

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 25899

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JOHN GRAHAM,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE JOHN J. DELANEY, SR.
Circuit Court Judge

APPELLEE'S BRIEF

MARTY J. JACKLEY
ATTORNEY GENERAL

Max A. Gors
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

John R. Murphy
Attorney at Law
328 East New York Street, Suite 1
Rapid City, SD 57701
Telephone: (605) 342-2909

ATTORNEY FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed February 7, 2011

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
JURISDICTIONAL STATEMENT	1
STATEMENT OF LEGAL ISSUES	2
STATEMENT OF THE CASE AND FACTS	5
ARGUMENT	
I. THE "DOCTRINE OF SPECIALTY" PROVISION IN THE EXTRADITION TREATY WITH CANADA DOES NOT DEPRIVE SOUTH DAKOTA OF JURISDICTION TO TRY GRAHAM FOR THE MURDER OF AQUASH BECAUSE CANADA WAIVED THE DOCTRINE OF SPECIALTY.	6
II. LOOKING CLOUD'S STATEMENT, THAT HE TOLD DENISE MALONEY IN 2002 THAT GRAHAM SHOT AQUASH, WAS NOT INADMISSIBLE HEARSAY.	12
III and IV. LEONARD PELTIER'S THREAT AT FARMINGTON, TO KILL AQUASH BECAUSE SHE WAS A GOVERNMENT INFORMANT, AND PELTIER'S STATEMENT THAT HE SHOT AN F.B.I. AGENT WERE NOT OFFERED TO PROVE THE TRUTH OF THE MATTERS AND WERE NOT HEARSAY. THE THREAT AND THE INCRIMINATING STATEMENT WERE RELEVANT TO PROVE THAT AIM HAD A MOTIVE TO MURDER AQUASH TO SILENCE HER AS AN INFORMANT AND TO SILENCE HER BECAUSE PELTIER HAD UTTERED THE INCRIMINATING STATEMENT IN HER PRESENCE.	22
V. THE EVIDENCE WAS SUFFICIENT TO CONVICT GRAHAM OF FELONY MURDER.	27
VI. GRAHAM'S LIFE SENTENCE WITHOUT PAROLE WAS VALID, LEGAL, AND CONSTITUTIONAL.	38
CONCLUSION	41
CERTIFICATE OF COMPLIANCE	43
CERTIFICATE OF SERVICE	43
APPENDIX	

TABLE OF AUTHORITIES

STATUTES CITED:	PAGE
SDCL 19-9-3	15, 16
SDCL 19-16-1(3)	13, 16, 25
SDCL 19-16-2	16
SDCL 19-16-2(2)	14
SDCL 22-16-9	9, 38
SDCL 22-16-12	38
SDCL 23-60-4	39
SDCL 23-60-6	40
SDCL 23-60-8	40
SDCL 23-60-9	40
SDCL 23A-32-2	1
 CASES CITED:	
<i>Alvine v. Mercedes-Benz of North America</i> , 2001 S.D. 3, 620 N.W.2d 608	12, 23
<i>Antwi v. United States</i> , 349 F. Supp. 2d 663 (S.D.N.Y. 2004), <i>cert. denied</i> , 546 U.S. 970, 126 S.Ct. 503, 163 L.Ed.2d 381 (2005)	8
<i>Brim v. South Dakota Bd. of Pardons and Paroles</i> , 1997 S.D. 48, 563 N.W.2d 812	40
<i>Castaneira v. Ligtenberg</i> , 2006 WL 571985, *3 (D.S.D. March 7, 2006)	40
<i>Crawford v. Washington</i> , 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)	26
<i>Dace v. Mickelson</i> , 816 F.2d 1277 (8th Cir. 1987)	40
<i>Gordon v. Warden, New Hampshire State Prison</i> , 2003 WL 22037316 (D.N.H.)	11
<i>Greenholtz v. Nebraska Penal Inmates</i> , 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979)	40

<i>Harmelin v. Michigan</i> , 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991)	41
<i>Harter v. Plains Ins. Co., Inc.</i> , 1998 S.D. 59, 579 N.W.2d 625	12, 23
<i>In Re Extradition of Ortiz</i> , 444 F. Supp. 2d 876 (N.D.Ill. 2006)	7
<i>Johnson v. Browne</i> , 205 U.S. 309, 27 S.Ct. 539, 51 L.Ed. 816 (1907)	7, 10
<i>Michigan v. Bryant</i> , ___ U.S. ___, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011)	26
<i>Schaffer v. Edward D. Jones & Co.</i> , 521 N.W.2d 921 (S.D. 1994)	12, 23
<i>Solem v. Helm</i> , 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983)	41
<i>State v. Armstrong</i> , 2010 S.D. 94, 793 N.W.2d 6	25
<i>State v. Berhanu</i> , 2006 S.D. 94, 724 N.W.2d 181	39
<i>State v. Bonner</i> , 1998 S.D. 30, 577 N.W.2d 575	39
<i>State v. Brim</i> , 2010 S.D. 74, 789 N.W.2d 80	39
<i>State v. Frazier</i> , 2001 SD 19, 622 N.W.2d 246	27
<i>State v. Frazier</i> , 2002 S.D. 66, 646 N.W.2d 744	41
<i>State v. Johnson</i> , 2009 S.D. 67, 771 N.W.2d 360	15, 27
<i>State v. Lopez</i> , 711 So.2d 563 (Fla.D.Ct.App. 1997)	14
<i>State v. Mattson</i> , 2005 S.D. 71, 698 N.W.2d 538	23
<i>State v. Mulligan</i> , 2007 S.D. 67, 736 N.W.2d 808	27, 38
<i>State v. Olhausen</i> , 1998 S.D. 120, 587 N.W.2d 715	38
<i>State v. Overbey</i> , 2010 S.D. 78, 790 N.W.2d 35	39
<i>State v. Piper</i> , 2006 S.D. 1, 709 N.W.2d 782	39
<i>State v. Pugh</i> , 2002 S.D. 16, 640 N.W.2d 79	39
<i>Steele v. Bonner</i> , 2010 S.D. 37, 782 N.W.2d 379	16

<i>Tennessee v. Street</i> , 471 U.S. 409, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985)	26
<i>Time Out, Inc. v. Karras</i> , 469 N.W.2d 380, 384 (S.D. 1991)	12, 23
<i>United States v. Bellomo</i> , 176 F.3d 580 (2d Cir. 1999), cert. denied, 528 U.S. 987, 120 S.Ct. 447, 145 L.Ed.2d 364 (1999)	13, 14, 20
<i>United States v. Cosentino</i> , 844 F.2d 30 (2d Cir. 1988)	21
<i>United States v. Diaz</i> , 176 F.3d 52 (2d Cir. 1999)	20, 21
<i>United States v. Graham</i> , 2010 WL 299345 (D.S.D. 2010)	5
<i>United States v. Graham</i> , 572 F.3d 954 (8th Cir. 2009), reh'g and reh'g en banc denied, 598 F.3d 930 (8th Cir. 2009)	5, 7, 8
<i>United States v. Graham</i> , 585 F. Supp. 2d 1144 (D.S.D. 2008)	5, 8
<i>United States v. Lomeli</i> , 596 F.3d 496, 500 (8th Cir. 2010)	7
<i>United States v. Looking Cloud</i> , 419 F.3d 781 (8th Cir. 2005)	24
<i>United States v. Rauscher</i> , 119 U.S. 407, 7 S.Ct. 234, 30 L.Ed. 425 (1886)	7
<i>United States v. Sensi</i> , 879 F.2d 888 (D.C. Cir. 1989)	11
<i>United States v. Yielding</i> , ___ F.3d ___, 2011 WL 4578434 *4 (8th Cir. 2011)	26
OTHER REFERENCES:	
1978 Sess. Laws, ch. 186, § 21	39
1978 Sess. Laws, ch. 186, § 44	39
Diplomatic Note No. 852, December 18, 2009	9
Protocol Amending the Treaty on Extradition Between Canada and the United States of America Signed at Washington on December 3, 1971, as Amended by an Exchange of Notes on June 28 and July 9, 1974	6, 10, 11
<i>Restatement (Third) of Foreign Relations Law of the United States</i> , § 477, comment a	11

Treaty on Extradition Between Canada and the United States
of America, Sub-paragraph 12(1)(iii)

9

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 25899

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JOHN GRAHAM,

Defendant and Appellant.

PRELIMINARY STATEMENT

The record in circuit court will be referred to as “R” followed by the page number(s). Motion hearing transcripts will be referred to as “TM” followed by the date of the transcript and page number(s) (i.e., TM2/3/1099). Trial transcripts will be referred to as “TT” followed by the volume and page number(s) (i.e., TTv3 100). The sentence hearing transcript will be referred to as “TS” followed by the page number(s) (i.e., TS 25).

JURISDICTIONAL STATEMENT

John Graham was found guilty of Felony Murder in Pennington County by a jury on December 10, 2010. R806. Graham was sentenced to life in prison without parole on January 24, 2010. TS 48. The Judgment of Conviction was filed on January 31, 2011. R817; Appendix C. Notice of Appeal was filed on February 7, 2011. R822. The Court has jurisdiction over this appeal pursuant to SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES

I

DOES THE “DOCTRINE OF SPECIALTY” PROVISION IN THE EXTRADITION TREATY WITH CANADA DEPRIVE SOUTH DAKOTA OF JURISDICTION TO TRY GRAHAM FOR FELONY MURDER FOR THE KIDNAPPING AND MURDER OF AQUASH?

Although the trial court did not rule on this issue directly, Graham was convicted of felony murder in the kidnapping and murder of Anna Mae Aquash.

United States v. Rauscher, 119 U.S. 407, 7 S.Ct. 234, 30 L.Ed. 425 (1886)

Johnson v. Browne, 205 U.S. 309, 27 S.Ct. 539, 51 L.Ed. 816 (1907)

United States v. Lomeli, 596 F.3d 496 (8th Cir. 2010)

Antwi v. United States, 349 F. Supp. 2d 663 (S.D.N.Y. 2004), *cert. denied* 546 U.S. 970, 126 S.Ct. 503, 163 L.Ed.2d 381 (2005)

II

WAS ARLO LOOKING CLOUD’S STATEMENT THAT HE TOLD DENISE MALONEY IN 2002 THAT JOHN BOY [GRAHAM] SHOT HER MOTHER, ANNA MAE AQUASH, INADMISSIBLE HEARSAY?

The trial court admitted Arlo Looking Cloud’s testimony that he told Denise Maloney in 2002 that John Boy [Graham] shot her mother, ANNIE Mae Aquash; and the trial court admitted Denise Maloney’s testimony that Arlo Looking Cloud told her in 2002 that John Boy [Graham] shot her mother, ANNIE Mae Aquash.

Alvine v. Mercedes-Benz of North America, 2001 S.D. 3, 620 N.W.2d 608

State v. Johnson, 2009 S.D. 67, 771 N.W.2d 360

United States v. Bellomo, 176 F.3d 580 (2nd Cir. 1999),
cert. denied, 528 U.S. 987, 120 S.Ct. 447, 145 L.Ed.2d 364
(1999)

United States v. Diaz, 176 F.3d 52 (2d Cir. 1999)

SDCL 19-9-3

SDCL 19-16-1(3)

SDCL 19-16-2(2)

III and IV

WAS LEONARD PELTIER'S THREAT AT FARMINGTON, TO
KILL AQUASH BECAUSE SHE WAS A GOVERNMENT
INFORMANT, INADMISSIBLE HEARSAY?

WAS PELTIER'S THREAT RELEVANT TO PROVE THAT AIM
HAD A MOTIVE TO MURDER AQUASH TO SILENCE HER AS
AN INFORMANT?

The trial court admitted Peltier's threat at Farmington to kill
Aquash because she was an informant.

WAS LEONARD PELTIER'S STATEMENT THAT HE SHOT AN
F.B.I. AGENT INADMISSIBLE HEARSAY?

WAS PELTIER'S STATEMENT THAT HE SHOT AN F.B.I.
AGENT RELEVANT TO PROVE THAT AIM HAD A MOTIVE
TO MURDER AQUASH TO SILENCE HER BECAUSE
PELTIER HAD UTTERED THE INCRIMINATING STATEMENT
IN AQUASH'S PRESENCE?

The trial court admitted Peltier's statement that he shot an
F.B.I. agent.

Michigan v. Bryant, ___ U.S. ___, 131 S.Ct. 1143,
179 L.Ed.2d 93 (2011)

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354,
158 L.Ed.2d 177 (2004)

United States v. Looking Cloud, 419 F.3d 781 (8th Cir. 2005)

State v. Armstrong, 2010 S.D. 94, 793 N.W.2d 6

SDCL 19-16-1(3)

V

WAS THE EVIDENCE SUFFICIENT TO CONVICT GRAHAM OF FELONY MURDER?

The jury convicted Graham of felony murder in connection with the kidnapping of ANNIE Mae Aquash.

State v. Johnson, 2009 S.D. 67, 771 N.W.2d 360

State v. Mulligan, 2007 S.D. 67, 736 N.W.2d 808

State v. Olhausen, 1998 S.D. 120, 587 N.W.2d 715

VI

WAS GRAHAM'S LIFE SENTENCE WITHOUT PAROLE VALID, LEGAL, AND CONSTITUTIONAL?

The trial court sentenced Graham to life in prison without parole.

Nebraska Penal Inmates, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979)

Dace v. Mickelson, 816 F.2d 1277 (8th Cir. 1987)

Brim v. South Dakota Bd. of Pardons and Paroles, 1997 S.D. 48, 563 N.W.2d 812

State v. Frazier, 2002 S.D. 66, 646 N.W.2d 744

SDCL 22-16-9 (1975)

SDCL 22-16-12 (1975)

STATEMENT OF THE CASE AND FACTS

1. *Statement of the Case.*

On March 20, 2003, Graham was indicted for the murder of Annie Mae Aquash in United States District Court. *United States v. Graham*, 2010 WL 299345 (D.S.D. 2010).

Graham was extradited to the United States in 2007. The federal court Indictment was dismissed. *United States v. Graham*, 585 F. Supp. 2d 1144 (D.S.D. 2008). Graham was re-indicted in federal court and the charges were dismissed again. The dismissals were affirmed. *United States v. Graham*, 572 F.3d 954 (8th Cir. 2009), *reh'g and reh'g en banc denied*, 598 F.3d 930 (8th Cir. 2009).

On September 9, 2009, Graham was indicted in Pennington County, South Dakota for Count 1: Felony Murder: kidnapping and Count 3: Premeditated Murder. R1-2; Appendix A. The State dismissed Count 2: Felony Murder: rape. R816.

A jury found Graham guilty of Murder While in the Commission of a Felony. R806; Appendix B. Graham was sentenced to life in prison without parole. TS 48; R817; Appendix C. Notice of Appeal was filed February 7, 2011. R822.

2. *Statement of the Facts.*

Issue V on sufficiency of the evidence contains the statement facts.

ARGUMENT

I

THE “DOCTRINE OF SPECIALTY” PROVISION IN THE EXTRADITION TREATY WITH CANADA DOES NOT DEPRIVE SOUTH DAKOTA OF JURISDICTION TO TRY GRAHAM FOR THE MURDER OF AQUASH BECAUSE CANADA WAIVED THE DOCTRINE OF SPECIALTY.

Graham contends that he cannot be tried in state court for felony murder because he was only extradited to the United States to be tried in federal court for first degree murder.

A. *The Treaty Between the United States and Canada.*

The extradition treaty between Canada and the United States provides:

Article 12

(1) A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting State for an offense other than that for which extradition has been granted nor be extradited by that State to a third State unless:

(i) He has left the territory of the requesting State after his extradition and has voluntarily returned to it;

(ii) He has not left the territory of the requesting State within thirty days after being free to do so; or

(iii) The requested State has consented to his detention, trial, punishment for an offense other than that for which extradition was granted or to his extradition to a third State, provided such other offense is covered by Article 2.

...

Appendix D. Article 12 embodies the “doctrine of specialty.”

B. *The Doctrine of Specialty.*

The “doctrine of specialty” was recognized in *United States v. Rauscher*, 119 U.S. 407, 7 S.Ct. 234, 30 L.Ed. 425 (1886), and *Johnson v. Browne*, 205 U.S. 309, 27 S.Ct. 539, 51 L.Ed. 816 (1907). Under the doctrine of specialty, an extradited defendant may not be prosecuted “for any offense other than that for which the surrendering country agreed to extradite.” *Rauscher* at 412, 7 S.Ct. at 234.

The Eighth Circuit Court of Appeals recognized the doctrine of specialty in *United States v. Lomeli*, 596 F.3d 496, 500 (8th Cir. 2010). The doctrine of specialty appears in all United States extradition treaties with foreign countries since the *Rauscher* decision. *Id.*

C. *Standard of Review.*

Whether prosecution of an extradited defendant violates the doctrine of specialty is reviewed de novo. *Lomeli*, 596 F.3d at 499. Extradition treaties are construed liberally to facilitate reciprocal surrender of fugitives for extraditable offenses. *In Re Extradition of Ortiz*, 444 F. Supp. 2d 876, 883 (N.D.Ill. 2006).

D. *The Charges.*

In 2003, Graham was indicted in federal district court in South Dakota for the 1975 murder of Aquash. In 2007, Graham was extradited to the United States from Canada to face the charge of first degree murder. *United States v. Graham*, 572 F.3d 954, 954-55 (8th Cir. 2009). The indictment was dismissed. *Id.* Graham was indicted again. The

charges were dismissed again because Aquash and Graham were not Indians. *United States v. Graham*, 585 F. Supp. 2d 1144 (D.S.D. 2008). Dismissal of the federal charges was upheld in *Graham*, 572 F.3d 954 (8th Cir. 2009), *reh'g and reh'g en banc denied*, 598 F.3d 930 (8th Cir. 2009).

On September 9, 2009, before the dismissal of his federal charges was affirmed by the Eighth Circuit on November 4, 2009, Graham was indicted in Pennington County, South Dakota, for felony murder (kidnapping), felony murder (rape), and first degree murder. R1-2. The State did not proceed on felony murder (rape). R816. The jury found Graham guilty of felony murder and acquitted Graham of first degree murder. R806. Graham was sentenced to life without parole. TS 48; R817; Appendix C.

E. *Waiver of the Doctrine of Specialty.*

1. *The Doctrine of Specialty May Be Waived.*

The asylum state may waive the doctrine of specialty:

There is a recognized limitation, however, on a defendant's right to object on the ground that his extradition has violated the doctrine of specialty. *He may not raise such a claim if the state from which he is extradited explicitly waives any objection based on the rule of specialty.* Such a waiver abrogates that portion of the treaty with respect to the defendant.

Antwi v. United States, 349 F. Supp. 2d 663 (S.D.N.Y. 2004), *cert. denied*, 546 U.S. 970, 126 S.Ct. 503, 163 L.Ed.2d 381 (2005) (emphasis added).

2. *Canada Waived the Doctrine of Specialty.*

The Canadian government waived the doctrine of specialty. The waiver contains the following:

Having regard to the request from the United States of America dated December 18, 2009, (Diplomatic Note No. 852) and to the provisions of sub-paragraph 12(1)(iii) of the *Treaty on Extradition between Canada and the United States of America*, I hereby consent to the detention, prosecution, and if he is convicted, punishment of John Graham with respect to the offences which are set forth in the Indictment, No. 09-3953, filed on September 9, 2009, in the Seventh Circuit Court, County of Pennington, namely:

Count 1: Murder while in the Commission of any felony namely kidnapping, in violation of South Dakota Codified Law 22-16-9 and 22-19-1; and

Count 2: Premeditated Murder, in violation of South Dakota Codified Law 22-16-4.

(Emphasis in original.) Sealed Document E; Appendix E.

The Waiver of Specialty explicitly allows Graham to be prosecuted for felony murder (kidnapping) and premeditated murder listed in Indictment Number 09-3593 in Seventh Circuit Court, County of Pennington. The State dismissed felony murder (rape). R816. Graham was tried and convicted of felony murder during the commission of kidnapping which was within the waiver of specialty. R806. He was not tried for the felony murder (rape) which was outside of the waiver. The doctrine of specialty was not violated. South Dakota had jurisdiction to try Graham for felony murder during the commission of kidnapping.

F. *Graham Is Not Entitled to Return to Canada Before Answering to State Charges for Felony Murder.*

Graham claims that he should have been allowed to return to Canada to challenge whether he should be extradited for State charges of felony murder. Graham argues that he was not charged with the same crime in State court that he was extradited for in federal court. Graham quotes *Johnson* for the following:

That right, as we understand it, is that he shall be tried only for the offense with which he is charged in the extradition proceedings and for which he was delivered up, and that if not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime committed previous to his extradition.

Johnson, 205 U.S. at 318, 27 S.Ct. at 541. The quote is based upon Article III of the then-existing treaty between the United States and Canada set forth in the margin of the opinion as follows:

Article III.

No person surrendered by or to either of the high contracting parties shall be triable or be tried for any crime or offense, committed prior to his extradition, other than the offense for which he was surrendered, *until he shall have had an opportunity of returning to the country from which he was surrendered.*

Id. at 320, 27 S.Ct. at 542 (emphasis added). The italicized language from *Johnson* does not appear in the 1971 extradition treaty (as amended in 1974 and 1988) between Canada and the United States which contains the following:

Article 12

(1) A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting State for an offense other than that for which extradition has been granted nor be extradited by that State to a third State unless:

...

(iii) *The requested state has consented to his detention, trial, punishment for an offense other than that for which extradition was granted or to his extradition to a third State, provided such other offense is covered by Article 2.*

...

Appendix D (emphasis added). Therefore, the quote from *Johnson* does not apply to Graham and he is not entitled to return to Canada to challenge his further extradition to South Dakota. Article 12(1)(iii) of the treaty explicitly allows Canada to consent to Graham's prosecution for an offense other than that for which Graham was extradited.

In addition, Graham was in state court for felony murder based upon the same facts in the federal court charges for which he was extradited.

Essentially, "[w]hat the doctrine of specialty requires is that the prosecution be 'based on the same facts as those set forth in the request for extradition.'" ' [sic] *United States v. Sensi*, 879 F.2d 888, 895 (D.C. Cir. 1989) (quoting *Restatement (Third) of Foreign Relations Law of the United States* § 477, comment a).

Gordon v. Warden, New Hampshire State Prison, 2003 WL 22037316 (D.N.H.).

Canada consented to Graham's prosecution in state court for felony murder while in the commission of kidnapping.

II

LOOKING CLOUD'S STATEMENT, THAT HE TOLD DENISE MALONEY IN 2002 THAT GRAHAM SHOT AQUASH, WAS NOT INADMISSIBLE HEARSAY.

Graham contends that Looking Cloud's statement to Denise Maloney in 2002 was inadmissible hearsay.

A. *Standard of Review.*

Admissibility of evidence is within the sound discretion of the trial court. The trial court has broad discretion in balancing the probative value of evidence against its prejudicial effect and its ruling will not be disturbed on appeal absent abuse of discretion. *Schaffer v. Edward D. Jones & Co.*, 521 N.W.2d 921, 925 (S.D. 1994); *Time Out, Inc., v. Karras*, 469 N.W.2d 380, 384 (S.D. 1991). An abuse of discretion refers to a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence. *Harter v. Plains Ins. Co., Inc.*, 1998 S.D. 59, ¶ 13, 579 N.W.2d 625, 629.

Alvine v. Mercedes-Benz of North America, 2001 S.D. 3, ¶ 11, 620 N.W.2d 608, 611.

B. *Looking Cloud's Testimony That He Told Denise Maloney in 2002 That Graham Had Shot Aquash.*

Graham claims that Looking Cloud was improperly allowed to testify that he told Denise Maloney in 2002 that Graham shot Maloney's mother, Aquash, and that Clarke and Looking Cloud were there. Graham objected that Looking Cloud's statement was a prior consistent statement before he had been impeached. TTV6 223. The trial court sustained the objection, reversed its ruling, and allowed the question. TTV6 223-24. Graham

objected again on the grounds that the statement did not predate the motive to fabricate, which the trial court overruled. TTV6 224. Looking Cloud testified:

Q. Okay.

What was it you told her?

...

A. I told her that John Boy [Graham] shot her and there was Theda and I, and I was sorry.

TTv6 224.

Looking Cloud's testimony as to what he previously said to Maloney was not hearsay. SDCL 19-16-1(3) provides that "Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Looking Cloud's statement was made while testifying at the trial. Looking Cloud was present and subject to cross-examination. Therefore, Looking Cloud's statement is not hearsay. In *United States v. Bellomo*, 176 F.3d 580 (2d Cir. 1999), *cert. denied*, 528 U.S. 987, 120 S.Ct. 447, 145 L.Ed.2d 364 (1999), Judge Noonan stated the following concerning a hearsay objection to a witness' recounting his own prior statement:

Sessa also testified that he carried out an order to kill an informer Within two hours he reported the shooting to the acting boss of the Colombo Family at the latter's home . . . "Everything's okay with that thing." Ida objected only to Sessa's testifying to his single-sentence report. *The testimony was properly admitted. Sessa was testifying to what he himself had said.*

Id. at 587 (emphasis added). In *State v. Lopez*, 711 So.2d 563

(Fla.D.Ct.App. 1997), a police officer was allowed to testify to what he told an informant to do and then described what the informant did. Judge Northcutt said:

The detective merely recounted what he had instructed the informant to do, and then described what he had observed the informant do thereafter. That simply was not hearsay.

Id. at 564 (emphasis added).

Looking Cloud's prior statement to Denise Maloney was also not hearsay because it was not offered to prove the truth of the matter asserted. Looking Cloud's statement to Maloney was offered to refute charges of falsification, recent fabrication, or improper influence or motive made by Graham in his opening statement to the jury. SDCL 19-16-2(2).

C. *Denise Maloney's Testimony That Looking Cloud Told Her in 2002 That Graham Had Shot Aquash.*

Following the testimony of Looking Cloud, Denise Maloney testified:

A. . . .

And then he said he was really sorry. His voice broke again and he didn't know they were going to do this to her. That people had been discussing and talking about her being an informant and that Angie and Theda and [Graham] --

. . . .

Q. (BY MR. JACKLEY) Ms. Maloney, did there come a time where you and Mr. Looking Cloud discussed the vehicle pulling over that your mother was in?

A. Yes. He said that they had left the house in Rosebud, had gone to a location that he didn't designate specifically, and that he was told to stay at the car. And that [Graham]

and [Clarke] and my mother went up over a hill. He heard a gunshot. And [Graham] and [Clarke] came back without my mother. And they got in the car and drove away.

TTv7 75-77.

Graham moved in limine to prevent Maloney from testifying to what Looking Cloud told her in April of 2002. R522-38 (specifically R533 lines 8-19). On October 29, 2010, R561, the State asked the trial court to delay ruling on the motion. R559-62. The trial court did not issue a definitive ruling. SDCL 19-9-3 provides:

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:

...

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(Emphasis added.) See *State v. Johnson*, 2009 S.D. 67, ¶ 16, 771 N.W.2d 360, 367.

The State argued the testimony of Looking Cloud and Maloney would be used to refute recent fabrication and improper motive. TM11/8/10 111. The State also argued that the statements could be introduced in the State's case-in-chief if Graham raised recent fabrication and improper motive before cross-examination of Looking Cloud. TM11/8/10 112. The court stated "I will consider it when the time is appropriate." TM11/15/10 23.

Since there was no definitive ruling before trial, Graham was required to renew his objection to preserve his claim of error for review. SDCL 19-9-3. At trial, Graham did not object to the following question and answer:

Q. (BY MR. JACKLEY) Ms. Maloney, did there come a time where you and Mr. Looking Cloud discussed the vehicle pulling over that your mother was in?

A. Yes. He said that they had left the house in Rosebud, had gone to a location that he didn't designate specifically, and that he was told to stay at the car. And that [Graham] and [Clarke] and my mother went up over a hill. He heard a gunshot. And [Graham] and [Clarke] came back without my mother. And they got in the car and drove away.

TTv7 76. When an objection is not made, the evidence is admissible.

Steele v. Bonner, 2010 S.D. 37, ¶ 20, 782 N.W.2d 379, 384-85.

D. *Prior Consistent Statements.*

Maloney's testimony was introduced to verify Looking Cloud's testimony that he told Maloney in 2002 that Graham had shot her mother. It was not introduced to prove the truth of the matter, and, therefore, it was not hearsay.¹ SDCL 19-16-1(3).

Arlo Looking Cloud's testimony that he told Maloney in 2002 that Graham had shot her mother, and Maloney's testimony that Looking Cloud told her in 2002 that Graham had shot her mother, were prior consistent statements made to refute charges of falsification, recent fabrication, or improper influence or motive. SDCL 19-16-2 provides:

¹ The trial court gave three limiting instructions on the use of hearsay testimony. Appendices F, G, and H.

A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

...

(2) *Consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive[.]*

(Emphasis added.) Looking Cloud testified at the trial. He was subject to cross-examination. His statement to Maloney, that Graham shot Aquash and that Looking Cloud and Clarke were present, was consistent with his testimony at trial that Graham shot Aquash. Looking Cloud testified on direct as follows:

Q. When she [Clarke] stopped, what took place?

A. [Graham] got out and he went in the back.

Q. And what did [Graham] do in the back?

A. He got Annie Mae and he walked towards the side.

...

Q. Where did you guys go?

A. I proceeded to follow [Graham].

Q. What did you see when you were right behind [Graham]?

A. *I see him standing with Anna Mae and then I seen him shoot her.*

TTv6 191 (emphasis added).

The testimony was offered to rebut an express or implied charge of recent fabrication or improper influence or motive against Looking Cloud.

In his opening statement, Graham's attorney suggested Looking Cloud had recently fabricated his story that Graham shot Aquash and that Looking Cloud had an improper motive:

MR. MURPHY: . . . Arlo Looking Cloud in 2004 was convicted of the murder of Anna Mae Aquash. He was sentenced to life. Life in federal prison.

. . .

What you are going to learn, though, is that when Arlo Looking Cloud got to that point where all other options were out and he was doing a life sentence in a hellish federal prison down in Louisiana, he hired an attorney—or his family hired an attorney, a former AIM attorney. A guy who used to represent Leonard Peltier, and he said, let's make a deal. Do whatever is necessary to get me out of here.

And they came to the government. And they started the process called a Rule 35 process. Rule 35, simply put, is where somebody asks the government to file a motion, to go before the judge, and to say, Judge, reconsider your life sentence. Cut me some slack.

But the condition for a Rule 35 motion, as you will hear, is the government has to say to the judge, this guy provided us substantial assistance in some prosecution. He cooperated with us. He provided us material.

So Arlo Looking Cloud, when he starts that [sic] negotiations for the Rule 35, suddenly changes his story in every material way.

We're going to hear how in 2008, after he started negotiating with the government, he suddenly claimed to have heard my client [Graham] and Anna Mae Aquash in a bedroom having sex. Previously, in sworn statements, he said, yeah, they were in a room once together. They were playing cards and talking. But, *now, in 2008, he invents this rape allegation* that they were having sex and it was at a time when Anna Mae Aquash was a captive.

Why is that important? *Why is the 2008 date important for that change?*

Two things. *One, he's at a point where he needs to deal. But secondly, they [sic] coincides with the time that my client's charges in federal court were dismissed; and the state wanted to prosecute him here in Rapid City. So they get Arlo Looking Cloud to say John Graham raped Anna Mae Aquash in Rapid City.*

Arlo Looking Cloud was willing to change his story from a couple of old Canadian friends playing cards in a room to a rape to fit their theory of prosecution.

At the same time Arlo Looking Cloud showed that he would be willing to do anything to help them in any prosecution.

...

What you are going to hear is during the course of an interview she [Kamook Banks] had with Arlo—the first interview she had with him—*Arlo asks her one question that rings above all the other. Arlo says, Kamook, who should I implicate.* And Kamook Banks, who has a very complicated history in this case, says, only John Boy [Graham]. She tells him the person Arlo is supposed to implicate is my client.

...

I will ask you to consider whether Arlo Looking Cloud and Serle Chapman respect the oath or whether they are testifying based on other reasons.

In the end of this case, what it boils down to is . . . two guys, Arlo and Serle, who have bias and motives to lie . . . and all sorts of other reasons for slanting their testimony.

TTv3 70-78. Graham's attorney clearly suggested Looking Cloud had recently (in 2008) fabricated his story that Graham shot Aquash and clearly suggested that Looking Cloud had an improper motive (to get a sentence reduction). Looking Cloud's 2002 statement to Denise Maloney (that Graham had shot Aquash) rebutted the allegation in Graham's

opening statement to the jury (1) that Looking Cloud fabricated the statement that Graham shot Aquash in 2008 (2) for an improper motive, and (3) that Looking Cloud was a liar.

After the aspersions cast on Looking Cloud's credibility in Graham's opening statement, the State was entitled to respond in its case-in-chief:

Moreover, defense counsel in their opening statements had assaulted the credibility of D'Arco and Sessa as the testimony of murderers. The government was permitted to impeach its own witnesses to anticipate devastating cross-examination if such crimes were left unmentioned.

Bellomo, 176 F.3d at 587, *cert. denied*, 528 U.S. 987, 120 S.Ct. 447, 145 L.Ed.2d 364 (1999). In *United States v. Diaz*, 176 F.3d 52 (2d Cir. 1999), Judge Tscoucalas wrote:

Cruz argues that Cintron's out-of-court statements to Wynne and Berrios were inadmissible hearsay because they were (1) prior consistent statements that were admitted on Cintron's and Berrios' direct before Cintron was cross-examined, and thus, were not offered to rebut anything; (2) made the day after the murder and, therefore, Cintron allegedly developed a motive to fabricate the statements, because according to Cruz, Cintron participated in the murders; and (3) merely offered to bolster the credibility of Cintron's story that he was not involved in such murders. In addition, Cruz asserts that merely because the government identified a relevant non-hearsay use of Cintron's statement related by Berrios (that is, it was used to explain Berrios' actions that morning), it was still inadmissible because the jury likely considered the statement for the truth of what was stated, and thereby, this overly prejudiced Cruz. These contentions are without merit.

Cintron's statement to Wynne was not offered as a prior consistent statement. *Rather, the government offered his statement to reduce the impact of impeachment testimony later presented by Cruz. Under these circumstances, it is well established that the government can develop impeachment material during direct examination of a cooperating witness, who testifies pursuant to a proffer agreement, in order to*

anticipate questions on cross-examination that the government was concealing a relevant fact. See United States v. Cosentino, 844 F.2d 30, 33 (2d Cir.1988) (“It may sometimes be useful . . . to develop impeaching matter in direct examination of a ‘friendly’ witness in order to deprive an adversary of the psychological advantage of revealing it to the jury for the first time during cross-examination.”). Moreover, it is unlikely that Cintron's statement to Berrios had a significant effect on the jury, and thus any possible prejudice to Cruz was slight. Even if Cintron's statements were erroneously admitted, we conclude that the admission was harmless in light of the defense's cross-examinations of Wynne and Berrios. Accordingly, the district court's admission of such statements does not constitute reversible error.

Id. at 88-89 (emphasis added).

Graham's allegation in his opening statement to the jury that Looking Cloud was a liar, who fabricated his testimony in 2008, that Graham killed Aquash surfaced again in his cross-examination of Looking Cloud. As promised in Graham's opening statement, Looking Cloud was subjected to withering cross-examination by Graham's attorney. He admitted to giving different testimony about times at Dick Marshall's trial six months earlier, TTv6 234; that he hoped to get a good deal out of testifying, TTv6 234; that he had been trying to broker a deal since 1994, TTv6 235; that he had forty prior criminal convictions, twelve of which were for providing false information, TTv6 237; that he previously had charges dropped in exchange for cooperation, TTv6 238-39; that his ability to recall had been affected by drug and alcohol abuse, TTv6 252; that he had given prior inconsistent statements, TTv6 241-43; that he was threatened with continued confinement if he did not cooperate, TTv6 244-48; that he was threatened with continued imprisonment if he did not

tell law enforcement what they wanted to hear, TTV6 252; that he was told by Kamook Ecoffey to point the finger at Graham, TTV6 261-62; that he was counting on his cooperation in this case to get out of prison, TTV6 276; that he frequently lied to police officers, TTV6 286; that he changed his story to please law enforcement, TTV7 11; that he was paid for testimony, TTV7 13; that he changed his testimony during the Dick Marshall trial, TTV7 16; that in a way Graham was his meal ticket out of federal prison, TTV7 17. He also admitted that his motion for reduction of sentence in federal court (his Rule 35 motion) is dependent on what he says against Graham. TTV7 17.

In view of the express charge of recent fabrication or improper influence or motive in Graham's opening statement, and the eventual delivery on Graham's threatened impeachment on cross-examination, the State was entitled to limit the damage by using prior consistent statements made by Looking Cloud in its case-in-chief.

III and IV

LEONARD PELTIER'S THREAT AT FARMINGTON, TO KILL AQUASH BECAUSE SHE WAS A GOVERNMENT INFORMANT, AND PELTIER'S STATEMENT THAT HE SHOT AN F.B.I. AGENT WERE NOT OFFERED TO PROVE THE TRUTH OF THE MATTERS AND WERE NOT HEARSAY. THE THREAT AND THE INCRIMINATING STATEMENT WERE RELEVANT TO PROVE THAT AIM HAD A MOTIVE TO MURDER AQUASH TO SILENCE HER AS AN INFORMANT AND TO SILENCE HER BECAUSE PELTIER HAD UTTERED THE INCRIMINATING STATEMENT IN HER PRESENCE.

Issues III and IV are discussed together because they both involve statements by Leonard Peltier. Graham contends Peltier's statements are

inadmissible hearsay and violations of the confrontation clause of the Sixth Amendment to the United States Constitution.

A. *Standard of Review.*

Admissibility of evidence is within the sound discretion of the trial court. The trial court has broad discretion in balancing the probative value of evidence against its prejudicial effect and its ruling will not be disturbed on appeal absent abuse of discretion. *Schaffer v. Edward D. Jones & Co.*, 521 N.W.2d 921, 925 (S.D. 1994); *Time Out, Inc., v. Karras*, 469 N.W.2d 380, 384 (S.D. 1991). An abuse of discretion refers to a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence. *Harter v. Plains Ins. Co., Inc.*, 1998 S.D. 59, ¶ 13, 579 N.W.2d 625, 629.

Alvine v. Mercedes-Benz of North America, 2001 S.D. 3, ¶ 11, 620 N.W.2d 608, 611. See *State v. Mattson*, 2005 S.D. 71, ¶ 13, 698 N.W.2d 538, 544.

B. *Leonard Peltier's Threat at Farmington.*

During trial, Troy Lynn Yellow Wood testified as follows concerning Leonard Peltier's threat to kill Aquash at Farmington, New Mexico:

A. She said that people were—it seems like there was some kind of—a little—meeting of certain people that were accusing her of being an informant. And that—she had to defend herself. And she told me that—that Leonard Peltier was there and that he said, you know, I want to hear it from the horse's mouth, Anna Mae. I want to know if you are doing what they are saying that you are doing. Are you giving us up? Are you doing this?

And she said that she just—she said she was really afraid because he had a gun and she said he held the gun to her head and she told him if you believe that about me, then pull the trigger. But either you defend me or you kill me because I am tired of everybody doing this to me. I am tired of being the target of your—all this nonsense. I am not guilty.

And then she said he just kind of laughed and he—he just said, I never believed what everybody else said anyway. And he just laughed it off. And she said but it was really frightful. It was really frightening to her and it was frightful.

TTv4 111-12.

C. *Peltier's Threat at Farmington Was Not Hearsay.*

A theory of the State's case was that an order for Aquash's murder was issued by members of AIM. R393. Graham was a member of AIM. The trial court denied Graham's motion in limine because Peltier's threat was "relevant to one of the proffered motives for Aquash's murder—that she was widely suspected to be an informant by members of the American Indian Movement ('AIM'), including Peltier." R392. Evidence that Aquash was rumored to be an informant was probative of Graham's motive to kill her. R392; *United States v. Looking Cloud*, 419 F.3d 781 (8th Cir. 2005). The trial court also noted that the statement was not introduced to prove the truth of the matter asserted—that Aquash was or was not an informant. R393. Judge Gibson noted the following testimony about rumors that Aquash was a government informant in *Looking Cloud*:

Here, the evidence that Aquash was rumored to be an informant was not offered for the truth of the matter asserted. It was not important for the jury to determine whether Aquash was actually an informant. Rather, the rumor's value was in helping the jury understand Looking Cloud's alleged motive for killing her. It only mattered whether Looking Cloud had heard or believed that Aquash was an informant, not whether she was an informant. The informant rumors were therefore not hearsay and were relevant to Looking Cloud's guilt. The informant rumors helped the jury understand the context and circumstances of the murder.

Id. at 788.

SDCL 19-16-1(3) provides:

(3) "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

State v. Armstrong, 2010 S.D. 94, ¶ 21, 793 N.W.2d 6, 13. As in *Looking Cloud*, Peltier's threat was not offered to prove the truth of the statement that Aquash was a government informant. It was offered to prove that AIM members, including Graham, thought she was an informant and that AIM ordered her death to silence her. Therefore, it was not hearsay.

D. *Peltier's Statement That He Shot an F.B.I. Agent.*

Darlene "Kamook" Nichols Ecoffey testified at trial as follows:

Q. Who, again, was present for the discussion involving Leonard Peltier?

A. It would be myself, Dennis Banks, Kenny Loud Hawk, my sister Bernie Nichols, and Annie Mae, and Leonard.

Q. Did you witness or did you see—did you witness and see Leonard Peltier make what appears to be incriminating statements?

A. Yes, I did.

Q. Would you please look to the jury and to the best you can describe what he said and any hand movements he said [sic] when he made it?

A. He held his hand like this (indicating). He was standing—there was a little table. We were sitting at the table. He was standing by the table in the motor home. He held his hand like this (indicating) and he said, that motherfucker was begging for his life but I shot him anyway.

Q. Kamook, who was he referring to?

A. He was talking about the FBI agents.

TTv6 7-8.

E. *Peltier's Statement That He Shot an F.B.I. Agent Was Not Hearsay.*

Peltier's statement that he shot an F.B.I. agent was not offered to prove the truth of the statement: that Peltier shot an F.B.I. agent. It was offered to prove that AIM members had a motive to silence Aquash because Peltier had uttered the incriminating statement in Aquash's presence. TTv5 109; R392. Therefore it was not hearsay.

F. *Confrontation Clause.*

Graham also claims introduction of Peltier's threat at Farmington and Peltier's statement that he shot an F.B.I. agent violated the Sixth Amendment confrontation clause because there was no evidence that Peltier was unavailable to testify. Appellant's Brief at 28 and 34-35. A statement that is not hearsay does not violate the confrontation clause. *Michigan v. Bryant*, ___ U.S. ___, 131 S.Ct. 1143, 1160 n.11, 179 L.Ed.2d 93 (2011); *Crawford v. Washington*, 541 U.S. 36, 60 n.9, 124 S.Ct. 1354, 1369 n.9, 158 L.Ed.2d 177 (2004) ("The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. See *Tennessee v. Street*, 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985)"); *United States v. Yielding*, ___ F.3d ___, 2011 WL 4578434 *4 (8th Cir. 2011) ("Because the statement was not used to establish the truth of the matter asserted, the evidence was not hearsay, and its admission also did not violate the Confrontation Clause.").

THE EVIDENCE WAS SUFFICIENT TO CONVICT GRAHAM
OF FELONY MURDER.

Graham contends the evidence was not sufficient to support his conviction of felony murder.

A. *Standard of Review.*

The following standard of review for a challenge to sufficiency of the evidence was recently set forth by Justice Severson:

This Court must determine “whether there is evidence in the record which, if believed by the jury, is sufficient to sustain a finding of guilt beyond a reasonable doubt.” *Mulligan*, 2007 S.D. 67, ¶ 7, 736 N.W.2d at 812-13 (citation omitted). Moreover, “the jury is . . . the exclusive judge of the credibility of the witnesses and the weight of the evidence.” *Id.* (citation omitted). Thus, “[a] guilty verdict will not be set aside if the state's evidence and all favorable inferences that can be drawn therefrom support a rational theory of guilt.” *Id.* (citation omitted). In addition, we must “consider all the evidence the [jury] had before it, including any evidence that is later determined to be inadmissible.” See *Frazier*, 2001 S.D. 19, ¶ 45, 622 N.W.2d at 261. Therefore, we review all the evidence admitted at trial.

State v. Johnson, 2009 S.D. 67, ¶ 29, 771 N.W.2d at 371.

B. *The Evidence.*

The following evidence is sufficient to find Graham guilty of felony murder.

Roger Amiotte found a body on his ranch south of Kadoka, South Dakota, on February 24, 1976, TTV3 81, at the bottom of a thirty foot cliff, TTV3 83, about 150 feet from Highway 73, TTV3, in an area not visible from the road. TTV3 92. The deceased was later identified as Aquash.

TTv3 106. Aquash had been shot in the head, TTv3 113, which caused her death. TTv3 115. Aquash was killed by a .32 caliber bullet fired from a revolver. TTv4 202.

In the summer of 1975, Aquash, an AIM member from Nova Scotia, was arrested in a tent full of explosives at Al Runnings' place near Crow Dog's Paradise on the Rosebud Reservation. Aquash was charged in federal court in Pierre. TTv4 203-14. Aquash was rumored to be a government informant. TTv4 111. Aquash was released on bond pending her jury trial in Pierre the next day, November 24, 1975. TTv4 210, 212. Aquash did not appear for her trial on the 24th and her lawyer, Robert Riter of Pierre, never saw her again. TTv4 214. On November 24, 1975, TTv3 190, Raymond Charles Hand Boy went to Pierre with his wife, Evelyn Bordeaux, where he picked up Aquash and took her to Denver. TTv3 192-94.

Angie Janis, who was a member of AIM, lived with her boyfriend, John Graham, TTv4 69, and worked at the Native American Rights Fund (NARF) in Boulder. Thelma Rios told Janis that Aquash needed to be taken to Rapid City because she was an informant. TTv4 70. A meeting about Aquash, TTv4 72, was held at Troy Lynn Yellow Wood's house in Denver, where Troy Lynn, Theda Clarke, John Boy [Graham], Aquash, and Arlo Looking Cloud were present. TTv4 71. Aquash was held in the basement during the meeting. TTv4 72. Clarke, Looking Cloud and Graham took Aquash, with her hands tied, away from Troy Lynn's house,

TTv4 72-73, to take Aquash to Rapid City. TTv4 73. Aquash, Clarke, Graham and Looking Cloud got in a car and left; Graham eventually came back but Aquash did not. TTv4 74.

Theda Clarke brought Aquash to Troy Lynn Yellow Wood's house in Denver around Thanksgiving in 1975. TTv4 107-09. Aquash told Troy Lynn that Aquash was being called an informant. TTv4 110-11. Aquash also told Troy Lynn that Leonard Peltier threatened to kill Aquash at Farmington, New Mexico. TTv4 111-12. Clarke and Graham showed up at Troy Lynn's house, TTv4 114, and Aquash was nervous when she saw who was there. TTv4 115. Troy Lynn said she heard Ernesto Vigil, who was talking with the others, say "I don't know what you guys do about snitches, but this is how we handle it," and saw him draw his finger across his throat. TTv4 116.

Troy Lynn tried to get someone to assist her in protecting Aquash. Troy Lynn called the police and Angie Janis pushed the phone down and told her not to do that. TTv4 120. Troy Lynn called the AIM house and got George Palfy. TTv4 118. Palfy received the call. TTv4 235-36. Palfy came to Troy Lynn's house. TTv4 118-19. Clarke told Palfy that national AIM wanted Aquash in Rapid City to confront her about being an informant. TTv4 119. Palfy went into the basement of Troy Lynn's house, talked to Aquash about the informant allegations, and Aquash said she was okay and declined Palfy's offer to take her somewhere. TTv4 240. Graham was there. TTv4 238. When Palfy went back upstairs, several

people were talking in the kitchen and Ernesto Vigil said “well, what we do with snitches is take them out to the country and get rid of them.” TTV4 241. Vigil made “the throat slit gesture.” TTV4 241. Then Aquash was brought upstairs and taken out to Clarke’s red Pinto station wagon. TTV4 242-43. Aquash’s hands were tied. Aquash told Palfy “it’s okay. Just get it over with. Let’s go.” TTV4 243. Then Aquash was placed in the back of the car, Clarke drove, Graham was in the front seat with Clarke, Clarke’s daughter was in the middle seat and Aquash was in the luggage area. TTV4 244 and 265. Palfy understood Aquash was being taken to Rapid City because she was accused of being an informant. TTV4 262-63.

Aquash told Troy Lynn “if they take me from here, you will never see me alive again.” TTV4 116-17. Clarke and Graham marched Aquash down the hallway, flanking her, TTV4 121, and Clarke cursed Troy Lynn and told her to get out of the way and said Troy Lynn “was F’ing [sic] stupid.” TTV4 117. Looking Cloud showed up when Graham and Clarke put Aquash in a red hatchback car. TTV4 121-22. Aquash sat in the back with her arms around her knees and a defeated look. TTV4 122.

Around Thanksgiving time in 1975, Candy Hamilton went to the Wounded Knee Legal Defense Offense Committee house in Rapid City. TTV5 5. Hamilton saw Aquash there. TTV5 12. Aquash had been crying and looked sad, serious. TTV5 12. Aquash went into a room with AIM members. TTV5 14. Hamilton never saw Aquash again. TTV5 15. Hamilton argued with Clarke, Lorelei Means, and Bruce Ellison about

Aquash and told them she would never believe that Aquash was a snitch. TTV5 15-16. Aquash was not free to leave. TTV5 16.

In 1975, Cleo Gates was married to Dick Marshall. TTV5 70. Late at night, Theda [Clarke], John Boy [Graham], Arlo Looking Cloud and Aquash came to the Marshalls' house. TTV5 72. Clarke, Graham and Looking Cloud walked Aquash to a chair and sat her down. TTV5 72. One of them guided Aquash in and had a hold on the back of Aquash's arm. TTV5 77. Clarke, Graham and Looking Cloud went into the bedroom with Dick Marshall. TTV5 72-73. Marshall came out of the bedroom and he and Gates discussed keeping Aquash at their home, and Marshall said they would maybe tie her up and keep her in the basement. TTV5 74. Gates refused because she did not like what was going on. TTV5 74-75. Gates gave Aquash a pair of jeans and a T-shirt. TTV5 78. Then Clarke, Graham, Looking Cloud, and Aquash left. TTV5 78. When Gates learned of Aquash's death, she felt terrible because "this is when that happened to her." TTV5 78-79.

Darlene Nichols Ecoffey, known as Kamook, was involved in AIM in 1975. TTV5 94. Kamook lived with Dennis Banks for seventeen years, from 1972 to 1989. TTV5 95. Kamook knew Aquash. TTV5 95. Kamook knew Clarke and knew Graham because he was always with Clarke. TTV5 97. Kamook also knew Arlo Looking Cloud and Troy Lynn Yellow Wood. TTV5 97-98. Kamook knew that there was concern in 1975 that Aquash was an informant. TTV5 98. When Kamook and Aquash were in

jail in Oregon, Aquash told her about the incident with Leonard Peltier at Farmington, New Mexico. TTV5 104-05. Aquash appeared to be nervous and upset about the incident. TTV5 104. From Farmington on, Aquash was suspected of being an informant and a lot of people did not trust her. TTV6 31.

Kamook testified that she was riding in a motor home with Dennis Banks, Kenny Loud Hawk, her sister Bernie Nichols, Aquash, and Leonard Peltier. Peltier made what appeared to be incriminating statements. Peltier was standing by the table in the motor home. He held his hand like this [sic] and he said that motherfucker was begging for his life but I shot him anyway, referring to the FBI agents. TTV6 7-8. This established that Aquash heard the incriminating statement and that AIM had a motive to have her killed to silence her. TTV5 109.

Dennis Banks called Kamook on February 24, 1975, the day Aquash's body was found by Roger Amiotte, and told Kamook that they had found Annie Mae, which was two weeks before the body was identified as Aquash by the authorities. TTV5 125-26.

Arlo Looking Cloud was convicted of aiding and abetting in the murder of Aquash in federal court. TTV6 187. Looking Cloud agreed to testify because the government would inform the judge of his cooperation and he wanted a sentence reduction. TTV6 188.

Prior to the murder, Looking Cloud had gone to Troy Lynn Yellow Wood's house in Denver, looking for a friend to party with. TTV6 195-96.

Clarke asked him to help her drive to Rapid City. TTV6 196. Looking Cloud went into the basement of Troy Lynn's house and saw Graham and Aquash. TTV6 197. Graham tied Aquash's hands in front of her. TTV6 199. Aquash was placed in the hatchback of Clarke's red Pinto and Looking Cloud drove with Clarke in the front and Graham in the back seat. TTV6 199-200. The car went to Cheyenne and then Rapid City without a stop. TTV6 200-02. They went to Thelma Rios' apartment which was empty. TTV6 202.

Looking Cloud, Clarke, Graham, and Aquash next went to Sharp's Corner and then to Rosebud. TTV6 208. They then went to Dick Marshall's house in Allen. TTV6 213. Clarke went into a bedroom with Marshall. TTV6 213. Clarke then asked Looking Cloud and Graham to go into the bedroom. TTV6 214. Marshall handed Clarke a note and then pulled a box out of the bottom drawer and handed a pistol and a box of shells to Clarke. TTV6 214-16. Looking Cloud then drove them to Potato Creek where they stopped for gas. TTV6 218. When they saw a police car, Clarke handed the gun to Looking Cloud. When the police car turned another way, Clarke asked him to return the gun. TTV6 219. The gun was a silver revolver with a red handle. TTV6 219-20. They went to Wambli [sic] where Clarke took over driving, and they went on. TTV6 220. They headed north toward Kadoka. TTV6 221.

Clarke was driving, Graham was in front on the passenger side, Looking Cloud was in the back seat, and Aquash was back in the

hatchback. TTV6 188-89. Clarke stopped the car south of Kadoka along the highway. Graham got out of the car and then got Aquash. Clarke told Looking Cloud to go with Graham. TTV6 188-91. Looking Cloud followed Graham and Aquash. TTV6 191. Looking Cloud testified: "I see [Graham] standing with Anna Mae and then I seen him shoot her." TTV6 191. Aquash sounded like she was praying before Graham shot her. TTV6 192. Graham was beside Aquash when he shot her. TTV6 192. Aquash fell over the bank to the bottom of the cliff. TTV6 192. Looking Cloud asked for the gun and shot the rest of the rounds because he was afraid he would be next. TTV6 193. After Aquash's murder, TTV6 194, they went back to Denver. TTV6 222. On the way back to Denver, Clarke said "if anyone questions or says anything that she done it." TTV6 230.

Looking Cloud identified Graham in open court. TTV6 193.

In 2003, Looking Cloud called Aquash's daughter, TTV6 222, and told her "that John Boy [Graham] shot her and there was Theda and I, and I was sorry." TTV6 224. Denise Maloney, Aquash's daughter, testified that Looking Cloud called her and "He said that they had left the house in Rosebud, had gone to a location that he didn't designate specifically, and that he was told to stay at the car. And that John Boy [Graham] and Theda [Clarke] and my mother went up over a hill. He heard a gunshot. And John Boy and Theda came back without my mother. And they got in the car and drove away." TTV76 76.

In 1995, Looking Cloud told Robert Ecoffey that Graham got Aquash out of the car at the bluff where she was murdered and that Graham shot Aquash. In 2003, Looking Cloud again told Ecoffey that Graham got Aquash out of the car at the bluff where she was murdered and that Graham shot Aquash. In 2000, Looking Cloud told Troy Lynn Yellow Wood and Kamook Nichols Ecoffey that Graham got Aquash out of the car at the bluff where she was murdered and that Graham shot Aquash. In 2008, Looking Cloud told a grand jury that Graham got Aquash out of the car at the bluff where she was murdered and that Graham shot Aquash. TTV7 31-33. At the Dick Marshall trial in 2010, Looking Cloud testified that Graham shot Aquash. TTV7 33.

Former U.S. Marshal for South Dakota (and former BIA criminal investigator and current BIA superintendent of the Pine Ridge Reservation) Robert Ecoffey went to Whitehorse in the Yukon, Canada, on April 20, 1994, to meet with Graham. Ecoffey told Graham what he knew about Aquash's murder. "Graham got real nervous. His lips started quivering. He had a cigarette in his hand and he started shaking this like and he was trying to smoke." TTV7 104. Later, after Ecoffey laid out the information he had, Graham said "well, he said, looks like you guys have my future planned out for me. You have your case." TTV7 126, 216. Graham also said "well, I'm ready to leave this place anyway. . . . I will probably spend the rest of my life in jail." TTV7 130, 218. Ecoffey showed Graham the photos of Aquash's body at the scene when she was found. Graham

“glanced at the photos real quick. He took a look and then he turned away, he looked up in the air, and he turned back. His eyes were all filled with tears as if he was going to cry.” TTV7 128, 217-18. Later Graham admitted “okay, okay. I was there. I drove the car. I helped take her back to Rapid City.” TTV7 131, 219. Graham repeated that he drove but would not give any other names. TTV7 132, 133, 219. Graham also admitted they went to a safe house in Rapid City. TTV7 133. Graham said they took the back roads to get back to the reservation in South Dakota. TTV7 133. Ecoffey observed that Graham was very nervous, trembling, and shaking, almost to the point where the table was rocking. TTV7 135-36, 221. Graham denied killing Aquash but his legs were shaking heavily. TTV7 179.

Graham also argues that Arlo Looking Cloud’s accomplice testimony was not corroborated. The following evidence corroborated Looking Cloud’s testimony. First, Looking Cloud testified to his part in the murder of Aquash. Looking Cloud’s conviction for aiding and abetting in the murder of Aquash corroborates his testimony about his part in the murder. TTV6 187. Second, Looking Cloud testified that Graham tied Aquash’s hands when she was taken from Troy Lynn Yellow Wood’s house in Denver. TTV6 199. Angie Begay corroborated Looking Cloud’s testimony that Aquash was tied up in Troy Lynn Yellow Wood’s basement in Denver. TTV4 72-73. George Palfy testified that Aquash’s hands were tied. TTV4 243. Third, Looking Cloud testified that when they left Troy

Lynn Yellow Wood's house in Denver, they put Aquash in the hatchback of a red Pinto station wagon. TTV6 188-89. George Palfy said Aquash was brought upstairs and taken out to Clarke's red Pinto station wagon. TTV4 242-43. Troy Lynn Yellow Wood testified that Aquash was placed in the back of the car, Clarke drove, Graham was in the front seat with Clarke, Clarke's daughter was in the middle seat and Aquash was in the luggage area. TTV4 121-22; TTV4 244, 265. Fourth, Graham himself corroborated Looking Cloud's testimony that they drove from Denver to Rapid City with Aquash in the back. Graham admitted "okay, okay. I was there. I drove the car. I helped take her back to Rapid City." TTV7 131, 219. Graham repeated that he drove but would not give any other names. TTV7 132-33; TTV7 219. In addition, Graham admitted in a video clip from a media interview that he drove Aquash from Denver to Pine Ridge. Exhibit 51. Fifth, Looking Cloud testified that they went to Thelma Rios' apartment in Rapid City. TTV6 200-02. Thelma Rios has been held responsible for her actions. TTV9 78. Around Thanksgiving in 1975, Candy Hamilton saw Aquash in Rapid City at the Wounded Knee Legal Defense Offense Committee (WKLDOC) house. TTV5 5; TTV5 12. Aquash had been crying and looked sad, serious. TTV5 12. Aquash went into a room with AIM members. TTV5 14. Hamilton never saw Aquash again. TTV5 15. Sixth, Looking Cloud testified that he told Aquash's daughter, Denise Maloney, that Graham shot Aquash. TTV6 224. Denise Maloney corroborated Looking Cloud's testimony. TTV7 75-77.

“[T]here is no requirement that every material fact testified to by the accomplice be corroborated.” *State v. Olhausen*, 1998 S.D. 120, ¶ 10, 587 N.W.2d 715, 718. “Whether evidence corroborates an accomplice's version of the facts is a question for the jury.” *Id.* The jury chose to believe the State’s evidence and found Graham guilty of felony murder. The evidence was sufficient to sustain a finding of guilt beyond a reasonable doubt. *State v. Mulligan*, 2007 S.D. 67, ¶ 7, 736 N.W.2d 808, 812-13.

VI

GRAHAM’S LIFE SENTENCE WITHOUT PAROLE WAS VALID, LEGAL, AND CONSTITUTIONAL.

Graham contends his life sentence without parole is illegal, invalid, and unconstitutional.

A. *The Statutes.*

The jury found Graham guilty of Murder While in the Commission of a Felony. R806. In 1975, SDCL 22-16-9 provided:

Homicide is murder when perpetrated without any design to effect death by a person engaged in the commission of any felony.

In 1975, SDCL 22-16-12 provided:

Every person convicted of murder shall be sentenced to death or to hard labor in the state penitentiary for life.

B. *The Sentence.*

Graham was sentenced to life in prison without parole. TS 48; R817; Appendix C.

C. *Standard of Review.*

Sentencing is reviewed for an abuse of discretion. *State v. Brim*, 2010 S.D. 74, ¶ 20, 789 N.W.2d 80, 87. Determination of whether a sentence is cruel and unusual under the state and federal constitutions is a question of law reviewed de novo. *State v. Berhanu*, 2006 S.D. 94, ¶ 7, 724 N.W.2d 181, 183. The standard of review of sentences under both the state and federal constitutional provisions is the same. *State v. Pugh*, 2002 S.D. 16, ¶ 19, 640 N.W.2d 79, 85. The standard for review of proportionality of a sentence is:

[W]hen a sentence is challenged on constitutional grounds as being cruel and unusual, we apply the proportionality standard from *State v. Bonner*, 1998 S.D. 30, 577 N.W.2d 575. See *State v. Piper*, 2006 S.D. 1, ¶ 72, 709 N.W.2d 782, 810-11 (citing *Bonner*, 1998 S.D. 30, ¶ 17, 577 N.W.2d at 580).

State v. Overbey, 2010 S.D. 78, ¶ 13, 790 N.W.2d 35, 40.

D. *Life Without Parole.*

Graham claims that when Aquash was murdered in 1975, inmates sentenced to life were eligible for parole. Graham bases his claim on the 1978 Sess. Laws, ch. 186, § 21, which added language that a person with a life sentence was not eligible for parole. Graham then relies on SDCL 23-60-4 (repealed 1978 Sess. Laws, ch. 186, § 44). Before it was repealed, SDCL 23-60-4 provided:

Whenever any person becomes an inmate of the Penitentiary it shall be the duty of the Department to immediately establish in their record the date when such inmate will be eligible to parole.

At the time Graham murdered Aquash in 1975 and at the time Graham was sentenced, life sentences were without parole except for those persons sentenced between July 1, 1911, and July 1, 1913. *Brim v. South Dakota Bd. of Pardons and Paroles*, 1997 S.D. 48, ¶¶ 4-18 and 21-22, 563 N.W.2d 812, 812-17. In 1975, the parole statutes provided that an inmate was eligible for parole after serving one-fourth of the sentence if convicted of a first felony, SDCL 23-60-6, after serving one half of the sentence if convicted of a second felony, SDCL 23-60-8, and after serving three-fourths of the sentence if convicted of a third or subsequent felony. SDCL 23-60-9. A person serving a life sentence was not entitled to good time in 1975. *Brim* at ¶ 16, 563 N.W.2d at 815-16. A parole date could not be calculated for a person with a life sentence because it was impossible to calculate one-fourth, one half, or three-fourths of life. *Brim* at ¶¶ 18-19, 563 N.W.2d at 816-17.

Graham has no federal constitutional right to parole. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7, 99 S.Ct. 2100, 2104, 60 L.Ed.2d 668 (1979). Under the South Dakota discretionary parole system (old system) which applies to Graham, Graham has no liberty interest in parole. *Dace v. Mickelson*, 816 F.2d 1277, 1280 (8th Cir. 1987). Under state law, Graham has no right to parole. *Castaneira v. Ligtenberg*, 2006 WL 571985, *3 (D.S.D. March 7, 2006); *Brim*, 1997 S.D. 48, ¶¶ 4-18 and 21-22, 563 N.W.2d at 812-17. *See, Dace*, 816 F.2d at 1280. Since

Graham has no constitutional or statutory right to parole, Graham's sentence to life without parole is valid, legal and constitutional.

E. *Proportionality.*

A life sentence for felony murder in connection with kidnapping is not disproportionate. *State v. Frazier*, 2002 S.D. 66, ¶¶ 17-24, 646 N.W.2d 744, 750-53. In *Frazier*, the South Dakota Supreme Court quoted United Supreme Court Justice Kennedy (concurring) as follows:

[T]he crime of felony murder without specific intent to kill . . . [is] a crime for which "no sentence of imprisonment would be disproportionate."

Id. at ¶ 19, 646 N.W.2d at 750; *Harmelin v. Michigan*, 501 U.S. 957, 1004, 111 S.Ct. 2680, 2706, 115 L.Ed.2d 836, 871 (1991) (quoting *Solem v. Helm*, 463 U.S. 277, 290 n.15, 103 S.Ct. 3001, 3009, 77 L.Ed.2d 637, 649 (1983)).

Graham's sentence to life without parole was legal, valid and proportionate to felony murder.

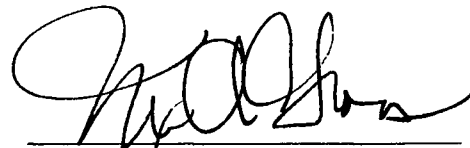
CONCLUSION

I. Canada consented to Graham's prosecution in state court for felony murder while in the commission of kidnapping. II. In his opening statement Graham charged Looking Cloud with recent fabrication and improper influence or motive and delivered on his impeachment on cross-examination. The State was entitled to limit the damage in the State's case-in-chief by using Looking Cloud's prior consistent statements made to Denise Maloney in 2002 that Graham killed Aquash. III & IV. Leonard

Peltier's threat to kill Aquash and his statement that he killed an F.B.I. agent were not offered to prove the truth of the statements, were not hearsay, and did not violate the confrontation clause of the Sixth Amendment. V. The evidence was sufficient to sustain a finding of guilt beyond a reasonable doubt. VI. Graham's life sentence without parole was legal, valid and proportionate to felony murder. The conviction and sentence should be affirmed.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read 'Max A. Gors', written over a horizontal line.

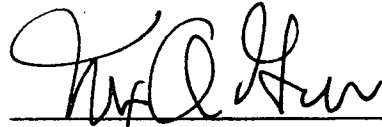
Max A. Gors
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Telephone: (605) 773-3215

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 9,844 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

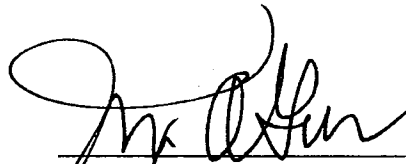
Dated this 9th day of November, 2011.



Max A. Gors
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of Appellee's Brief in the matter of *State of South Dakota v. John Graham* were served upon John R. Murphy, 328 East New York Street, Suite 1, Rapid City, South Dakota 57701, by enclosing the same in envelope with first class postage, prepaid and affixed thereto, and depositing said envelopes in the United States mail at Pierre, South Dakota, on this 9th day of November, 2011.



Max A. Gors
Assistant Attorney General



**Consent to Waiver of Specialty
Article 12(1)(iii) of the Treaty on Extradition
between Canada and the United States of America**

United States of America v. John Graham

Having regard to the request from the United States of America dated December 18, 2009, (Diplomatic Note No. 852) and to the provisions of sub-paragraph 12(1)(iii) of the Treaty on Extradition between Canada and the United States of America, I hereby consent to the detention, prosecution and, if he is convicted, punishment of John Graham with respect to the offences which are set forth in the Indictment, No. 09-3953, filed on September 9, 2009, in the Seventh Circuit Court, County of Pennington, namely:

- Count 1:** Murder while in the Commission of any felony namely kidnapping, in violation of South Dakota Codified Law 22-16-9 and 22-19-1; and
- Count 3:** Premeditated Murder, in violation of South Dakota Codified Law 22-16-4.

Dated at

Ottawa On., this *February 7th*, 2010

Minister of Justice