UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 24-2254

Jason Krumback

Petitioner - Appellant

v.

Teresa L. Bittinger, Warden; Attorney General for the State of South Dakota

Respondents - Appellees

Appeal from U.S. District Court for the District of South Dakota - Southern
(4:23-cv-04155-KES)

JUDGMENT

Before LOKEN, GRUENDER, 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. Appellant's pending motions are also denied. The appeal is dismissed.

October 04, 2024

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

/s/ Maureen W. Gornik

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

JASON KRUMBACK, Petitioner, vs. ACTING WARDEN ALEX REYES and ATTORNEY GENERAL OF THE STATE OF SOUTH DAKOTA, MARTY JACKLEY, Respondents.	**4:23-CV-04155-KES** **JUDGMENT**

Pursuant to this court's Order Adopting Report and Recommendation (Docket 76), it is

ORDERED, ADJUDGED, and DECREED that this matter, is dismissed without prejudice.

Dated May 24, 2024.

BY THE COURT:

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

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

JASON KRUMBACK, Petitioner, vs. ACTING WARDEN ALEX REYES and ATTORNEY GENERAL OF THE STATE OF SOUTH DAKOTA, MARTY JACKLEY, Respondents.	**4:23-CV-04155-KES** **ORDER ADOPTING REPORT AND RECOMMENDATION, DENYING PETITIONER'S MOTIONS TO AMEND, AND GRANTING RESPONDENT'S MOTION TO DISMISS THE PETITION**

Movant, Jason Krumback, filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2254. Dockets 1, 6. The court entered an order to show cause directing the parties to show cause "why Mr. Krumback's federal habeas petition should not be dismissed as unexhausted, procedurally defaulted, or both." Docket 10 at 2-3. The government responded to the order to show cause and argued that Krumback's claims are unexhausted, that some of his claims are not cognizable, and that Krumback lacks standing on some of his claims. Docket 28. Krumback filed his own motion to show cause, which the court construes as his response to the court's order. *See* Docket 29. Magistrate Judge Veronica Duffy issued a report and recommendation based on the briefing recommending that Krumback's petition be dismissed without prejudice for failure to exhaust. Docket 39. Magistrate Judge Duffy also recommends dismissing Krumback's motions to amend and other miscellaneous motions for relief. *See id.* at 16 (recommending dismissal of

Dockets 7, 8, 29, 34, 38). Krumback filed objections to the report and recommendation. Docket 48. The government did not object to the report and recommendation.

BACKGROUND

Magistrate Judge Duffy recounts the facts of the above-entitled case in her report and recommendation. Docket 39 at 2-4. Krumback does not object to Magistrate Judge Duffy's statement of the facts. *See* Docket 48. This court adopts the facts as presented in the report and recommendation, and briefly recounts them here as relevant.

On June 2, 2022, Krumback was charged in South Dakota state court with one count of tampering with a witness, a class 4 felony (SDCL § 22-11-19(2)), and 22 counts of violating a no contact order, a class 1 misdemeanor (SDCL §§ 25-10-13 and 25-10-1). Docket 9-1 at 1-6. An information filed in the case identified Krumback as a habitual offender. *South Dakota v. Krumback*, 49 CRI-22-003305, Information Part II, Habitual Offender (S.D. 2nd Cir. Minnehaha Cnty., June 2, 2022). Attorney Jonathan Leddige represented Krumback throughout the proceedings. *See* Docket 9-1 at 11-12.

Krumback and the State entered into a plea agreement to resolve the charges. *See id.* at 13. At the combined change of plea and sentencing hearing on October 4, 2022, the court first addressed a letter Krumback submitted to the court in which he raised concerns about Leddige's representation. *Id.* at 11-12. The court questioned Krumback about whether he wanted to continue with Leddige as his attorney. *Id.* Krumback stated that he just wanted to be heard

and that he no longer had concerns about Leddige's performance. *Id.* Krumback decided to continue with the hearing. *Id.*

Krumback pleaded guilty to count 1, witness tampering, and entered an admission regarding the revocation of his suspended sentence in the separate case *South Dakota v. Krumback*, 49 CRI-21-8125 (S.D. 2nd Cir. Minnehaha Cnty.). *Id.* at 30-31; *Krumback*, 49 CRI-22-003305, Judgment & Sentence. Krumback also admitted to being a habitual offender, though the government dismissed the remaining charges for violations of the no contact order. *See* Docket 9-1 at 30-31. Krumback was sentenced to 20 years' imprisonment with 10 years suspended on the witness tampering charge and 12 years with 12 years suspended on his revocation. *Id.* at 45-46. The sentences were to run consecutively. *Id.* The judgment was entered on October 12, 2022. *Krumback*, 49 CRI-22-003305, Judgment & Sentence.

Krumback did not file a direct appeal of his conviction or sentence, nor did he file a habeas corpus petition in state court. Docket 6 at 2; Docket 28 at 18. Instead, on October 4, 2023, Krumback filed the instant federal habeas corpus petition under 28 U.S.C. § 2254. Docket 1. On October 23, 2023 and November 3, 2023, Krumback filed amended petitions. Dockets 6, 18. During the same period, the court ordered the parties to show cause. Docket 10. After the time for response had passed, Magistrate Judge Duffy issued a report and recommendation, which concluded that all claims should be dismissed as unexhausted. Docket 39. Krumback filed objections to the report. Docket 48. The government did not file objections.

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)(B); 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)(C); *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. The court adopts the recommendations and addresses the issues raised by Krumback's objections.

DISCUSSION

I. Exhaustion

"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 unless it appears that the applicant has exhausted the remedies available in the courts of the State . . . ." 28 U.S.C. § 2254(b)(1)(A). "The exhaustion requirement of § 2254(b) ensures that the state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment." *Duncan v. Walker*, 533 U.S. 167, 178-79 (2001). Section 2254(c) states that "[a]n 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."

"Although this language could be read to effectively foreclose habeas review by requiring a state prisoner to invoke *any possible* avenue of state court review, [the Supreme Court] ha[s] never interpreted the exhaustion requirement in such a restrictive fashion." *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) (emphasis in original). Instead, the Court has found that § 2254(c) is satisfied when the petitioner "give[s] the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *Id.* at 845.

If a petitioner has not exhausted his state remedies and further, non-futile remedies remain available to him in state court, then the federal court should dismiss the federal petition without prejudice and allow the petitioner to seek a remedy in the state court. *See Carmichael v. White*, 163 F.3d 1044, 1045-46 (8th Cir. 1998). But if the court finds that a habeas petitioner has no further state remedy for his claims, then the court must turn to whether those claims are barred by the related, but separate, doctrine of procedural default. *See Piper v. Attorney General*, 682 F. Supp. 3d 740, 757 (D.S.D. 2023).

II. Procedural Default

When a petitioner has no further state law remedy due to a failure to present the claims to the state court, "the claims are defaulted if a state procedural rule precludes him from raising the issues now." *Abdullah v.*

Groose, 75 F.3d 408, 411 (8th Cir. 1996). In other words, the doctrine of procedural default bars a petitioner from litigating a claim in federal court that he did not present to the state court, and now cannot bring due to a state procedural bar. *See id.* This rule prevents habeas petitioners from performing an "end run" around state procedural rules by purposefully failing to raise the argument in state court. *See Coleman v. Thompson*, 501 U.S. 735, 750 (1991).

But procedural default is not insurmountable. A petitioner may overcome procedural default if "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." *Id.* at 750. The only miscarriage of justice recognized by the Supreme Court to excuse procedural default is "actual innocence." *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992). Actual innocence has not been recognized as an independent constitutional claim; rather, it is "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Schlup v. Delo*, 513 U.S. 298, 315 (1995) (quoting *Herrera v. Collins*, 506 U.S. 390, 505 (1993)). Actual innocence claims pose a heavy burden on the petitioner to introduce "new reliable evidence" that exonerates him of the challenged offense. *See id.* at 324.

III. Krumback's Objections

Krumback filed seven objections to the report and recommendation. *See* Docket 48. Because Krumback is proceeding pro se in this matter, the court

liberally construes Krumback's objections and addresses each in turn. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

A. Objections 1, 5, 6, and 7

Krumback's first objection concerns the procedural posture of the case. *See* Docket 48 at 1-2. Krumback objects to "the indication [that] petitioner's 'Motion to Show Cause' . . . is in fact a pending matter before the Court." *Id.* at 1. Krumback states that "[t]his is of grave concern, as the Court in fact ordered the said pleading[.]" *Id.* at 2. "The poor case management," Krumback further argues, "results in the Court not being fully aware of the evidence that supports the actual innocence" of the petitioner. *Id.* Though Krumback does not clearly articulate what procedural posture he believes is appropriate, the court construes Krumback's objection as contesting the report and recommendation's dismissal of Krumback's claims without an analysis on the merits.[1]

Krumback raises similar arguments in objections 5, 6, and 7. In objection 5, Krumback challenges the report and recommendation's conclusion that he did not meet the procedural requirements for this court to entertain his habeas claims. *Id.* at 7. In objection 6, Krumback argues that he has demonstrated factual innocence, and that this innocence should excuse his failure to exhaust his claims at the state level. *Id.* at 8-9. In objection 7,

[1] To the extent that Krumback contests the propriety of the court issuing an order to show cause, the court overrules such an objection. Under Rule 4 of the Rules Governing § 2254 Cases, the court is required to screen all § 2254 petitions.

Krumback proposes that failing to entertain the merits of his petition would be a miscarriage of justice. *Id.* at 11-12. Because all of these objections concern the dismissal of Krumback's petition due to failure to exhaust without a ruling on the merits, the court addresses these objections together.

Under 28 U.S.C. § 2254(b)(1)(A), a petitioner must exhaust state court remedies before a federal court may consider a habeas corpus petition. The exhaustion requirement has two prongs: first, the petitioner must offer the state court an opportunity to fully review the claims; and second, the petitioner must have no further state law remedies. *See* 28 U.S.C. § 2254(c); *see also Duncan*, 533 U.S. at 178-79. Krumback does not argue that he has raised any claim for post-conviction relief in state court. *See* Docket 48. Nor does the record indicate that he filed a direct appeal of his conviction or a petition for collateral relief. Thus, Krumback has not offered the state court an opportunity to review his claims.

Additionally, Krumback has the right to raise his claims in the state courts. Under South Dakota state law, a petitioner must file a habeas petition within 2 years of the date of final conviction. SDCL § 21-27-3.3. If no direct appeal is filed, a conviction becomes final under South Dakota state law thirty-one days after entry of the judgment. *See* SDCL § 23A-32-15 (proscribing 30-day appeal period); *see also Honomichl v. Leapley*, 498 N.W.2d 636, 638 (S.D. 1993) ("A case is final when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari expired.") (cleaned up and internal citation omitted). Because Krumback's

conviction became final on November 13, 2022, Krumback has until November 13, 2024 to file a state habeas petition. *Krumback*, 49 CRI-22-003305, Judgment & Sentence (demonstrating judgment was entered on October 12, 2022). Krumback, therefore, has the right to raise his claims in state court. Thus, his claims are not exhausted and are not properly before this court.[2]

Krumback resists this conclusion by arguing that, though his claims are not exhausted, his actual innocence excuses the failure to file in state court. *See* Docket 48 at 1-2, 7-9, 11-12. Krumback's argument, however, conflates exhaustion with the related doctrine of procedural default. Though actual innocence may excuse procedural default, Krumback does not cite, nor is the court aware of, any case in which actual innocence excused want of exhaustion. *See Schlup*, 513 U.S. at 314-15 (finding actual innocence may excuse procedural default). Nor does Krumback argue that any recognized excuse for exhaustion exists in this case. *Compare Mellott v. Purkett*, 63 F.3d 781, 785 (8th Cir. 1995) ("We waive the exhaustion requirement only in rare cases where exceptional circumstances of peculiar urgency are shown to exist.") (internal citation omitted) *and* Docket 48 (not arguing for exceptional circumstances).

[2] Krumback argues that he wanted to file a direct appeal, but that his attorney refused to do so. Under SDCL § 23A-27-51, if a defendant is denied the right to a direct appeal, he may ask the court to "issue a new judgment and impose the same sentence if such relief is requested within a reasonable time and an adequate record of the original trial proceeding is available for review." SDCL § 23A-27-51. Thus, Krumback may also be able to file a direct appeal if the state court finds he was denied the right to appeal and reissues the original judgment. *See State v. Pentecost*, 868 N.W.2d 590, 594 (S.D. 2015).

Further, that actual innocence cannot excuse want of exhaustion accords with the purpose of the doctrine. *See Rose v. Lundy*, 455 U.S. 509, 518 (1982). The exhaustion doctrine exists to "protect the state courts' role in the enforcement of federal law[.]" *Id.* As the Supreme Court explained, "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." *Id.* (citation omitted). Federal courts should, instead, first give state courts the opportunity to correct a constitutional violation that is alleged to have occurred in those courts. *See id.* Thus, actual innocence may excuse procedural default because a petitioner attempting to overcome procedural default has already exhausted his claims in state court. *See Schlup*, 513 U.S. at 314-16. Having no further state court remedies available to the petitioner, the federal court must consider his claims or risk denying relief to the innocent. *See Shockley v. Crews*, --- F.3d ---, 2023 WL 6381445, at *16 (E.D. Mo. Sept. 29, 2023) (describing federal habeas review as "a last resort against miscarriages of justice in state criminal court").

Such is not the case here. Krumback could seek relief in the state courts, and so he must. *See* SDCL § 21-27-3.3; *Krumback*, 49 CRI-22-003305, Judgment & Sentence. Though Krumback argues that forcing him to pursue his relief in state court would be a "miscarriage of justice," this argument is unpersuasive, because Krumback has an avenue to pursue relief, even if it is not the one he prefers. *See* Docket 48 at 11. Thus, Krumback's objections 1, 5,

6, and 7 are overruled, and his habeas petition under § 2254 is dismissed without prejudice for want of exhaustion.

B. Objection 2

Krumback's second objection concerns the report and recommendation's decision to construe the government's response to the court's order to show cause as a motion to dismiss. Docket 48 at 3. Krumback argues that such liberal interpretation of filings is only appropriate for pro se litigants and that the liberal construction of filings by attorneys "would violate the well-established 14th Amendment[] of Due Process." *Id.*

As an initial matter, the court notes that the Fourteenth Amendment applies to actions by the state, whereas the Fifth Amendment applies to the federal government. *See Malloy v. Hogan*, 378 U.S. 1, 8 (1964) ("The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement[.]"). Thus, the court construes Krumback's objection as arising under the Fifth Amendment due process clause.

The Fifth Amendment states that "no person . . . shall be . . . deprived of life, liberty, or property, without due process of law[.]" U.S. Cont. amend. V. "The fundamental requisite of due process of law is the opportunity to be heard." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). The Supreme Court has found that an opportunity to be heard requires both notice of the pending action and an opportunity to present objections. *See id.* at 314.

In the instant case, Krumback was presented both with notice and with an opportunity to object. Magistrate Judge Duffy specified in the court's order to show cause that the court is required to screen pro se habeas petitions under 28 U.S.C. § 2254, that Krumback's petition may be unexhausted, and that unexhausted petitions are subject to dismissal. *See* Docket 10. As a pro se litigant, Krumback is provided with copies of all filings in this matter and, thus, was given notice that the court would dismiss his petition unless he demonstrated that it was properly before the court. Additionally, Krumback had an opportunity to object, and did in fact object. *See* Docket 29 (styling response to order to show cause as "Motion for Order to Show Cause"); *see also* Docket 32 (responding to government's briefing). Because Krumback was already on notice that the court may dismiss his habeas petition and because he was provided an opportunity to object to such a dismissal, Krumback's Fifth Amendment due process rights were not violated when the court construed the government's response as a motion to dismiss. *See* Docket 39 at 1. Objection 2 is overruled.

C. Objections 3 and 4

Krumback's third and fourth objections contest the report and recommendation's description of his claims. *See* Docket 48 at 4, 6-7. Specifically, in objection 3, Krumback argues that the report and recommendation incorrectly describes his habeas corpus petition as containing six constitutional grounds. *Id.* Krumback contends that the claims in his "Declaration of Judgment" filed at Docket 8 are not habeas claims, but

independent constitutional claims "filed under the jurisdiction of 28 U.S.C. [§] 2201[.]" *Id.* at 4. Krumback further argues that he has standing to pursue these non-habeas claims, contrary to the report and recommendation's finding that he does not have standing "to question the constitutionality of an overbroad statute." *Id.* at 5.

In objection 4, Krumback argues that the report and recommendation misconstrues another proposed amendment. *Id.* at 6. In his pending motion to amend filed on January 9, 2024, *see* Docket 38, Krumback moves to add a claim for "the 4th Amendment violation regarding the prosecution misconduct to show the malicious prosecution under [the] finding in *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364 (1994)." *Id.* at 2. The report and recommendation construed this amendment as adding a claim for prosecutorial misconduct, but Krumback argues that the claim alleges malicious prosecution. Docket 48 at 6-7.

For the purpose of argument, the court adopts Krumback's construction of the pleadings and construes both the "Declaration of Judgment" and the January 9 motion as motions to amend seeking to add non-habeas claims to his action. *See Moeller v. Weber*, 2008 WL 1957842, at *2 (D.S.D. May 2, 2008) (finding that habeas and non-habeas claims may be entertained in the same action). Under Federal Rule of Civil Procedure 15(a)(1), "[a] party may amend its pleading once as a matter of course no later than []21 days after serving it[.]" Further, Rule 15(a)(2) states that "[i]n all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave."

Krumback filed his initial petition on October 4, 2024. Docket 1. On October 23, Krumback filed an amended petition. *See* Docket 6. Thus, Krumback has already amended his petition once under Rule 15(a)(1) and may only further amend his petition with the court's leave. *See* Fed. R. Civ. P. 15(a)(2); *see also* Dockets 8, 9 (not demonstrating consent of respondents).

Rule 15 is generally permissive, stating that "[t]he court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). "However, there is no absolute right to amend and a court may deny the motion based upon a finding of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies in previous amendments, undue prejudice to the non-moving party, or futility." *Baptist Health v. Smith*, 477 F.3d 540, 544 (8th Cir. 2007). Relevant to this matter is futility. "Denial of a motion for leave to amend on the basis of futility 'means the district court has reached the legal conclusion that the amended complaint could not withstand a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure.' " *Zutz v. Nelson*, 601 F.3d 842, 850 (8th Cir. 2010) (quoting *Cornelia I. Crowell GST Trust v. Possis Med., Inc.*, 519 F.3d 778, 782 (8th Cir. 2008)).

Having reviewed Krumback's proposed amendment contained in the "Declaration of Judgment," the court finds the amendment is futile. The Supreme Court has found that, to survive the Rule 12(b)(6) standard, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555

(2007) (internal citations omitted) (cleaned up). Rather, a plaintiff must allege specific factual details which, if true, would support a finding in his favor. *Id.* Those factual allegations must also "raise a right to relief above the speculative level." *Id.* In his filing, Krumback merely states that he is challenging the constitutionality of SDCL §§ 25-10-25 and 25-10-13. *See* Docket 8. He does not state how these statutes have been applied to him, how the statutes violated his constitutional rights, who enforced these statutes, or when the alleged constitutional violation occurred.[3] *See id.* Because Krumback has only provided "labels and conclusions," his claim does not rise "above the speculative level" and would not survive a challenge under Rule 12(b)(6). *See Twombly*, 550 U.S. at 555. Thus, Krumback has failed to provide a sufficient factual basis for his motion to amend. The court denies his motion to amend and overrules Krumback's objection to the report and recommendation. Krumback's First Amendment claims are dismissed without prejudice.

For similar reasons, the court must also deny Krumback's January 9 motion to amend the complaint to add a claim of malicious prosecution. *See*

[3] Even if the court was to consider the facts argued in Krumback's memorandum of law supporting his motion to amend, *see* Docket 9, Krumback fails to include adequate factual support for his claim. Krumback is challenging SDCL §§ 25-10-25 and 25-10-13, which concern no contact orders. But Krumback does not state whether a no contact order was issued against him, to whom that order was issued, or how his conduct violated any such order. *See* Docket 9. The court also finds unclear from Krumback's filings whether one of the named defendants in this case is alleged to have caused the constitutional violation at issue. *See id.*; *see* Docket 8.

Docket 38. To succeed on a claim of malicious prosecution, a plaintiff must demonstrate that:

> (i) the suit or proceeding was instituted without any probable cause; (ii) the motive in instituting the suit was malicious, which was often defined in this context as without probable cause and for a purpose other than bringing the defendant to justice; and (iii) the prosecution terminated in the acquittal or discharge of the accused.

Thompson v. Clark, 596 U.S. 36, 44 (2022) (internal citations omitted).

In his proposed amendment, Krumback cites to a myriad of legal cases and argues that "[t]here is no question that the prosecutorial misconduct is [apparent]." Docket 38-1 at 1. But Krumback does not provide sufficient factual allegations to support this claim. For example, Krumback states that there was no probable cause for the prosecution to charge him with the "overbroad statute,"[4] but does not support this legal conclusion with any factual allegations. *See id.* at 1-2. At most, Krumback asks the court to infer the prosecution's ill-intent from the prescutor's decision to file an amended complaint. *See id.* Even when read in a light most favorable to Krumback, this assertion does not "raise a right to relief above the speculative level." *See Twombly*, 550 U.S. at 555. Thus, Krumback's proposed amendment would not survive a challenge under Rule 12(b)(6). The amendment is, therefore, futile and must be denied.

[4] Krumback does not clearly state which statute is at issue in his claim for prosecutorial misconduct, but the court construes the "overbroad statute" to be SDCL §§ 25-10-25 and 25-10-13, which Krumback challenges throughout his filings. *See, e.g.*, Dockets 8, 9.

Because Krumback's motions to amend are both futile, the court declines to grant either motion to amend. Krumback's third and fourth objections are overruled.

IV. Certificate of Appealability

To appeal the denial of a § 2254 motion, a petitioner must first seek a certificate of appealability from the district court. *See* 28 U.S.C. § 2253(c). The 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). To meet the substantial showing requirement, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In other words, "[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). Krumback has not made a substantial showing that his claims are debatable among reasonable jurists, that a court could resolve his claims differently, or that any of the issues raised in his claims deserve further proceedings. Thus, a certificate of appealability is not issued.

CONCLUSION

As Magistrate Judge Duffy accurately discussed in her and recommendations, Krumback's habeas claims are unexhausted and not properly before the court. Furthermore, Krumback's motions to amend his

complaint to add non-habeas claims are futile, and the court denies both motions to amend. Thus, it is

ORDERED that the government's motion to dismiss (Docket 28) is granted, and Krumback's motions to amend (Dockets 7-8, 38) are denied. All of Krumback's claims are dismissed without prejudice and Magistrate Judge Duffy's report and recommendation (Docket 39) is adopted in full, as supplemented by this order. A certificate of appealability will not issue. It is

FURTHER ORDERED that, because the underlying petition in this matter is dismissed, Krumback's remaining pending motions (Dockets 29, 34, 42-47, 51-54, 57, 59-61, 63, 64, 67, 70) are denied as moot.

DATED May 24, 2024.

BY THE COURT:

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

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

JASON KRUMBACK, Petitioner, vs. WARDEN BRENT FLUKE; ATTORNEY GENERAL OF THE STATE OF SOUTH DAKOTA, MARTY JACKLEY, Respondent.	4:23-CV-04155-KES REPORT AND RECOMMENDATION

INTRODUCTION

This matter is pending before the court pursuant to the petition pursuant to 28 U.S.C. § 2254 of Jason Krumback, a person incarcerated pursuant to a judgment of a South Dakota state court. See Docket Nos. 1, 6, 18. Mr. Krumback represents himself. Respondent filed a response to the Order to Show Cause and requests this court dismiss Mr. Krumback's petition without holding an evidentiary hearing.[1] See Docket No. 28. Mr. Krumback opposes the motion. See Docket Nos. 32 & 36. Also pending are Mr. Krumback's motion to leave (Docket No. 7), motion for declaratory judgment (Docket No. 8), motion for order to show cause (Docket No. 29), motion for injunctive relief (Docket No. 34), and motion to amend (Docket No. 38). This matter has been referred to this magistrate judge for a recommended

[1] The court interprets this response as a motion to dismiss Mr. Krumback's petition.

disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and DSD L.R. CIV 72.1(A)(2)(B).

FACTS

Mr. Krumback was charged with one count of tampering with a witness, a class 4 felony (SDCL § 22-11-19(2)), and 22 counts of violating a no contact order, a class 1 misdemeanor (SDCL §§ 25-10-13 and 25-10-1).[2] CR 3305 pp. 11-16. A part II information identified Mr. Krumback as a habitual offender. Id. at p. 17. Mr. Krumback was represented by attorney Jonathan Leddige throughout the proceedings of his state court criminal cases. Id. at p. 1 & 44 (change of plea and sentencing transcript p. 1).

At the combined change of plea and sentencing hearing, the court first addressed a letter Mr. Krumback had submitted in which he voiced concerns about Mr. Leddige's representation. Id. at pp. 25 & 48. The court asked Mr. Krumback if he wanted to continue with Mr. Leddige's representation. Id. at 49. Mr. Krumback stated at the hearing that he no longer had concerns about Mr. Leddige's representation and that he "just wanted to be listened to." Id. He asserted that the issues raised in his letter had been resolved, and that

[2] Documents from Mr. Krumback's underlying criminal case, State of South Dakota v. Jason Arthour Krumback, 49 CRI22-003305 (S.D. 2nd Cir. Minnehaha Cnty.) will be cited using the file's assigned page number preceded by "CR 3305." Mr. Krumback's plea agreement in CR 3305 resolved the charges of two other outstanding cases against him: State of South Dakota v. Jason Arthour Krumback, 49 CRI22-003641 (S.D. 2nd Cir. Minnehaha Cnty.) and State of South Dakota v. Jason Arthour Krumback, 49 CRI21-8125 (S.D. 2nd Cir. Minnehaha Cnty.). This court takes judicial notice of the documents contained in the state criminal records CR 3305, 8125, and 3641.

he wanted to move forward with his change of plea and sentencing with Mr. Leddige as his counsel. Id.

Mr. Krumback pled guilty to count I, witness tampering, in CR 3305, and entered an admission as to the revocation of his suspended sentence in CR 8125. Id. at p. 50, 59-60. Mr. Krumback also admitted to being a habitual offender. Id. at p. 60. The remaining charges of violating his no contact order in CR 3305 and CR 3641 were dismissed. Id. at p. 50. Mr. Krumback was sentenced to 20 years imprisonment, 10 years suspended for witness tampering (CR 3305), and 12 years, with 12 years suspended for his revocation (CR 8125). Id. at pp. 26-28 & 83. Mr. Krumback received a credit of 134 days for time served for CR 8125. Id. The sentences for CR 3305 and CR 8125 were to run consecutively. Id.

Mr. Krumback did not file a direct appeal of his conviction or sentence in state court, nor did he file a state habeas petition. Docket No. 6, p. 2; cf. Docket No. 28, pp. 11-12. Mr. Krumback filed this federal habeas petition under 28 U.S.C. § 2254 on October 4, 2023. Docket No. 1. He subsequently filed two amended petitions and a motion to amend. Docket Nos. 6, 18, 38. Mr. Krumback raises the following grounds for relief:

> Ground 1: Violation of 6th Amendment (ineffective assistance of counsel) . . . for counsel's failure to object to the factual bases [sic] that did not contain any key element of the indictment.
>
> Ground 2: Violation of 6th Amendment (ineffective assistance of counsel) for counsel's failure to investigate the exculpatory evidence in relation to the 22 counts of violation of SDCL § 25-10-13.

> Ground 3: Violation of 6th Amendment (ineffective assistance of counsel) for counsel's failure to prepare any defense to the 22 counts of violation of SDCL § 25-10-13.
>
> Ground 4: Violation of 6th and 14th Amendments for prosecution misconduct charging Mr. Krumback with the 22 counts of violation of SDCL § 25-10-13 then later dismissing them.[3]
>
> Ground 5: Violation of 6th and 14th Amendments for abuse of court discretion by accepting a factual bases [sic] that did not contain the key element of the charging indictment of an "official proceeding."
>
> Ground 6: SDCL § 25-10-25 and § 25-10-13 are a violation of the 1st and 14th Amendment and unconstitutionally overbroad.

Docket No. 18, pp. 8-43; Docket No. 8, p. 1.

DISCUSSION

A. 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) (citation omitted). 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

[3] In Mr. Krumback's motion to amend his petition at Docket No. 38, he adds a 4th Amendment violation for prosecutorial misconduct, but the substance of the claim remains the same from his previous amended petition at Docket No. 18. Docket No. 38-1, pp. 1-7.

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). 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).

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, 1045 (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).

B. State Court Exhaustion and Procedural Default

Respondent argues that Mr. Krumback did not exhaust his state remedies but that his claims are not procedurally defaulted. Docket No. 7 at p. 2. Mr. Krumback argues that urgency and actual innocence overcome the exhaustion requirement and his procedural default. Docket No. 18, pp. 44-46. Before reaching the merits of Mr. Krumback's petition, he must show he meets the procedural requirements under 28 U.S.C. § 2254(b).

1. Exhaustion

Federal habeas review of state court convictions is limited in that each claim must first have been presented to the state courts before being presented to the federal courts:

> (b)(1) 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 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.

28 U.S.C. § 2254(b)(1), (c).

A federal court may not consider a claim for relief in a § 2254 habeas corpus petition if the petitioner has not exhausted his state remedies. 28 U.S.C. § 2254(b)(1). "[T]he state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999). 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) (citations omitted). The exhaustion doctrine "protect[s] the state courts' role in [enforcing] federal law and prevent[s] 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.

Id. (citations and internal quotation marks omitted).

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)(1)(A); Rose, 455 U.S. at 522.

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. "[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 appellate 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).

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 (citation omitted). 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 (citations and internal quotation marks omitted). This does not, however, require petitioner to cite "book and verse on the federal constitution." Picard, 404 U.S. at 278 (quoting 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.

In addition, the petitioner must have submitted his claims at all levels of the state court system according to the state's established appellate review process. O'Sullivan, 526 U.S. at 845. This means presenting his claims to the

state's appellate court(s) even if that appeal is discretionary. Id. In South Dakota, all persons convicted of a misdemeanor or felony have the right to appeal their conviction to the South Dakota Supreme Court. SDCL § 15-26A-3. Under South Dakota's statutory scheme for appellate review of habeas claims, the petitioner is required to seek a certificate of probable cause from the circuit court first. SDCL § 21-27-18.1. If that attempt is unsuccessful, he must seek a certificate of probable cause within 20 days from the state supreme court. Id.

The exhaustion requirement is waived "only in rare cases where exceptional circumstances of peculiar urgency are shown to exist." Mellott v. Purkett, 63 F.3d 781, 784 (8th Cir. 1995) (quoting Rose, 455 U.S. at 515-16); see 28 U.S.C. § 2254(b)(1)(B). A petitioner must show "outrageous delay" to bypass the state court exhaustion requirement. Mellott, 63 F. 3d at 785.

Mr. Krumback has never presented the claims in this petition for consideration in state court. Mr. Krumback urges this court to find execeptional circumstances to excuse the exhaustion requirement due to the current back log of state court dockets. Docket No. 18, p. 44. Mr. Krumback is concerned that a determination from the state habeas court would exceed the length of his incarceration. Id. at pp. 44-45. Mr. Krumback states that in the case of State v. Luna, the state habeas court determined that a new trial was needed, however three years later that new trial has yet to take place. Id. at p. 44. Without additional citation, this court could not verify the status of State v. Luna. Regardless, Mr. Krumback speculates as to how long a

determination would take from the state court without attempting to file a timely direct appeal or timely habeas. "It is true that exhaustion of state remedies takes time. But there is no reason to assume that . . . state courts will not act expeditiously." Preiser v. Rodriguez, 411 U.S. 475, 494-95 (1973). This court finds that Mr. Krumback has not presented sufficient evidence that would waive the exhaustion requirement.

2. Procedural Default

Closely related to the doctrine of state court exhaustion is the doctrine of procedural default.[4] 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). 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, 1045-46 (8th Cir. 1998). Where the petitioner has no further state remedies available to him, analysis of the procedural default doctrine is the next step.

[4] Pre-AEDPA law held that procedural default must be raised by the state or it was waived. See Gray v. Netherland, 518 U.S. 152, 166 (1996). After passage of AEDPA in 1996, the defense is not waived unless the State expressly waives the requirement. See Banks v. Dretke, 540 U.S. 668, 705 (2004) (citing 28 U.S.C. § 2254(b)(3)).

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. 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. at 730-31. But 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. See id. at 732.

A petitioner may overcome procedural default if they 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. Coleman, 501 U.S. at 750. "Actual innocence" is the only example of "miscarriage of justice" so far recognized by the Supreme Court. Sawyer v. Whitley, 505 U.S. 333, 339 (1992). It is not an independent constitutional claim upon which habeas relief can be granted, it is "a gateway through which a habeas petitioner must pass to have his otherwise [procedurally] barred constitutional claim considered on the merits." Schlup v. Delo, 513 U.S. 298, 315 (1995). "Actual innocence means factual innocence," it does not mean "mere legal insufficiency." Bousley v. United States, 523 U.S. 614, 623 (1998). Actual innocence claims are rarely successful as they require the petitioner to carry an exacting burden. Schlup, 513 U.S. at 324.

Actual innocence can be a gateway to excuse "severely confined categor[ies] [of] cases" involving procedural defaults: expiration of the statute of limitations, successive petitions (reasserting claims previously asserted in an earlier petition), abusive petitions (asserting claims that could have been but were not asserted in an earlier petition), failure to raise a constitutional claim on direct appeal, failure to develop facts in state court, and failure to observe state procedural rules, including filing deadlines. McQuiggin v. Perkins, 569 U.S. 383, 386, 392-93, 395 (2013).

In order to show actual innocence, Mr. Krumback must (1) produce "new reliable evidence" not presented previously; and (2) he must "show that, in light of all the evidence, it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt of the crime for which he pleaded guilty and was convicted." Schlup, 513 U.S. at 324; United States v. Apker, 174 F.3d 934, 938-39 (8th Cir. 1999).

Mr. Krumback asserts that his claims are procedurally defaulted and raises the "actual innocence" exception to procedural default. Docket No. 18, p. 45; Docket No. 29, p. 2. The time for direct appeal of his state court conviction has passed. Mr. Krumback had 30 days after his conviction and sentence was filed on October 13, 2022 to file his direct appeal. CR 3305 p. 28; SDCL § 23A-32-15; Docket No. 28, p. 8. Mr. Krumback states the reason he did not file his direct appeal was on the advice of his counsel, Jonathon Leddige, for which he now brings an ineffective assistance of counsel claim. Docket No. 6, p. 13.

Respondent states that Mr. Krumback is not procedurally defaulted from raising his claims in state court to comply with the exhaustion requirement. Docket No. 28, p. 26. This court agrees. Mr. Krumback has an available remedy in state court to address his claim that Mr. Leddige refused to file his direct appeal.

> If the court finds that an applicant was denied the right to an appeal from an original conviction in violation of the Constitution of the United States or the Constitution of South Dakota, the court shall issue a new judgment and impose the same sentence if such relief is requested within a reasonable time and an adequate record of the original trial proceeding is available for review. The court shall advise the applicant of the following:
>
> (1) The rights associated with an appeal from a criminal conviction; and
>
> (2) The time for filing a notice of appeal from the reimposed judgment and sentence.

SDCL § 23A-27-51.

Mr. Krumback also can file a timely state habeas petition. The statute of limitations for South Dakota habeas petitions is 2 years from the date Mr. Krumback's conviction became final. SDCL § 21-27-3.3. Mr. Krumback's conviction became final as of November 13, 2022 (31 days after his conviction and sentence was filed). CR 3305 p. 28; SDCL § 23A-32-15. Mr. Krumback has until November 13, 2024, to file a state habeas petition. Because Mr. Krumback has available state remedies to exhaust, his petition is not procedurally defaulted and this court will not entertain his argument of actual innocence. Mr. Krumback must exhaust these state remedies before his claims may be reviewed in federal court.

C. Standing for Mr. Krumback's Claims Against SDCL ch. 25-10

Respondents also argue that Mr. Krumback lacks standing for his claims addressing the constitutionality of his confinement under SDCL ch. 25-10. Docket No. 28, p. 19 Grounds 2 & 3 claim that counsel was ineffective for failing to investigate evidence and for failing to prepare defenses for SDCL § 25-10-13. Docket No. 18, pp. 15-37. Ground 4 claims there was prosecutorial misconduct for charging Mr. Krumback with violating SDCL § 25-10-13 and later dismissing those charges. Id. Ground 6 claims that SDCL §§ 25-10-25 and 25-10-13 are a violation of the 1st Amendment and unconstitutionally overbroad. Docket No. 8, p. 1.

To have standing for a writ of habeas corpus under 28 U.S.C. § 2254, the person must be in custody pursuant to the judgment of a State court. 28 U.S.C. § 2254. "It is clear, not only from the language of § . . . 2254(a), but also from the common-law history of the writ, that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody." Preiser, 411 U.S. at 484.

Mr. Krumback is currently serving a sentence of incarceration for pleading guilty to one count of witness tampering (SDCL § 22-11-19) as a habitual offender. CR 3305, pp. 26-28. Mr. Krumback admits that he is currently a state prisoner in relation to the conviction of SDCL § 22-11-19. Docket No. 18, p. 1. This court liberally interprets Mr. Krumback to be

attacking his witness tampering conviction under grounds 1 & 5. Docket No. 32, p. 1 (Mr. Krumback in his reply stated that he is attacking this conviction).

Although he was charged with 22 counts of violating a no contact order under SDCL §§ 25-10-13 and 25-10-13 in CR 3305, all of those charges were dismissed as part of his plea agreement. CR 3305, pp. 11-16, 28. He received a suspended sentence for violating the no contact order as to the revocation of his previous suspended sentence in CR 8125. CR 3305, p. 28; CR 8125, pp. 57-60. Because Mr. Krumback is not in custody for violating SDCL §§ 25-10-13 or 25-10-13, a petition for habeas corpus is not the appropriate vehicle for his requested relief for grounds 2-4 & 6.

D. Mr. Krumback's Motion for Injunctive Relief

Mr. Krumback asks this court to grant injunctive relief to allow him to exceed South Dakota Department of Corrections limitations on printed copies and provide these copies at no cost to him. Docket No. 34 & 35.
Mr. Krumback argues this relief is proper so that he can be in compliance with the court service requirements. Id. Mr. Krumback states that under 28 U.S.C. § 2250, he is entitled to his required documents at no cost to him. Id.

Indigent habeas corpus petitioners--upon a court order to proceed "*in forma pauperis,*" or without prepayment of filing fees—are entitled to certified copies of documents, or parts of the record from the clerk of any court as may be required by order of the judge without cost. 28 U.S.C. § 2250. This statute does not entitle a petitioner to unlimited self-produced printed copies at a

prison. Mr. Krumback never requested this court to order delivery of documents relevant to 28 U.S.C. § 2250.

This court did grant Mr. Krumback *in forma pauperis* status and provided him with the forms necessary to proceed with his habeas petition. Docket Nos. 2, 3, Docket entry following 11, & 15. The court also notes that the print restriction supposedly causing Mr. Krumback hardship has not prevented Mr. Krumback from numerous hand-written filings that were accepted by the court and available to the respondent. Mr. Krumback has sufficiently stated his claims for consideration and has complied with the court's filing requirements thus far. This court finds that Mr. Krumback is not entitled to injunctive relief for unlimited no-cost printed copies at Mike Durfee State Prison. Further, this court has determined that an evidentiary hearing is not appropriate at this time given Mr. Krumback's failure to exhaust his state court remedies. Because of this determination, Mr. Krumback's proposed filings are not procedurally required by this court. See Docket No. 35, p. 2.

CONCLUSION

Based on the foregoing facts, law and analysis, this magistrate judge respectfully recommends granting respondent's motion to dismiss at Docket No. 28 and denying Mr. Krumback's outstanding motions at Docket Nos. 7, 8, 29, 34, & 38. Mr. Krumback's habeas petition is recommended to be dismissed without prejudice so that he may present his claims in the first instance to the state courts.

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 16th day of January, 2024.

BY THE COURT:

Veronica L. Duffy

VERONICA L. DUFFY
United States Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 24-2254

Jason Krumback

Appellant

v.

Teresa L. Bittinger, Warden and Attorney General for the State of South Dakota

Appellees

Appeal from U.S. District Court for the District of South Dakota - Southern
(4:23-cv-04155-KES)

ORDER

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

November 19, 2024

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

/s/ Maureen W. Gornik

Additional material from this filing is available in the Clerk's Office.