subpoenas during the trial.

2. Whether trial counsel rendered ineffective assistance of counsel by failing to adequately prepare for trial.

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[6]The court concluded "[t]he three issues addressed in this decision are the issues raised at the hearing and in Gard's post-hearing brief. . . . On direct appeal, the South Dakota Supreme Court has previously determined that the sentence was not cruel, unusual or unconstitutional. . . . The issue was not addressed at the hearing or in Petitioner's post-hearing brief. It appears that the claim has been abandoned. Similarly, to the extent that most of Gard's sixty-four issues were not addressed at the hearing or covered by his brief and this decision, they are deemed abandoned." (AMD at p. 3 n. 1).

3. Whether trial counsel rendered ineffective assistance of counsel by failing to raise the issue of intent on the forgery counts in a motion for judgment of acquittal.

Id.

In evaluating these issues, the state habeas court "applie[d] the test set forth in Strickland v. Washington, 466 US 668 (1984)." Id. The decision of the state habeas court as to each issue is summarized as follows:

1. Trial counsel testified that most of the witnesses Mr. Gard requested be present in his defense were called by the prosecution and were negative to his case. Other witnesses were more harmful than helpful to the defense. The decision not to call these witnesses was an appropriate trial strategy to attempt to limit negative testimony. (AMD, p. 6).

2. Trial counsel had a longstanding informal discovery arrangement with the prosecution. Evidence which Mr. Gard claimed was exculpatory was never found and no corroborative evidence suggests it ever existed. Through a private investigator, trial counsel learned that most of Mr. Gard's requests for additional interviews and evidence resulted in a "wild goose chase" and "spinning wheels." Evidence Mr. Gard claimed was exculpatory disclosed he cashed many of the diverted business checks at casinos to support his gambling. Finally, the trial transcript negates Mr. Gard's claim that counsel was "unprepared or inadequate." (AMD, pp. 8-10).

3. Mr. Gard failed to show prejudice as the jury was instructed on "intent" and found him guilty of forgery. The record supports the jury verdict and the motion would have been "meritless." (AMD, pp. 12-13).

The state habeas court filed findings of facts, conclusions of law and an order denying the petition. (SHR, Findings of Fact and Conclusions of Law and Order Denying Application for Writ of Habeas Corpus, filed October 7, 2009). The state habeas court entered an order denying the motion for issuance of a certificate of probable cause on October 19, 2009. (Docket 1-4). The South Dakota Supreme Court entered an order denying the motion for a certificate of probable cause on February 26, 2010. (Docket 1-5).

DISCUSSION

A. THE FEDERAL HABEAS PETITION WAS TIMELY FILED UNDER 28 U.S.C. § 2244(d)(1)

Section 2244(d)(1) of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), sets out the statute of limitation for federal habeas cases. The AEDPA requires "a state prisoner seeking federal habeas corpus relief to file his federal petition within a year after his state conviction becomes final." Payne v. Kemna, 441 F.3d 570, 571 (8th Cir. 2006). In relevant part, § 2244(d)(1) states:

> 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.

28 U.S.C. § 2244(d)(1).

For purposes of commencing the statute of limitation period, a state conviction is final at either "(1) 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 (2) 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 United States Supreme Court is ninety days. Jihad v. Hvass, 267 F.3d 803, 804 (8th Cir. 2001).

The time during which a properly filed application for state post-conviction relief is pending in state court tolls the one-year limitation period. Faulks v. Weber, 459 F.3d 871, 873 (8th Cir. 2006); 28 U.S.C. § 2244(d)(2). A direct appeal from a state trial court judgment to the South Dakota Supreme Court must be taken "within thirty days after the judgment is signed, attested, and filed." SDCL § 23A-32-15. The AEDPA statute of limitation begins to run after the state conviction is final, is tolled while the state habeas proceedings are pending and begins running again when the state habeas proceedings become final. Curtiss v. Mount Pleasant Correctional Facility, 338 F.3d 851, 853 (8th Cir. 2003).

Mr. Gard's direct appeal concluded on November 14, 2007, when the South Dakota Supreme Court affirmed his conviction. Gard, 2007 SD 117, 742 N.W.2d 257. He had until February 12, 2008, to file a petition for certiorari with the United States Supreme Court, after which the one-year AEDPA limitation period would begin to run.

On October 23, 2008, when Mr. Gard filed his state habeas petition, 253 days of the AEDPA limitation period had expired.[7] Filing the state habeas petition tolled the AEDPA limitation period. See Faulks, 459 F.3d at 873. The state habeas petition remained pending until the South Dakota Supreme Court issued its order denying a certificate of probable cause on February 26, 2010. On that date the AEDPA statute of limitation began running again. Only 21 days passed from the date the state habeas proceeding was final to the date the federal petition for habeas relief was filed. The AEDPA statute of limitation had not expired as only 274 days elapsed. The court finds the petition was timely filed. 28 U.S.C. § 2244(d)(1).

B. EXHAUSTION OF STATE COURT REMEDIES

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

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[7]The court gives Mr. Gard the benefit of the prison mailbox rule and will consider this date as the official filing date of the petition. See Miller v. Lincoln County, 171 F.3d 595, 596 (8th Cir. 1999).

§ 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 claim for relief in a federal petition makes factual claims or legal arguments not presented in the state habeas petition, the claim is not exhausted. Kenley v. Armontrout, 937 F.2d 1298, 1302 (8th Cir. 1991). The exhaustion doctrine protects the state court's role in enforcing federal constitutional law and prevents the disruption of state judicial proceedings. Rose v. Lundy, 455 U.S. 509, 518 (1982). The Supreme Court declared:

> 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 (quoting Darr v. Burford, 339 U.S. 200, 204 (1950)). The exhaustion doctrine requires a state prisoner to seek complete relief on all claims in state court prior to filing a petition in federal court. The court should dismiss a federal petition which contains claims which were not exhausted at the state level. See 28 U.S.C. § 2254; Rose, 455 U.S. at 522.

"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). A federal court must determine whether the petition fairly presented an issue to the state court 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. 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 not sufficient for a state petition to merely assert facts necessary to support a federal claim or to assert a similar state-law claim. Ashker, 5 F.3d at 1179. The petition must present both the factual and legal bases of the federal claims to the state court. Smittie v. Lockhart, 843 F.2d 295, 297 (8th Cir. 1988). "The petitioner must 'refer to a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue.' " Ashker, 5 F.3d at 1179 (citing Kelly v. Trickey, 844 F.2d 557, 558

(8th Cir. 1988) (quoting Martin v. Solem, 801 F.2d 324, 330-31 (8th Cir. 1986)). The state petition must make apparent the constitutional substance of the claim. Satter, 977 F.2d at 1262.

Mr. Gard's federal petition asserts two principal claims for relief. Those are:

(1) The state court sentence constitutes cruel and unusual punishment under the Eighth Amendment; and

(2) Ineffective assistance of counsel in violation of the Fifth, Sixth and Fourteenth Amendments, in that state trial counsel

(A) Failed to prepare for trial by

(i) Not interviewing witnesses before trial, and

(ii) Not subpoenaing witnesses for trial;

(B) Failed to raise the issue of lack of intent necessary for the crime of forgery; and

(C) Failed to present Mr. Gard's potential for rehabilitation at sentencing.

(Docket 1). See also Respondent's Answer (Docket 9 ¶ 7). These claims are substantially identical to the Eighth Amendment claim presented to the South Dakota Supreme Court in the direct appeal and the ineffective assistance of counsel claim presented to the state habeas court. See Gard, 2007 SD at ¶¶ 44-45, 742 N.W.2d at 264-66; AMD, pp. 6-13. Although the South Dakota Supreme Court did not actually consider and decide the

ineffective assistance of counsel claim when the court denied a certificate of probable cause, Mr. Gard exhausted his state court remedy by a fair presentation of his Eighth Amendment claim to the state's highest court. O'Sullivan, 526 U.S. at 842; Ashker, 5 F.3d at 1179.

Respondents argue only claims (1), (2)(A), and 2(B) were exhausted in state court. (Docket 9, ¶ 8). Respondents submit claim 2(C), the failure of trial counsel to present rehabilitation at sentencing, was not properly before the state court. Id. at ¶ 17. Rather, respondents assert because the state habeas court found the sixty-four separate claims of ineffective assistance of counsel abandoned, Mr. Gard is "procedurally barred from pursuing those claims in federal court." Id.

The court finds the South Dakota Supreme Court on direct appeal considered rehabilitation as one of the issues internal to the claim of cruel and unusual punishment. See Gard, 2007 SD at ¶11, 742 N.W.2d at 260. The South Dakota Supreme Court specifically addressed rehabilitation in its decision.

> [T]he sentencing court did consider rehabilitation when it said, "You don't have much of a conscience. I'm satisfied that if you got out tomorrow, you'd probably be doing it again one of these days. Whether you ever grow out of it, I don't know. I hope you do." Gard did not present any evidence that he could rehabilitate.

Gard, 2007 SD at ¶ 46, 742 N.W.2d at 266.

In Mr. Gard's *pro se* state habeas petition, which was incorporated into the amended petition filed by state habeas counsel, it was asserted "[state trial counsel] failed to investigate the probability of rehabilitation on the effects of bipolar disorder, and communicate them to the Court." (SHR, *pro se* petition attachment, page 12). That ineffective assistance claim was resolved by the state habeas court. "[T]o the extent that most of Gard's sixty-four issues [including the rehabilitation claim] were not addressed at the hearing or covered by his brief and this decision, they are deemed abandoned." (AMD at p. 3 n. 1). Waiver and abandonment are often used interchangeably.[8]

South Dakota law also requires a petition to address all issues in a state habeas proceeding.

> All grounds for relief available to a petitioner under this chapter shall be raised in his original, supplemental or amended application. Any ground not raised, finally adjudicated or knowingly and understandingly waived in the proceedings resulting in his conviction or sentence or in any other proceeding

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[8]"Because [petitioner's] brief fails to discuss [a number of claims], they are deemed waived. 'Failure to brief [a] matter supported by case or statutory authority constitutes a waiver of that issue.' " Spenner v. City of Sioux Falls, 1998 SD 56, ¶ 30, 580 N.W.2d 606, 613 (citing Weger v. Pennington County, 534 N.W.2d 854, 859 (S.D. 1995). See also State v. Wright, 2009 SD 51, ¶ 38, 768 N.W.2d 512, 534 ("[Defendant] never asked the circuit court to rule on the issue, and the failure to raise an issue before the circuit court constitutes a waiver of the issue on appeal."); State v. Knoche, 515 N.W.2d 834, 840 (S.D. 1994) ("Failure of a brief to cite supporting authority is deemed a waiver of the issue.").

> that the applicant has taken to secure relief from his conviction, or sentence, may not be the basis for a subsequent application, unless the court finds grounds for relief asserted which for reasonable cause were omitted or inadequately raised in the original, supplemental, or amended application.

SDCL § 21-27-16.1. Any claim not advanced in a state habeas proceeding is abandoned and a petitioner "default[s] that claim by his failure to pursue it in state post-conviction proceedings." Satter, 977 F.2d at 1262. "In all cases in which a [petitioner] . . . has defaulted his federal claims in state court pursuant to an adequate and independent state procedural rule, federal habeas review is barred unless the prisoner can show 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." Id. (citing Coleman v. Thompson, 501 U.S. 722, 724 (1991). "Just as the state must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the state a full and fair opportunity to address and resolve the claim on the merits." Id. (citing Keeney v. Tamayo-Reyes, 504 U.S. 1, 10 (1992).

This "full and fair opportunity to address and resolve the claim on the merits" standard is codified in 28 U.S.C. § 2254:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--
>
> (A) the claim relies on--

> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

Mr. Gard makes no claim of "cause and prejudice," a requirement adopted by the United States Supreme Court in Wainwright v. Sykes, 433 U.S. 72 (1977). Following the court's thorough review of the record, Mr. Gard's case "does not involve the 'extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime' so as to amount to a fundamental miscarriage of justice." Satter, 977 F.2d 1262 (citing McCleskey v. Zant, 499 U.S. 467, 494 (1991)). Mr. Gard's failure to advance his ineffective assistance of counsel claim on the issue of rehabilitation in the state habeas proceeding "functions as an

adequate and independent procedural default and thus bars review by this court." Id. at 1262-63.

The court finds claims (1), (2)(A), and 2(B) were exhausted in state court. See AMD at pp. 3 and 6-13. As to claim 2(C), the court finds the claim was abandoned in the state habeas proceedings. There is no constitutional violation alleged which amounts to a "fundamental miscarriage of justice." Satter, 977 F.2d 1262. Because of this procedural default, the court is barred from reviewing the claim.

C. STANDARD OF FEDERAL REVIEW OF A STATE COURT CONVICTION

Section 2254(d) of the AEDPA provides the standard by which a federal court may grant habeas relief to state prisoner. This section reads:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;[9] or

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[9]"Under § 2254(d)(1), 'clearly established Federal law' is the governing legal principle or principles set forth by the [United States Supreme] Court at the time a state court renders its decision." Lockyer v. Andrade, 538 U.S. 63, 64 (2003).

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The "contrary to" clause and the "unreasonable application" clause of section 2254(d)(1) provide two independent bases which may provide habeas relief. Williams v. Taylor, 529 U.S. 362, 412-13 (2000). The term "contrary to" means "diametrically different," "opposite in character or nature," or "mutually opposed." Id. at 405 (internal citation and quotation marks omitted). A state habeas decision is an "unreasonable application" of clearly established Supreme Court precedent "if it unreasonably applies the correct governing rule to the facts of the prisoner's case," Storey v. Roper, 603 F.3d 507, 520 (8th Cir. 2010) (citing Taylor, 529 U.S. at 407-08), or if it " 'confronts a set of facts that are materially indistinguishable from a decision of [the] Court and nevertheless arrives at a result different from [the Court's] precedent.' " Morales v. Ault, 476 F.3d 545, 549 (8th Cir. 2007) (citing Taylor, 529 U.S. at 405-06).

With respect to § 2254(d)(2), "a state court decision involves 'an unreasonable determination of the facts in light of the evidence presented in the state court proceedings' only if it is shown that the state court's presumptively correct factual findings are rebutted by 'clear and convincing

evidence' and do not enjoy support in the record." Morales, 476 F.3d at 550.

D. EVALUATION OF MR. GARD'S PETITION

1. Eighth Amendment Claim

Mr. Gard argues the 65-year sentence imposed by the state trial court violates the Eighth Amendment prohibition against cruel and unusual punishment. (Dockets 1, p. 5 & 23, pp. 10-12). "Petitioner's consecutive sentences . . . result[] in a sentence that places his first parole eligibility at a date after he will statistically be dead [and] amounts to a sentence . . . out of proportion to his offense . . . ." (Docket 23, pp. 11-12). Mr. Gard asserts he "will be first eligible for parole in twenty-six years, when he is seventy years old." Id. at p. 10.

In the direct appeal, the South Dakota Supreme Court applied a proportionality test. Gard, 2007 SD at ¶ 44, 742 N.W.2d at 265 (citing State v. Bonner, 1998 SD 30, ¶ 17, 577 N.W.2d 575, 580). In doing so, the South Dakota Supreme Court cited to one of the leading cases on proportionality. Id. (citing Harmelin v. Michigan, 501 U.S. 957, 1000 (1991) (Kennedy, J., concurring).

The Court of Appeals for the Eighth Circuit adopted a similar proportionality test. "The Eighth Amendment, which forbids cruel and unusual punishments, contains a 'narrow proportionality principle' that

'applies to noncapital sentences.' " United States v. Robinson, 617 F.3d 984, 990-91 (8th Cir. 2010) (citing Ewing v. California, 538 U.S. 11, 20 (2003) (quoting Harmelin, 501 U.S. at 996-97 (Kennedy, J., concurring)). "In light of the severity of the harm to society posed by [defendant's criminal conduct] . . . and the evidence substantiating a finding [of a pattern of criminal conduct], we conclude that [defendant's] . . . sentence for the second . . . [violation] is not grossly disproportionate to his crimes." Id. at 991.

"In considering whether a sentence is unconstitutionally disproportionate to a crime, '[w]e first address the gravity of the offense compared to the harshness of the penalty.' " United States v. Paton, 535 F.3d 829, 837 (8th Cir. 2008) (quoting United States v. Weis, 487 F.3d 1148, 1153 (8th Cir. 2007) (quoting Ewing, 538 U.S. at 28). "In weighing the gravity of [defendant's] offense, we must place on the scales not only his current felon[ies], but also his long history of felony recidivism." Id. (quoting Ewing, 538 U.S. at 29). The court then compares the defendant's current "offenses with the severity of the sentence imposed." Id. at 838.

When sentencing Mr. Gard, the state trial court declared:

> I find that on two prior occasions the Defendant has been convicted of theft according to the judgments. . . . I find that on two prior occasions he's been convicted of felonies. I conclude as a matter of law that those convictions are constitutionally valid.

(Sentencing Hearing, November 2, 2005, Part 1, p. 9:6-13). Those two prior felony offenses were: (1) theft on July 22, 1993, in Midland County, Texas; and (2) theft on October 6, 1993, in Lubbock County, Texas. Id. at pp. 3:4-10 & 8:1-14.

At sentencing, Mr. Gard's two former business partners in Dakota Properties, LLC, testified. Dr. Little explained his view of Mr. Gard's conduct:

> Bottom line is, this gentleman was first convicted I think of a crime when he was 20 years of age. That means he committed a crime before that time. He's committed multiple crimes since that time. I don't believe he's paid back any of the people [another witness] . . . was talking about. Certainly he hasn't paid us anything back, don't expect that he ever will. As far as restitution is concerned, I don't think he'll ever consider paying back a single thing. We kind of realize we've lost that money, and if he did pay us back something, this money would be from some elaborate new scheme that he steals money from somebody else. So our own thought is put the guy away so he can't keep on stealing from people. Barry [Dr. Smith] and I have done our job on all this, the jury has done their job, and now it's your turn. So that's our feeling.

(Sentencing Hearing, Part 2, November 14, 2005, p. 55:5-20). The other partner, Dr. Barry Smith, who had been battling cancer during most of the partnership period, also testified.

> I can just tell you that personally for our family, it's been not only hard, but it's been hard because with my diagnosis, ... Rex had said that he was my friend and he was helping me through cancer. He told my wife he would always be there. He would watch after her, watch after our finances. And I guess I just want to have him look at me and say, you know, I'm sorry for that. That would help me and make me feel a lot better. I don't have much to say

> because I'm going to become too emotional. I don't know what's going to happen to any of us, but there's a greater judge at some point in our lives.

Id. at pp. 56:15-57:5. At sentencing, the Lawrence County States Attorney advised the court that both of Mr. Gard's former partners were forced to take out second mortgages on their homes to pay the debts which Mr. Gard "absconded on." Id. at p. 59:18-22.

In pronouncing Mr. Gard's 65-year sentence, the trial court explained his reasoning:

> I was satisfied from hearing all of the evidence that Mr. Gard has somewhat of a larcenous spirit to him. I am satisfied that he spent the money gambling, having had two trials now with him and a . . . [criminal] case of the use tax. You have quite a history. You've got a charming personality. People are taken in by you, and you've taken advantage of it. . . . This is more than just a business failure. You continued to take money and you were spending it downtown, I think. That's where it seems like most of it went. Gambling didn't seem to bother you any. You don't have much of a conscience. I'm satisfied that if you got out tomorrow, you'd probably be doing it again one of these days. Whether you ever grow out of it, I don't know. I hope you do.

Id. at pp. 68:18-69:9.

The South Dakota Supreme Court found Mr. Gard's sentence constitutionally permissible. "Given the fact that Gard's sentences were within the statutory maximums, his history of prior theft convictions and other complaints, the sentence does not constitute gross disproportionality." Gard, 2007 SD at ¶ 45, 742 N.W.2d at 265-66.

Mr. Gard's "case is not 'the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.' " United States v. Scott, 610 F.3d 1009, 1018 (8th Cir. 2010) (citing Ewing, 538 U.S. at 30) (quoting Harmelin, 501 U.S. at 1005) (Kennedy, J., concurring in part and concurring in the judgment)). The decision of the South Dakota Supreme Court was not an unreasonable application of clearly established federal law as determined by the United States Supreme Court. 28 U.S.C. § 2254(d)(1). Nor was the South Dakota Supreme Court decision "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Mr. Gard's Eighth Amendment claim is denied.

2. Pretrial Ineffective Assistance of Counsel

Mr. Gard's 2(A) claim is trial counsel failed to adequately prepare for trial by not interviewing witnesses and failing to subpoena witnesses for trial. This Strickland claim is fact dependent. "[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

The state habeas court set out in detail both Mr. Gard's argument in support of his claim and the facts presented at the habeas hearing. See AMD, pp. 6 and 8-10. Applying Strickland to those facts, the state habeas

court concluded Mr. Gard "has not met his burden of showing that counsel committed any errors, or that counsel's errors were sufficiently serious and prejudicial to deprive him of a fair trial. A review of the trial transcript does not show that trial counsel was unprepared or inadequate." (AMD, p. 10). In the federal petition, Mr. Gard simply restates the same argument made to the state habeas court. He fails to present clear and convincing evidence to rebut the presumption of the correctness of the state habeas court's findings and conclusions. 28 U.S.C. § 2254(e)(1).

The decision of the state habeas court was not an unreasonable application of clearly established federal law as determined by the United States Supreme Court. 28 U.S.C. § 2254(d)(1). Nor was the decision "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Mr. Gard's pretrial ineffective assistance of counsel claim is denied.

3. Ineffective Assistance of Counsel for Failing to Raise the Issue of Lack of Intent on the Forgery Counts

Mr. Gard's 2(B) claim argues trial counsel was ineffective because counsel failed to properly raise the issue of "lack of intent" with respect to the forgery counts of the indictment. The South Dakota Supreme refused to address the issue as it was not raised by counsel during trial. Gard, 2007 SD at ¶ 33, 742 N.W.2d at 264. "We do not address this issue . . . raised for the first time on appeal." Id.

"The forgery charges arose from the doctors' testimony that the Applicant did not have their permission to sign their name to credit applications, contracts, or other documents." (AMD, p. 11). "[Mr. Gard's] strategy at trial was to claim there was no forgery or theft as there was no criminal intent to defraud. [Mr. Gard] claimed that he was an agent for Dakota Properties acting in the scope of his authority and was entitled to do all things reasonable and necessary on behalf of the business." Id. at 12. "The jury . . . was specifically instructed that in each of the six forgery counts the State was required to prove beyond a reasonable doubt that [Mr. Gard] committed the offense with the intent to defraud." Id. "The convictions on each count indicate that the jury found the necessary intent." Id.

The state habeas court properly stated the proof required to succeed on a claim of ineffective assistance of counsel. "To obtain habeas relief, [Mr. Gard] must show that trial counsel's failure to raise the issue of intent during trial and on direct appeal was prejudicial." (AMD, p. 12). This is the second part of the Strickland test. "[A]ny deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." Strickland, 466 U.S. at 692. See also Gianakos v. United States, 560 F.3d 817, 821 (8th Cir. 2009) (citing Strickland, 466 U.S. at 691) ("An 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.").

The state habeas court found Mr. Gard failed to show prejudice as the jury was properly instructed on intent and found him guilty of forgery. (AMD, p. 12). "Trial counsel cannot be faulted for failing to make a motion that is meritless." Id. at 13. "The instructions, taken as a whole, were not incorrect. . . . counsel's actions . . . were therefore not objectively unreasonable or prejudicial under the Sixth Amendment." United States v. Flynn, 87 F.3d 996, 1001 (8th Cir. 1996). See also Thomas v. United States, 951 F.2d 902, 904 (8th Cir. 1991) ("because the claim lacks merit, [petitioner's] attorney was not ineffective for failing to raise it.").

The decision of the state habeas court was not an unreasonable application of clearly established federal law as determined by the United States Supreme Court. 28 U.S.C. § 2254(d)(1). Nor was the decision "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Mr. Gard's ineffective assistance of counsel claim on failure to assert lack of intent on the forgery counts is denied.

4. Cumulative Nature of Errors

Mr. Gard claims "[w]hile any one of these errors may not constitute a lack of representation, the totality of the errors do." (Docket 1, p. 6).

"[C]umulative error does not call for habeas relief, as each habeas claim must stand or fall on its own." Henderson v. Norris, 118 F.3d 1283, 1288 (8th Cir. 1997) (citing Scott v. Jones, 915 F.2d 1188, 1191 (8th Cir. 1990)). See also Becker v.Luebbers, 578 F.3d 907, 914 n. 5 (8th Cir. 2009), *cert. denied*, ___ U.S. ___, 130 S. Ct. 3520 (2010) ("Because we hold none of [petitioner's] individual claims of error amount to constitutionally defective representation, [his] cumulative error argument is without merit."). Mr. Gard's cumulative error claim is denied.

E. MOTION TO STAY AND REMAND

Following briefing, Mr. Gard filed a series of motions asking the court to stay the federal proceedings and remand to state court for further development of certain claims. (Dockets 24, 25, 27, & 29).

"[S]tay and abeyance should be available only in limited circumstances." Rhines v. Weber, 544 U.S. 269, 277 (2005). The Supreme Court explained the reason for this restriction:

> Because granting a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless.

Id. "On the other hand, it likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner

had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics." Id. at 278. "In such circumstances, the district court should stay, rather than dismiss, the mixed petition." Id.

There is no constitutional violation alleged for remand which amounts to a "fundamental miscarriage of justice." Satter, 977 F.2d 1262. The court finds the issues framed for remand are without merit. The court further finds the use of the stay and abeyance procedure is inappropriate. Mr. Gard's motions are denied.

ORDER

Based upon the above analysis, it is hereby

ORDERED that the petition under 28 U.S.C. § 2254 for a writ of habeas corpus by a person in state custody (Docket 1) is dismissed on its merits and with prejudice.

IT IS FURTHER ORDERED that Mr. Gard's motions to stay and remand (Dockets 24, 25, 27, & 29) are denied.

IT IS FURTHER ORDERED that Mr. Gard's motion regarding access to research materials (Docket 28) is denied as moot.

IT IS FURTHER ORDERED that Mr. Gard's *ex parte* motion for appointment of counsel (Docket 33) is denied.

IT IS FURTHER ORDERED that, pursuant to 28 U.S.C. § 2253(c) and Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts, the court declines to issue a certificate of appealability as Mr. Gard has not made a substantial showing of the denial of a constitutional right. Mr. Gard may timely seek a certificate of appealability from the United States Court of Appeals for the Eighth Circuit under Fed. R. App. P. 22. See Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts.

IT IS FURTHER ORDERED that the Clerk of Court shall promptly mail to Mr. Gard a copy of the document entitled "Information Regarding Possible Appeal."

IT IS FURTHER RECOMMENDED that Mr. Gard thoroughly review the Federal Rules of Appellate Procedure, paying particular attention to Rules 4(a), 22, and 24.

Dated March 3, 2012.

BY THE COURT:

/s/ Jeffrey L. Viken
JEFFREY L. VIKEN
UNITED STATES DISTRICT JUDGE