

APPEAL NO. 25899

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IN THE SUPREME COURT OF THE  
STATE OF SOUTH DAKOTA

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STATE OF SOUTH DAKOTA  
V.  
JOHN GRAHAM

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

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HONORABLE JOHN J. DELANEY, SR.  
Circuit Court Judge of the Seventh Judicial Circuit

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APPELLANT'S BRIEF

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## I. PRELIMINARY STATEMENT

John Graham was convicted of first degree felony murder for the killing of Anna Mae Aquash. Graham was acquitted of first degree premeditated murder. Graham was sentenced to life without parole.

The following abbreviations are used in this brief: SR for settled record; AT for arraignment transcript; MT for motions hearing transcript; JT for jury trial transcript; ST for sentencing transcript; Exh for exhibit; and, APP for the appendix. Parties are cited by last name, except that Darlene Kamook Ecoffey is cited as “Kamook” to avoid confusion with another witness with the same last name.

Graham requests oral argument based on the unique nature of the case and the severity of the sentence imposed.

## II. JURISDICTIONAL STATEMENT

This Court has jurisdiction to consider Graham’s appeal pursuant to SDCL 15-26A-3(1). The circuit court issued a judgment of conviction finding Graham guilty of first degree felony murder and imposed a life sentence.

Graham’s appeal is timely pursuant to SDCL 15-26A-6. The circuit court filed its judgment of conviction on January 31, 2011. Graham filed

his notice of appeal on February 7, 2011.

### III. STATEMENT OF LEGAL ISSUES

1. Was Graham was properly tried in the state courts of South Dakota for felony murder when he was extradited to the United States to face a federal premeditated murder charge?

*The circuit court ruled that Graham was subject to prosecution in state court for felony murder.*

Authorities:

Johnson v. Browne, 205 U.S. 309, 27 S.Ct. 539 (1907)

2. Were Arlo Looking Cloud's out of court statements to Denise Maloney that implicated Graham admissible?

*The circuit court ruled that these statements were admissible.*

Authorities:

SDCL 19-16-2

SDCL 19-16-32

3. Was Leonard Peltier's threatening conduct toward Aquash admissible at Graham's trial?

*The circuit court ruled that this evidence was admissible.*

Authorities:

Shepard v. United States, 290 U.S. 96, 54 S.Ct. 22 (1933)

SDCL 19-16-1

SDCL 19-16-7

4. Was Peltier's confession to a separate murder admissible at Graham's trial?

*The circuit court ruled that this evidence was admissible.*

Authorities:

Shepard v. United States, 290 U.S. 96, 54 S.Ct. 22 (1933)

5. Was there sufficient evidence to sustain a finding of guilt for felony murder?

*The circuit court ruled that sufficient evidence existed.*

Authorities:

State v. Rough Surface, 440 N.W.2d 746 (S.D. 1989)  
SDCL 23A-22-8

6. Was Graham's life without parole sentence authorized by statute and constitutional under the Eighth Amendment?

*This circuit court determined that a life without parole sentence was authorized by statute and was not cruel and unusual.*

Authorities:

Brim v. South Dakota Bd. of Pardons & Paroles, 1997 SD 48,  
563 N.W.2d 812  
Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368 (1982)  
Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432 (1980)

#### IV. STATEMENT OF THE CASE

Graham's case began in federal court. In 2003, he was charged in federal court with premeditated murder. He and Arlo Looking Cloud were

charged with killing Anna Mae Aquash in 1975.

Graham was extradited to the United States from Canada in 2007.

Looking Cloud had already been convicted of the crime in 2004. The case against Graham was dismissed in 2008 based on defects in the indictment.

United States v. John Graham, 585 F.Supp.2d 1144 (D.S.D. 2008).

Graham was re-indicted in federal court. He was charged with Vine Richard Marshall as a co-defendant. In this indictment, Graham was charged with premeditated murder under three different theories.<sup>1</sup> In 2009, these charges were dismissed for failing to properly charge an offense.

United States v. John Graham, 2009 WL 1173039 (D.S.D. 2009). Marshall stood trial in federal court and was acquitted in 2010.

The dismissals of Graham's indictments were consolidated for appeal. The Eighth Circuit Court of Appeals affirmed the dismissals and refused to reconsider the matter. United States v. John Graham, 572 F.3d 954 (8<sup>th</sup> Cir.), reh'g and reh'g en banc denied, 598 F.3d 930 (8<sup>th</sup> Cir. 2009).

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The crime alleged remained the same. The government changed the indictment to allege three different jurisdictional scenarios (Graham charged as an Indian, Aquash charged as an Indian, Graham charged as aiding and abetting an Indian) to try to cure the previously identified defects in the indictment.

After dismissal of the federal cases, Graham was indicted in Pennington County for three counts of murder: Count I, felony murder (kidnaping), SDCL 22-16-9, 22-19-1; Count II, felony murder (rape), SDCL 22-16-9, 22-22-1(1) & (2); and, Count III, premeditated first degree murder, SDCL 22-16-4. SR 001. The Honorable John J. Delaney, Sr., presided.

The State elected not to proceed on Count II of the Indictment. The case was tried to a jury for eight days. The jury deliberated for two days. Graham was found guilty of Count I and acquitted of Count III. Graham was sentenced to life in prison without parole.

#### V. SUMMARY OF FACTS

Aquash's death was investigated for 30 years by multiple law enforcement agencies. Discovery included over 6,000 documents, approximately 100 audio and video recordings, many photographs, and the transcripts of two other jury trials involving Graham's former co-defendants.

Below is a summary of the facts. In the subsections that follow, Graham outlines specific facts with citations to the record that relate to the issues on appeal.

Anna Mae Aquash was a high level operative within the South

Dakota wing of the American Indian Movement (AIM) in the 1970s. She was romantically linked to Dennis Banks, an AIM founder. She was involved in making and placing bombs, the possession and transportation of explosives and illegal guns, and the harboring of fugitives.

Graham was a nineteen year old AIM supporter from Canada. He lived in Denver. He had no leadership role in AIM. He did not participate in the violent or criminal acts committed by some AIM members.

In 1975 Aquash became a federal fugitive. In September of 1975 she had been found in a tent full of illegal weapons and explosives at Al Running's place on the Rosebud Indian Reservation. She was arrested with several other AIM leaders. She failed to appear at a suppression hearing and a warrant was issued for her arrest.

In October of 1975, Aquash, Leonard Peltier, Banks, and Kamook, all of whom were federal fugitives, traveled in a motor home from Nebraska to Washington, then to Oregon. On November 14, 1975, that motor home was pulled over by Oregon Highway Patrol. A gun battle ensued. Aquash was arrested. She was charged with federal crimes related to the illegal weapons and explosives found in the motor home.

Aquash was sent back to South Dakota to attend her jury trial on the

charges from Rosebud. On November 24, 1975, Aquash appeared in federal court in Pierre. She was released on bond and told to appear for trial the next day. Aquash immediately fled to Denver. She became a fugitive on the Oregon charges as well as the South Dakota charges.

Aquash hid in Denver at the home of Troy Lynn Yellow Wood, an AIM supporter. At the end of November, Aquash returned to South Dakota with Graham, Looking Cloud, and Theda Clarke (a/k/a Theda Nelson).

Conflicts in the evidence existed as to whether Aquash went to South Dakota voluntarily or against her will. Some witnesses said she was tied up and brought to Rapid City as a suspected informant; others said she volunteered to go so she could clear up jealous accusations made by the spouses of some male AIM leaders.

The evidence was also vague as to Aquash's movements within South Dakota. Only Looking Cloud testified as to a continuous chain of events involving Aquash and Graham from the time she left Denver to when she was allegedly killed. Looking Cloud was an accomplice as a matter of law and his version of events was not corroborated. No other witness claims to have ever seen Aquash and Graham together in Rapid City.

The State's witnesses were consistent as to the date that Aquash left

Denver for Rapid City. However, that date conflicted from the prosecution's theory of the case and the date charged in the indictment.

Looking Cloud testified that he, Aquash, Graham and Clarke left Denver on the night of November 27 or 28, 1975. They arrived in Rapid City the next morning. Later that evening, the same group traveled to the home of Dick Marshall and Cleo Gates in Pine Ridge to obtain a gun, stopped briefly at a couple other homes in Pine Ridge and Rosebud, then went to the badlands near Wanbli. Looking Cloud claimed to have seen Graham shoot Aquash in the badlands. Three other prosecution witnesses claimed that the trip from Denver happened in late November of 1975.

The State alleged that Aquash was killed on or about December 10 through December 12, 1975. All of the federal indictments had also charged that Aquash was killed during this time frame.

Only one witness claimed to have seen Aquash in Rapid City. Candy Hamilton, a State witness, testified that she saw Aquash in Rapid City on or about December 15, 1975, at the Wounded Knee Legal Defense/Offence Committee's (WKLDOC) office. Aquash was not in the custody or control of Graham, Looking Cloud, or Clarke at that time. Other witnesses testified that Graham and Looking Cloud had returned to Denver within two or three

days of having left in late November of 1975.

On February 24, 1976, Aquash was found dead in the badlands off Highway 73 between Kadoka and Wanbli, in what is now Jackson County. She died of a single bullet wound to the head.

A. EXTRADITION FACTS (ISSUE 1)

In 2003, Graham, a Canadian citizen, was charged in the United States District Court for the District of South Dakota with one count of premeditated murder in regard to Aquash's death. United States v. Graham, File No. 03-50020-002 (D.S.D. W. Div.). Graham was extradited to the United States in 2007 on that indictment. That indictment was dismissed. United States v. John Graham, 585 F.Supp.2d 1144 (D.S.D. 2008). Graham was re-indicted in federal court with three counts of pre-meditated murder. United States v. Graham, File No. 08-50079-01 (D.S.D. W. Div.). Those charges were also dismissed. United States v. Graham, 2009 WL 1173039 (D.S.D. 2009). The dismissals in both files were upheld on appeal. United States v. John Graham, 572 F.3d 954 (8<sup>th</sup> Cir.), reh'g and reh'g en banc denied, 598 F.3d 930 (8<sup>th</sup> Cir. 2009).

Graham was not allowed to return to Canada. He was immediately charged with felony murder and premeditated murder in the state courts of

South Dakota. SR 001.

Graham challenged the legitimacy of the state court prosecution and moved for disclosure of documents from the Canadian government giving South Dakota jurisdiction over him. SR 016; MT (2/23/10) p. 8; MT (3/8/10) pp. 3-20. Graham argued that he was being denied his right to due process and his right to discovery. MT (3/8/10) pp. 4-6, 18. Graham contested the ability of the State to prosecute him when he was extradited on federal charges, and he raised jurisdictional issues within Canada based on his membership in a First Nations band and his residence in an autonomous region within Canada. MT (3/8/10) p. 4-7. Graham also argued that he was not provided with counsel or notice in Canada. MT (3/8/10) pp. 12-13.

The circuit court denied Graham's position and held that his physical presence in the state was sufficient for Graham to be tried in state court. MT (3/8/10) pp. 6-9, 11-12. The circuit court also denied Graham's request to be shown documents authorizing the state court prosecution. MT (3/8/10) pp. 3-20. The circuit court was provided a document, that it placed under seal, which Graham was not allowed to see. That document, which has now been unsealed, is a photocopy of a document that purports to be a

Consent to Waiver of Speciality drafted by someone within the Canadian Ministry of Justice. SR 071, 083, 086; SR Sealed Exh.

B. LOOKING CLOUD'S STATEMENTS TO MALONEY  
(ISSUE 2)

Denise Maloney is Aquash's daughter. At the time of Aquash's murder, Maloney lived in Canada with her father and had only seen her mother once in the two years preceding her death. JT Vol. 7, pp. 77-78, 89. Maloney did not know Looking Cloud, Graham, or Clarke.

In 2002, Maloney received a call from Looking Cloud. JT Vol. 7, p. 73. This call came 27 years after Aquash was allegedly killed, and one year before Looking Cloud or Graham was charged. The call was not recorded. JT Vol. 7, p. 73.

During the call, Looking Cloud allegedly told Maloney that Graham and Clarke killed Aquash while Looking Cloud stayed in the car. JT Vol. 6, p. 224; JT Vol. 7, p. 76. Looking Cloud alleged he was unaware of Clarke and Graham's plan to kill Aquash. JT Vol. 6, p. 224; JT Vol. 7, p. 76.

Looking Cloud's statement to Maloney contradicted all prior and subsequent statements he gave regarding the case. All of Looking Cloud's out of court statements from 1994 through 2010 alleged that he and Graham

took Aquash out to the badlands while Clarke waited with the car. And Looking Cloud's testimony at Graham's trial repeated this claim. JT Vol. 6, p. 191. Looking Cloud's statements to Maloney were inconsistent with the theory of prosecution presented by the State, which was that Looking Cloud and Graham were the persons present when Aquash was killed. JT Vol. 3, p. 49.

Graham had objected to the admission of this evidence prior to and during trial. SR 522; JT Vol. 6, p. 224; JT Vol. 7, p. 75.

#### C. PELTIER'S CONDUCT AT FARMINGTON (ISSUE 3)

In June of 1975, AIM held its national convention in Farmington, New Mexico. During that convention, Peltier allegedly accused Aquash of being an informant and threatened her with a gun. SR 192; MT (8/2/10) pp. 174-191; JT Vol. 4, p. 111.

No eye witness to the incident testified at trial. Graham was not alleged to have witnessed or known about the incident, and Graham was not alleged to have any connection with Peltier. SR 192; MT (8/2/10) pp. 174-191; JT Vol. 6, p. 23. Peltier, the alleged declarant, was not subpoenaed by the State or determined to be unavailable by the circuit court. JT Vol. 5, p. 110.

Graham objected to the admission of this evidence prior to trial. SR 192; TR (8/2/10) pp. 174-191. At hearing, the circuit court appeared to rule that the evidence was not admissible. TR (8/2/10) pp. 189-191. However, in its written Order, the circuit court changed its decision and ruled the evidence was admissible. SR 383 at p. 10 (¶ 11).

Pursuant to the court's ruling, Yellow Wood was permitted to testify that:

[Aquash] said that people were – it seems like there was some kind of – a little – a meeting of certain people that were accusing her of being an informant. And that – and 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.

JT Vol. 4, pp. 111-12. Additionally, witness Kamook was permitted to testify as to Aquash's scared and emotional demeanor when describing this

event. JT Vol. 5, pp. 104-05.

D. PELTIER'S MURDER CONFESSION (ISSUE 4)

In mid-October of 1975, Aquash, Peltier, Banks, Kamook, and others traveled from South Dakota to Washington in a motor home. JT Vol. 6, pp. 48-56. Aquash and most of the occupants were fugitives from justice at this time. Peltier was wanted for the murder of two FBI agents on Pine Ridge. JT Vol. 6, pp. 58-51. During this trip, Peltier allegedly bragged to the occupants of the motor home that he had executed one of the FBI agents while the agent begged for his life. JT Vol. 6, pp. 7-8.

Graham was not in the motor home. JT Vol. 6, p. 48. Graham had no connection with Banks, Peltier, Kamook, or others in the motor home. Graham was not implicated in the deaths of the FBI agents. JT Vol. 6, p. 26.

The State sought to admit Peltier's alleged confession to the murder of the FBI agent through Kamook. Peltier was not subpoenaed by the State and he was not declared unavailable by the circuit court. JT Vol. 5, p. 110.

Graham objected to the admission of this evidence prior to trial. SR 187; MT (8/2/10) pp. 150-174. At hearing, the circuit court questioned the relevance of the material and noted the high degree of prejudice caused by

the evidence. MT (8/2/10) p. 171-72. After the hearing, the court issued an order denying Graham's motion in limine. SR 383 at p. 10 (¶ 11). At trial, Graham again objected to the introduction of the evidence. JT Vol. 5, p. 109. The circuit court sustained the objection. JT Vol. 5, p. 111. The circuit court, however, reversed itself the next day and allowed the evidence to be admitted. JT Vol. 6, pp. 4-7.

Pursuant to this ruling, the State was allowed to introduce the following testimony through Kamook:

[Peltier] 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 . . . He was talking about the FBI Agents.

JT Vol. 6, pp. 7-8.

#### E. SUFFICIENCY OF THE EVIDENCE (ISSUE 5)

Graham was convicted of felony murder. The underlying felony alleged was kidnaping.

Four witnesses<sup>2</sup> testified that Aquash left Denver with Graham, Looking Cloud, and Clarke. These witnesses believed the group was heading to Rapid City. These witnesses' testimony constituted the State's

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<sup>2</sup> Looking Cloud, George Palfy, Angela Janis, and Yellow Wood.

evidence of a kidnaping.

Each witness testified that the alleged kidnaping occurred in late November of 1975. JT Vol. 3, p. 190; JT Vol. 4, pp. 100-101; JT Vol. 4, p. 109; JT Vol. 4, p. 235; JT Vol. 7, p. 24. Looking Cloud was the only witness who claimed the group ever made it to Rapid City.

Two witnesses (Marshall and Gates) testified that Graham, Clarke, Looking Cloud, and Aquash came to their house in Allen, South Dakota. JT Vol. 4, pp. 70-92; JT Vol. 5, pp. 117-149. Neither could recall the date. JT Vol. 5, p. 129. Looking Cloud claimed that they were at Marshall and Gates' house within two days of leaving Denver on November 27 or 28, 1975. JT Vol. 6, p. 195, 226; JT Vol. 7, p. 24.

Aquash was alive, in Rapid City, on or near December 15, 1975. JT Vol. 4, pp. 39-45 & Exhs. 116, 117. The State's uncontroverted evidence from its witness, Candy Hamilton, placed Aquash at the WKLDOC home no earlier than December 12<sup>th</sup> and no later than December 18<sup>th</sup>, 1975. JT Vol. 4, pp. 39-45 & Exhs. 116, 117.

Graham and Looking Cloud were not with Aquash when she was seen in Rapid City by Hamilton. JT Vol. 5, pp. 47-48. No witness testified to seeing Looking Cloud, Clarke, or Graham with Aquash after late

November of 1975. Not a single witness or exhibit was presented to the jury suggesting that Aquash was held in captivity from late November through mid December of 1975.

Aquash's body was found on February 24, 1976. JT Vol. 3, p. 81. No definitive time of death could be established. JT Vol. 4, p. 56-57, 66. The State's expert agreed that most of the decomposition of Aquash's body happened in February of 1976. JT Vol. 4, p. 65-66.

The jury was properly instructed that to find Graham guilty of felony murder, the evidence had to prove beyond a reasonable doubt that Aquash's death was the result of the alleged kidnaping or occurred while the kidnaping was being committed. SR 795. No evidence was presented to the jury that Aquash died as a result of Graham's alleged acts two weeks before the time of death alleged in the indictment, or that Aquash died during the trip from Denver to South Dakota.

#### F. SENTENCING (ISSUE 6)

Graham was sentenced on January 24, 2011. He was sentenced to life without parole.

At sentencing, Graham objected to the imposition of a life sentence without parole eligibility. ST p. 6. He argued that, in 1975, felony murder

was punishable by death or life at hard labor. There was no sentence of life without parole in 1975. ST p. 6. Graham noted that, in 1975, all inmates were to be given a parole date upon entry into the penitentiary system. ST p. 6. Graham identified inmates convicted of murder at the time this sentencing framework was law that were deemed parole eligible. ST p. 7.

Graham also challenged the constitutionality of a life without parole sentence under the specific circumstances of his case. ST 8. Graham was not convicted of premeditated murder. The jury acquitted him of that. The evidence of guilt was weak. At the time of the alleged acts he was 19 years old. He had no prior record. He was a visitor to this country. He was not involved in the violent activities of AIM. He argued he should not be given a life without parole sentence for felony murder.

## VI. ARGUMENT

### A. GRAHAM SHOULD NOT HAVE BEEN PROSECUTED IN SOUTH DAKOTA

Graham contests the circuit court's jurisdiction over him personally based on the doctrine of specialty. Graham preserved this issue for appellate review. SR 016; MT (2/23/10) p. 8; MT (3/8/10) pp. 3-20. This issue is subject to de novo review. United States v. Anderson, 472 F.3d

662, 666 (9th Cir. 2006).

The doctrines and principles supporting Graham's position are outlined in Johnson v. Browne, 205 U.S. 309, 310-22, 27 S. Ct. 539, 539-43, 51 L. Ed. 816 (1907). Johnson also involved the extradition of a criminal defendant from Canada to the United States.

In Johnson, the defendant was charged in federal court with one count of conspiracy to commit fraud and one count of failing to pay proper silk tariffs. 205 U.S. at 310-11. He was convicted of both, but fled to Canada, his place of citizenship, before sentencing.

Canada agreed to extradite the defendant to the United States to be punished for the tariff charge, but not for conspiracy. Id. at 311. Upon the defendant's return to the United States, he was imprisoned on the conspiracy count. Id. at 311.

The United States Supreme Court granted the defendant's writ of habeas corpus and vacated the sentence. In doing so, it described the limitations of the doctrine of specialty.

The Court stated that a defendant can only be punished for the offense for which he was extradited. Id. If a requesting state seeks to punish a defendant for a crime other than that for which he was extradited,

the defendant has a personal right to challenge the legitimacy of his confinement. Id. Johnson gives individuals standing to contest the parameters of extradition. Id. In Johnson, the Court acknowledged this personal standing through issuance of a writ of habeas corpus, but the decision does not preclude Graham from raising this issue on direct appeal.

Johnson also stands for the proposition that a defendant's mere presence in the United States does not render subsequent prosecution or punishment legitimate. Johnson, supra, at 317 ("Although the surrender has been made, it is still our duty to determine the legality of the succeeding imprisonment . . ."). In Graham's case, the circuit court believed that Graham's presence in South Dakota foreclosed any inquiry into the legitimacy of the prosecution. MT (3/8/10) p. 6 ("However you get here really doesn't matter much, as long as you get here."). That is not supported by Johnson.

Johnson also gives defendants the right to return to their country of origin to contest the scope of an extradition order if a requesting state seeks to prosecute or punish a defendant for crimes other than those originally authorized:

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.

Id. at 318 (citation omitted). Graham should have been returned to Canada after the federal charges were dismissed to challenge whether he should be extradited to South Dakota on state felony murder charges.

The principles articulated in Johnson are reflected in the plain language of the Treaty on Extradition Between the Government of Canada and the Government of the United States [hereinafter “the Treaty”]. Article 12 of the Treaty, as it was in effect in 1975, states that an extradited person “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.” APP p. 9. Under these provisions of the Treaty, Graham could not be held, tried, or punished in state court for felony murder because he was extradited to face premeditated murder charges in federal court.

The Treaty contained an exception in 1975 that permitted the prosecution of an extradited individual for an offense other than that which he was extradited for provided that the offense was listed in the annex to the Treaty. APP at pp. 5 & 9 (Articles 2, 12). Felony murder was not listed

among the annexed offenses. APP at 12. Thus, even the exceptions within the Treaty as it was drafted in 1975 do not authorize Graham's prosecution for felony murder in state court.

In 1988, the Treaty was substantially revised, the annex was deleted in its entirety, and a new standard was imposed for trying persons for an offense other than that for which they were extradited. APP at 16 - 17. That standard permits prosecution if the new crime is considered a criminal act in both the requested and requesting states. APP at 17. The application of that standard to Graham has never been tested, nor was Graham ever provided counsel, notice, or an opportunity to argue the issue.

Graham should not have been subjected to prosecution for felony murder. This was not the crime he was extradited for. He did not have the ability to contest extradition for felony murder. He was not provided counsel and was not afforded an opportunity to contest the process. He was denied access to basic documents relative to the alleged claim of jurisdiction over him. He should have been allowed to return home to challenge extradition for felony murder. And Graham should have been given an opportunity to challenge whether the version of the Treaty in effect in 1975 or the one in effect in 2010 dictated the permissible parameters of

extradition.

Graham asks this Court to find a lack of personal jurisdiction over him and vacate his conviction and sentence.

**B. LOOKING CLOUD'S STATEMENT TO MALONEY WAS INADMISSIBLE AND PREJUDICIAL**

Looking Cloud was allowed to testify that he had told Maloney that Graham and Clarke had killed Aquash. JT Vol. 6, p. 224. Maloney was allowed to testify that Looking Cloud told her that Graham and Clarke had killed Aquash. JT Vol. 7, p. 76. Graham objected to this testimony prior to and during trial. SR 522; JT Vol. 6, p. 223-24; JT Vol. 7, p. 75-76.

Evidentiary rulings are reviewed for abuse of discretion. State v. Mattson, 2005 SD 71, ¶ 13, 698 N.W.2d 538, 544. This Court reviews evidentiary rulings to determine whether “a judicial mind, in view of the law and the circumstances, could have reasonably reached the same conclusion.” Id. (citation omitted). A trial court ruling will be overturned if it was erroneous and if it was prejudicial. Id. An error is prejudicial if “it produced some effect upon the final result and affected rights of the party assigning it.” Id. (internal quotation and citations omitted).

The circuit court erred in admitting this testimony. There is no rule of

evidence or exception thereto that permits the introduction of Looking Cloud's out of court statements to Maloney. This testimony was prejudicial to Graham because it improperly bolstered Looking Cloud's testimony that Graham shot Aquash.

First, it was not a statement against interest under SDCL 19-16-32. Looking Cloud was not unavailable. Unavailability is a foundational prerequisite for this exception to the rule against hearsay. And, the statement expressly exculpated Looking Cloud and inculpated others, thus it was not a statement against the declarant's interest.

Second, it was not a non-hearsay statement as defined by SDCL 19-16-2. Looking Cloud's 2002 statement to Maloney was not given under oath, so it is not a non-hearsay prior inconsistent statement. SDCL 19-16-2(1). It was not a prior consistent statement admissible under SDCL 19-16-2(2). Looking Cloud's 2002 statement was inconsistent with his trial testimony, not consistent with it: In 2002 he blamed Graham and Clarke for the killing and claimed he stayed at the car; at Graham's trial he claimed that he and Graham took Aquash to the badlands and Clarke stayed at the car. Further, there was no attempt by Graham to impeach Looking Cloud on the issue as to whether Graham and Clarke killed Aquash or whether

Looking Cloud and Graham killed Aquash. And it was not a statement to prove identification under SDCL 19-16-2(3).

Third, it was not a statement admissible under SDCL 19-16-3(5) as a co-conspirator statement. Statements under this rule are only admissible if made while the conspiracy was continuing and constitute a step in furtherance of the conspiracy. State v. Tiegen, 2008 SD 6, ¶ 27, 744 N.W.2d 578, 588. Looking Cloud's call to Maloney came 27 years after the killing, 26 years after Looking Cloud claimed to have last had contact with Graham or Clarke, and 8 years after Looking Cloud was first given immunity for his cooperation with federal authorities. There was no conspiracy in existence when the statement was made, and the statement did not further any objective of the conspiracy.

The testimony was highly prejudicial to Graham. Maloney testified:

[Looking Cloud] 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 [Aquash]. And they got in the car and drove away.

JT Vol. 7, p. 76.

Looking Cloud's credibility was destroyed during cross-examination.

Looking Cloud repeatedly admitted to lying to authorities, he changed his story constantly, he acknowledged testifying to get a better deal, and he admitted to over 40 prior convictions including multiple felonies and crimes involving lying to authorities. E.g. JT Vol 6, p. 237 (40 prior convictions), p. 237 (12 prior convictions for providing false information), p. 238-39 (charges dropped in exchange for cooperation), p. 269, 290 (changes in story after conviction in order to get deal), p. 251 (ability to recall affected by drug and alcohol abuse), p. 252 (threatened with continued imprisonment if he didn't give law enforcement story they wanted), p. 261-62 (told by State's witness to implicate Graham), p. 276 (counting on cooperation to get him out of prison), p. 286 (admitting to frequently lying to police officers); JT Vol. 7, p. 11 (changing story to please law enforcement), p. 13 (being paid by law enforcement for cooperation), p. 16 (admitting to changing his story under oath during course of trial), p. 17 (viewing Graham as his meal ticket out of prison if he cooperates), p. 17 (sentence reduction motion in federal court dependant on what he said about Graham).

Looking Cloud's significance to the prosecution's case cannot be overstated. He was the only eye witness to the murder, and there was no forensic evidence linking Graham to the crime.

The out of court statements between Maloney and Looking Cloud directly implicated Graham in the killing of Aquash. It bolstered Looking Cloud's in court testimony. Looking Cloud was the only alleged eye witness to the crime. Any evidence that bolstered Looking Cloud's in court testimony was substantially prejudicial to Graham. Graham's conviction should be reversed because inadmissible, prejudicial evidence on a key issue in the case was admitted at trial.

C. PELTIER'S THREAT AT FARMINGTON SHOULD NOT HAVE BEEN ADMITTED

The circuit court permitted the State to introduce evidence that, in June of 1975, Peltier held a gun to Aquash's head and accused her of being an informant. SR 192; MT (8/2/10) pp. 174-191; JT Vol. 4, p. 111. Graham objected to the admission of this evidence prior to trial. SR 192; TR (8/2/10) pp. 174-191. The circuit court ruled the evidence was admissible. SR 383 at p. 10 (¶ 11).

Alleged violations of constitutional rights are reviewed de novo. State v. Johnson, 2009 SD 67, ¶ 10, 771 N.W.2d 360, 365. Evidentiary rulings are reviewed for abuse of discretion. Mattson, supra, 2005 SD 71, ¶ 13. Erroneous, prejudicial rulings may warrant reversal of a conviction. Id.

Graham's right to confrontation was violated by the admission of this hearsay evidence. The Sixth Amendment to the United States Constitution grants defendants the right to confront the prosecution's witnesses against them. U.S. Const. Amend. VI.

In this case, a statement purportedly made by Peltier was admitted against Graham through a third party even though there was no showing that Peltier was unavailable. JT Vol. 5, p. 110. And the court admitted the statement without any showing of reliability of either the statement or of the third party through which it was admitted.

This evidence was inadmissible double hearsay. It was an out of court statement allegedly made by Peltier to Aquash that was admitted through Yellow Wood and Kamook. It described an event that allegedly happened 35 years prior to trial.

The evidence was admitted for the truth of the matter asserted. SDCL 19-16-1(3). The State was trying to prove that Peltier threatened to kill Aquash for being a suspected informant. The State was allowed to admit a statement, albeit third hand, that Peltier had threatened to kill Aquash for being an informant. JT Vol. 4, pp. 111-12. The matter asserted was exactly the fact the State sought to prove.

The State argued that the evidence was admissible under the state of mind exception to the rule against hearsay. The state of mind exception is memorialized at SDCL 19-16-7, which states in full:

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, is not excluded by § 19-16-4, even though the declarant is available as a witness, but a statement of memory or belief to prove the fact remembered or believed is excluded unless it relates to the execution, revocation, identification, or terms of declarant's will.

This exception does not apply to this testimony. It is important to keep track of who the declarant was and what testimony was admitted to understand why the exception does not apply.

Peltier was the declarant. The testimony was admitted through Yellow Wood and Kamook. E.g. JT Vol. 4, pp. 111-12. The State was not trying to prove Peltier's state of mind. MT (8/2/10) p. 179. The State was trying to prove Aquash's state of mind based on Peltier's statements to her. This is impermissible.

“[T]he state of mind exception does not authorize receipt of a statement by one person as proof of another's state of mind.” Hong v. Children's Mem'l Hosp., 993 F.2d 1257, 1265 (7th Cir. 1993), cert. denied, 511 U.S. 1005 (1994) (citing 4 David W. Louisell & Christopher B.

Mueller, Federal Evidence § 441 (1980); United States v. Cintolo, 818 F.2d 980, 1001 (1st Cir.), cert. denied, 484 U.S. 913 (1987); Calhoun v. Baylor, 646 F.2d 1158, 1162 (6th Cir.1981); H.R.Rep. No. 650, 93d Cong., 1st Sess. (1973). Yet, that is precisely what occurred in Graham's case. Peltier's declaration was admitted to prove Aquash's state of mind.

This is clearly improper under the rules of evidence. And, in light of the inflammatory nature of the declaration, it was highly prejudicial to Graham for this evidence to be received.

Similarly, it was an abuse of the rules to admit Aquash's out of court statements as to a specific past act by Peltier to be admitted as proof of her state of mind. Eighty years ago, Justice Cardozo confronted this issue in Shepard v. United States, 290 U.S. 96, 54 S.Ct. 22 (1933). That case has been cited over 350 times and has never been overruled.

In Shepard, the decedent told her nurse that the whiskey she drank prior to becoming sick tasted strange, and then asserted that her husband, Shepard, had poisoned her. This testimony was admitted through the nurse as proof of the decedent's state of mind. At the habeas stage, the Court found this to be error and vacated the conviction.

The facts in Graham's case are more remarkable than those presented

in Shepard. In Shepard, the out of court statements were at least those of the decedent. Yet, they were still deemed inadmissible. In Graham's case, the statements are more remote in that they are the statements of a person not charged in the crime, Peltier.

Justice Cardozo was clear in defining the parameters of the state of mind exception. First, he noted that the declarations by the decedent were not mere descriptions of her present feelings, but were admitted "as proof of an act committed by some one else." Id. at 103. This was deemed impermissible. The same error was made in Graham's case. Testimony was not limited to statements concerning Aquash's present feelings. Instead, the jury received a detailed factual description of a past event allegedly committed by Peltier.

Second, Justice Cardozo disregarded the notion that hearsay evidence of a past act could be admitted to inferentially prove a decedent's state of mind without also being received by the jury as proof of the matter asserted:

It will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to some one else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their

source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.

Id. at 103-04 (citation omitted).

The testimony elicited by the State described a specific act allegedly committed by Peltier and the precise words he allegedly uttered to Aquash during the act. It would strain credibility for the State to assert that these acts and declaration were received by the jury for any other purpose other than as evidence that Peltier did and said what he was alleged to have done and said.

The Court in Shepard emphasized the distinction between declarations of future intention, which may be admissible, as opposed to declarations describing past conduct, which are not:

Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored.

The testimony now questioned faced backward and not forward. This at least it did in its most obvious implications. What is even more important, it spoke to a past act, and, more than that, to an act by some one not the speaker. Other tendency, if it had any, was a filament too fine to be disentangled by a jury.

Id. at 106.

The evidence proscribed in Shepard is precisely the evidence admitted in Graham's case. It was evidence of a past act by someone other than the speaker. The State was allowed to admit Peltier's past threat and use of a gun on Aquash against Graham. It was improper for the circuit court to admit this. And, the highly inflammatory nature of the evidence, combined with any ability by Graham to confront it, irreparably prejudiced Graham.

D. PELTIER'S ALLEGED CONFESSION WAS  
INADMISSIBLE AND PREJUDICIAL

The circuit court allowed the State to introduce evidence through a third party, Kamook, that Aquash heard Peltier describe murdering an FBI agent. Peltier was not subpoenaed by the State and he was not declared unavailable by the circuit court. JT Vol. 5, p. 110. Graham was not alleged to have been present or known about the event.

Alleged violations of constitutional rights are reviewed de novo. State v. Johnson, 2009 SD 67, ¶ 10, 771 N.W.2d 360, 365. Evidentiary rulings are reviewed for abuse of discretion. Mattson, supra, 2005 SD 71, ¶ 13. Erroneous, prejudicial rulings may warrant reversal of a conviction. Id.

The matter has been preserved for appellate review. Graham objected

to the admission of this evidence prior to trial. SR 187; MT (8/2/10) pp. 150-174. The circuit court acknowledged the prejudicial impact of the evidence and the questionable relevance. MT (8/2/10) p. 171-72. The court issued an order that admitted the evidence. SR 383 at p. 10 (¶ 11). Graham renewed his objection at trial, JT Vol. 5, p. 109, which was initially sustained, JT Vol. 5, p. 111, but was then over ruled, JT Vol. 6, pp. 4-7.

There is no rule of evidence or exception thereto that supports the admission of this highly inflammatory evidence of a past factual event. The State's primary argument for admission is that similar evidence was admitted in Looking Cloud's federal trial. MT (8/2/10) p. 153. Looking Cloud did not object to the evidence on the same grounds as Graham. It appears from Looking Cloud's file that no pretrial litigation occurred on the issue, or whether the state of mind assertion raised by the prosecution was ever challenged during Looking Cloud's trial.

The legal issues are similar to those addressed above regarding Peltier's alleged threat at Farmington. The declarant was Peltier. Peltier was available, but no attempt was made to call him as a witness. Peltier was never subject to cross-examination on the statement. The statement was admitted through a third party. This denied Graham his constitutional right

to confront those who acted as witnesses against him.

Peltier's alleged confession to the murder was admitted for the truth of the matter asserted. The State tried to confuse the issue at hearing by alleging that Peltier's confession was admitted to prove motive. MT (8/2/10) p. 154. The State said that it wasn't trying to prove that Aquash was an informant, but rather that she was believed to be an informant and that is why she was killed. MT (8/2/10) p. 154.

The evidence received was a graphic description of Peltier confessing to killing an FBI agent in cold blood. JT Vol. 6, pp. 7-8. There was nothing in the testimony as to Aquash being an informant, Aquash being suspected as an informant, or that AIM wanted her dead because she was an informant. JT Vol. 6, pp. 7-8. It was a description of a past act by Peltier that had nothing to do with Aquash.

The State wanted to prove as fact that Peltier confessed to the murder. From that, it wanted the jury to infer that AIM had a motive to silence Aquash because she had heard Peltier's confession. The fact sought to be proven was the confession, and the inference was to be drawn from that. Thus, Peltier's alleged confession was offered to prove the truth of the matter asserted. It was hearsay.

The State's argument in Graham's case was specifically rejected in Shepard. Inferences may be argued, but the facts upon which inferences are built cannot be established through hearsay:

It used the declarations as proof of an act committed by some one else, as evidence that she was dying of poison given by her husband. This fact, if fact it was, the government was free to prove, but not by hearsay declarations.

Shepard, 290 U.S. at 104.

There is no exception to the rule against hearsay that would otherwise permit the introduction of the evidence. Peltier was the declarant, and his state of mind is irrelevant. Aquash made no statement at the time Peltier allegedly confessed. And there is no indication Aquash ever discussed Peltier's alleged confession with any other person, or that it had any effect on her state of mind. The testimony was not admissible.

The testimony was highly prejudicial. It described one of the most infamous crimes in South Dakota history: the execution of two FBI agents. This crime was the subject of a nationwide manhunt for Peltier. JT Vol. 3, p. 137. Graham had no connection to this crime, yet he was linked to it through the introduction of this evidence at his trial. The prejudicial impact of the introduction of this graphic testimony ("he said, 'that motherfucker

was begging for his life but I shot him anyway”) was devastating to Graham’s hope of getting a fair trial. It should not have been admitted.

E. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT GRAHAM OF FELONY MURDER

At the close of the State’s case, JT Vol. 7, p. 238, and after the defense rested, JT Vol. 8, p. 6, Graham moved for a judgment of acquittal. He challenges the sufficiency of the evidence for the denial of his motions for judgment of acquittal and the sufficiency of the evidence for the jury’s verdict. Both challenges are reviewed under the same standard:

In reviewing the denial of a motion for judgment of acquittal, the ultimate question is whether the evidence was sufficient to sustain the convictions. Our standard of review of a denial of a motion for judgment of acquittal is whether State set forth sufficient evidence from which the jury could reasonably find the defendant guilty of the crime charged. In determining the sufficiency of the evidence to constitute the crime, the question is whether there is sufficient evidence in the record which, if believed by the jury, is sufficient to sustain a finding of guilt beyond a reasonable doubt; in making this determination, the court will accept the evidence, and the most favorable inference fairly drawn therefrom, which will support the verdict.

State v. Larson, 1998 SD 80, ¶ 9, 582 N.W.2d 15, 17 (citations and quotations omitted).

Graham could not be convicted of felony murder unless there was evidence from which the jury could find beyond a reasonable doubt that his

acts were the proximate cause of Aquash's death. State v. Rough Surface, 440 N.W.2d 746, 758-59 (S.D. 1989). To be guilty of felony murder, a defendant must have caused the death while engaged in the perpetration of the underlying crime. Id. See United States v. Montgomery, 635 F.3d 1074, 1087 (8th Cir. 2011) ("Common law felony murder requires a temporal and causal connection between the death and the felony, but the death and the felony need not occur in a particular sequence.").

All of the witnesses to the alleged kidnaping, including Looking Cloud, claimed that Graham's involvement ended on or around November 28 or 29, 1975. This testimony was uncontroverted and came in through the testimony of the State's witnesses. It was also uncontroverted that Aquash was seen alive on or around December 15, 1975. Last, it was not disputed that Aquash could have died weeks or months after that.

The absence of evidence linking Graham to Aquash during the period between late November and mid December, and Aquash's reappearance in Rapid City in mid December without Graham, breaks any temporal and causal link between the kidnaping and Aquash's subsequent death. The fact that Aquash's death could have occurred weeks or months after her reappearance in Rapid City further destroys any link between Graham's

alleged acts and her death.

The only testimony that the jury could have relied upon to create a causal link between Graham's alleged conduct and Aquash's death was that of Looking Cloud. However, this would have been improper.

Looking Cloud was an accomplice as a matter of law. His testimony could not be relied upon to make a causal connection without corroboration:

A conviction cannot be had upon the testimony of an accomplice unless it is corroborated by other evidence which tends to connect the defendant with the commission of the offense. The corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof.

SDCL 23A-22-8.

Looking Cloud's testimony was not corroborated. Looking Cloud was the sole witness who claimed to have been with Graham and Aquash from beginning to end. And he is the only witness to claim that Graham shot Aquash during the timeframe that she was being moved from place to place by Clarke, Looking Cloud, and Graham. There was no forensic evidence, admissions by Graham, or other evidence corroborating Looking Cloud's assertion that Graham was with Aquash from when they left Marshall and Gate's house in late November until the day and time when Aquash was supposedly killed in mid December.

This insufficiency of the evidence on this critical element of the felony murder charge should have resulted in a judgment of acquittal. There was insufficient evidence from which the jury could find a causal and temporal link between Graham's alleged kidnaping and Aquash's murder. There was insufficient evidence from which a reasonable jury could conclude that Graham killed Aquash while engaged in the commission of the alleged kidnaping. There was insufficient evidence that Graham's alleged involvement in Aquash's kidnaping was a proximate cause of Aquash's death. Graham's conviction is not supported by the evidence.

F. GRAHAM'S SENTENCE IS INVALID AND ILLEGAL

Graham was sentenced to life without parole. At the sentencing hearing, Graham objected to the imposition of a life without parole sentence on both statutory and constitutional grounds. ST p. 6-8. Graham's statutory challenge is subject to de novo review. Peterson, ex rel. Peterson v. Burns, 2001 SD 126, ¶ 7, 635 N.W.2d 556, 561. Graham's constitutional challenge is subject to review for gross disproportionality. State v. Pugh, 2002 SD 16, 19, 640 N.W.2d 79, 85.

Graham's challenge to the imposition of a life sentence for felony murder is based upon changes in South Dakota's sentencing statutes

between 1975 and the present. In 1975, SDCL 22-16-12 provided two sentences for felony murder, those being death or life at hard labor. Death, however, was not available as a sentence in 1975. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976).

In 1975, life at hard labor was not defined as life without parole. There was no sentence described as life without parole by statute. Other statutes existed that suggested that persons sentenced to life were parole eligible. SDCL 24-15-3 expressly stated that all inmates upon their entry into the penitentiary system were to be given a parole date. The statute did not include any exclusion for inmates sentenced to life.

In 1978 the legislature enacted SDCL 24-15-4, which stated that life sentences were not subject to parole. The enactment of that statute suggests by implication that, prior to its enactment, life sentences were subject to parole. If life sentences had never been subject to parole, then the legislature would not have needed to enact this statute. Once the legislature enacted this change, the ex post facto clause of the United States Constitution would prevent it from being applied retroactively to increase the severity of an inmate's sentence. Lewis v. Class, 1997 SD 67, ¶ 15, 565

N.W.2d 61, 63-64.

The State may argue that SDCL 24-15-4 did not signal a change in policy, but rather was an attempt to clarify an ambiguity in the statutory scheme as to whether life sentences were eligible for parole. If that is the case, then the rule of lenity applies. The rule of lenity states that ambiguities in sentencing statutes cannot be used to increase a defendant's sentence, but should be interpreted in favor of the accused. Whalen v. United States, 445 U.S. 684, 694 & n. 10, 100 S. Ct. 1432, 1439 & n. 10 (1980).

Graham is aware of this Court's decision in Brim v. South Dakota Bd. of Pardons & Paroles, 1997 SD 48, ¶ 22, 563 N.W.2d 812, 817. In that case, the Court held that "a person serving a life sentence in this state was eligible for parole only if sentenced prior to July 1, 1913." For the reasons set forth above, as well as those set forth in the dissenting opinion in Brim, by Justice Sabers and joined by Justice Amundson, Graham urges reconsideration of this issue.

Graham also argues that a sentence of life without parole for persons convicted of felony murder violates his right to be free from cruel and unusual punishment as protected by the Eighth Amendment to the United

States Constitution. Presently, his sentence is within statutory limits and similar sentences have been upheld as constitutional by this Court. State v. Frazier, 2002 SD 66, ¶ 24, 646 N.W.2d 744, 752-53. And there is no United States Supreme Court precedent prohibiting per se life sentences for persons convicted of felony murder.

Graham argues herein for an extension of the doctrine set forth Enmund v. Florida, 458 U.S. 782, 798, 102 S. Ct. 3368, 3377 (1982). In Enmund, the Court held the death penalty is unconstitutional for defendants convicted of felony murder absent proof that the defendant participated in the actual killing, aided and abetted the killing, or intended the killing. Graham argues that Enmund should be extended to prohibit the imposition of sentences of life without parole.

In Graham's case, he was acquitted for first degree murder as both a principle and an aider and abetter. Therefore, he is presumed innocent of the charge and of the implication that he acted as a principle or as an aider and abetter in the crime of premeditated murder. He was convicted of felony murder, which does not require any finding by the jury that he intended the death to occur. SR 795 (Jury Instruction 3).

Life without parole is the second most severe punishment known to

the law. Harmelin v. Michigan, 501 U.S. 957, 996, 111 S. Ct. 2680, 2702 (1991). And, in 1975, it was the most severe punishment available in South Dakota.

Thus, for Graham, there was no sentence available to any defendant for any crime that was harsher than the sentence he received. In 1975, a person who deliberately, intentionally, and cruelly caused the death of multiple children would receive the exact same sentence that he received for allegedly kidnaping Aquash which correlated in some way to her ultimate demise. Graham's sentence was grossly disproportionate because it does not reflect the lesser culpability reflected in the jury's verdict.

Graham's position is not inconsistent with this Court's decision in Frazier, supra. In Frazier, the Court determined that the defendant's life without parole sentence for felony murder was not grossly disproportionate to the crime because the evidence showed that Frazier's actions made the murder possible, that she concealed the crime, and that she may have actively participated in the commission of the killing. Frazier, 2002 SD 66, at ¶ 24. In Graham's case, no such inferences can be drawn.

The only testimony suggesting Graham was present when Aquash was killed, actively participated in the killing, or concealed the crime, came

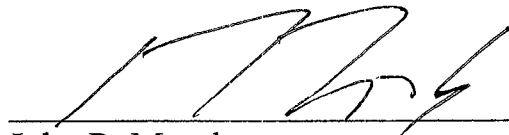
from Looking Cloud. The jury's acquittal of Graham for premeditated murder supports the notion that Looking Cloud's allegations should be disregarded. Had the jury believed Looking Cloud, they would have to have convicted Graham of premeditated murder. The corroborated evidence shows, at best, Graham's involvement in a kidnaping that occurred weeks before Aquash's murder.

As set forth in the preceding section, the facts taken in the light most favorable to the prosecution establish conduct by Graham two weeks prior to Aquash's death. That conduct could not be construed as having intentionally caused her death. Accordingly, Graham's sentence of life without parole should be vacated.

VII. CONCLUSION

For the reasons contained herein, Graham asks that this Court vacate his conviction and sentence for lack of jurisdiction, vacate his conviction and sentence for admission of improper evidence, vacate his conviction and sentence for insufficiency of the evidence, or vacate his sentence based on its unconstitutionality.

Dated September 7, 2011.

A handwritten signature in black ink, appearing to read 'J. R. Murphy', is written over a horizontal line.

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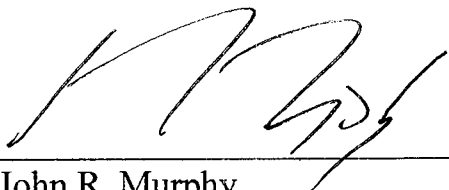
CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served two (2) true and correct copies of the foregoing brief upon the persons herein next designated, on the date shown below, by depositing the same in the U.S. Mail at Rapid City, South Dakota, first-class postage prepaid, at their last known addresses, to wit:

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Dated September 7, 2011.

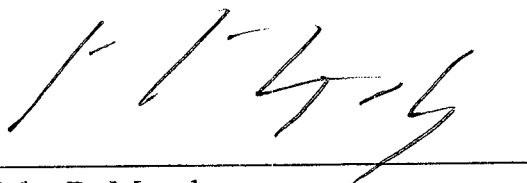
  
\_\_\_\_\_  
John R. Murphy

## CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66, John R. Murphy, counsel for appellant John Graham, submits the following:

The forgoing brief is 46 pages in length. It is typed in proportionally spaced 14 point Times New Roman. The left hand margin is 1.5 inches, the right hand margin is 1.0 inches. It contains 9,606 words and 47,308 characters.

Dated September 7, 2011.

A handwritten signature in black ink, appearing to read "J. R. Murphy", written over a horizontal line.

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PROTOCOL AMENDING THE TREATY ON EXTRADITION BETWEEN THE  
GOVERNMENT OF CANADA AND THE GOVERNMENT OF THE UNITED  
STATES OF AMERICA ..... 16

STATE OF SOUTH DAKOTA )  
 ) SS.  
COUNTY OF PENNINGTON )

IN CIRCUIT COURT  
SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, )  
 )  
Plaintiff, )

File No. 51C09003953A0

v. )  
 )

JUDGMENT OF CONVICTION

JOHN GRAHAM )  
A/K/A JOHN BOY PATTON, )  
D.O.B.: 08/13/1955 )  
CR #: 09-3953 )  
Defendant. )

An Indictment was filed with this Court on the 9<sup>th</sup> day of September, 2009, charging the Defendant with the crime(s) of **COUNT 1: FELONY MURDER (SDCL 22-16-9, 22-19-1), COUNT 2: FELONY MURDER (SDCL 22-16-9, 22-22-1(1)(2)), and COUNT 3: PREMEDITATED MURDER (SDCL 22-16-4)**. The Defendant was arraigned on said Indictment on the 3<sup>rd</sup> day of February, 2010. The Defendant, the Defendant's attorney, John R. Murphy, and Rod Oswald, Assistant Attorney General and prosecuting attorney, appeared at the arraignment. The Court advised the Defendant of all constitutional and statutory rights pertaining to the charges filed against the Defendant. The Defendant pled not guilty to the charges of the Indictment.

Thereafter, on the 29<sup>th</sup> day of November, 2010, the Defendant, the Defendant's attorney, John R. Murphy, Marty J. Jackley, Attorney General, Rod Oswald, Assistant Attorney General

and Robert Mandel, Special Assistant Attorney General, appeared and a jury trial was held whereupon the Defendant was found guilty of **Count 1** of the indictment charging him with **FELONY MURDER (KIDNAPPING)** by a jury of his peers, in violation of SDCL 22-16-9, 22-19-1, occurring on or about December, 1975. The Defendant was acquitted of Count 3 and the State did not proceed on Count 2 of the Indictment.

The jury being individually polled as to their guilty verdict, and the Court being satisfied accepts the guilty verdict for Count 1 **FELONY MURDER (KIDNAPPING)**.

It is, therefore, the JUDGMENT of this Court that the Defendant is guilty of **FELONY MURDER (KIDNAPPING)**, in violation of SDCL 22-16-9, 22-19-1.

#### SENTENCE

On the 24<sup>th</sup> day of January, 2011, the Court asked whether any legal cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence: It is

**ORDERED** that the Defendant is hereby sentenced to **LIFE WITHOUT PAROLE** in the South Dakota State Penitentiary in Sioux Falls, South Dakota, upon the following conditions:

1. That the Defendant receive credit for one thousand three hundred thirty-four (1334) days already served, and any time awaiting transportation from the sentencing date.

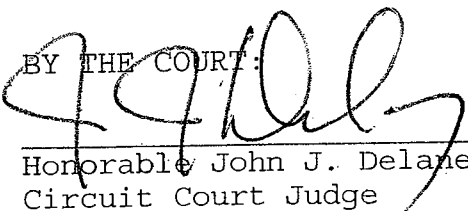
2. That the Defendant pay to the Clerk of Courts court costs pursuant to SDCL 23-3-52, 23A-28B-42 and 16-2-41 in the amount of one hundred four dollars (\$104). The Court recognizes the Defendant's financial status and considers these as a hardship issue.
3. That the Defendant pay to the Clerk of Courts (for reimbursement to the Office of Attorney General, 1302 E Hwy 14, Ste. 1, Pierre, South Dakota 57501-8501) for the costs of grand jury transcripts attributable to the Defendant in this action in the amount of three hundred fifteen dollars and seventy-five cents (\$315.75). The Court recognizes the Defendant's financial status and considers these as a hardship issue.
4. That the Defendant reimburse Pennington County for the costs of his court appointed counsel and costs of any other transcripts of court proceedings herein which have been incurred in this matter. The Court recognizes the Defendant's financial status and considers these as a hardship issue.

It is further

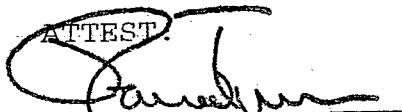
**ORDERED** that the Court reserves the right to review and make any modifications to the sentence within the statutory time period.

Dated this 18 day of January, 2011, at Rapid City, South Dakota.

BY THE COURT:


  
 Honorable John J. Delaney  
 Circuit Court Judge

ATTEST.

  
 Clerk of Courts  
 Christine Johnson  
 (SEAL) Deputy

State of South Dakota } Seventh Judicial  
 County of Pennington } Circuit Court  
 I hereby certify that the foregoing instrument  
 is a true and correct copy of the original as  
 the same appears on record in my office this

FEB 02 2011

  
 RANAEL. TRUMAN  
 Clerk of Courts, Pennington County

By \_\_\_\_\_ Deputy

3

Pennington County, SD  
 FILED  
 IN CIRCUIT COURT

JAN 31 2011

  
 Ranae Truman, Clerk of Courts  
 By \_\_\_\_\_ Deputy

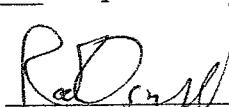
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RIGHT TO APPEAL

You, **John Graham a/k/a John Boy Patton**, are hereby notified that you have a right to appeal as provided for by SDCL 23A-32-15, which you must exercise by serving a written notice of appeal upon the Attorney General of the State of South Dakota by filing a copy of the same, together with proof of such service with the Clerk of this Court within thirty (30) days from the date that this Judgment Of Conviction was signed, attested and filed.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the proposed Judgment of Conviction in the matter of State of South Dakota v. John Graham a/k/a John Boy Patton, Pennington County Crim. No. 09-3953, was served by United States mail, first class, postage prepaid upon John R. Murphy, attorney for John Graham, on this 26 day of January, 2011.

  
\_\_\_\_\_  
Rod Oswald  
Assistant Attorney General

State of South Dakota } Seventh Judicial  
County of Pennington } Circuit Court  
I hereby certify that the foregoing instrument  
is a true and correct copy of the original as  
the same appears on record in my office this

FEB 02 2011

RANAE L. TRUMAN  
Clerk of Courts, Pennington County

By \_\_\_\_\_ Deputy

Pennington County, SD  
FILED  
IN CIRCUIT COURT

JAN 31 2011

Ranae Truman, Clerk of Courts

By \_\_\_\_\_ Deputy

[Page 4]

## **Treaty on extradition between the Government of Canada and the Government of the United States of America**

---

Canada and the United States of America, desiring to make more effective the co-operation of the two countries in the repression of crime by making provision for the reciprocal extradition of offenders, agree as follows:

### **Article 1**

Each Contracting Party agrees to extradite to the other, in the circumstances and subject to the conditions described in this Treaty, persons found in its territory who have been charged with, or convicted of, any of the offenses covered by Article 2 of this Treaty committed within the territory of the other, or outside thereof under the conditions specified in Article 3(3) of this Treaty.

### **Article 2**

(1) Persons shall be delivered up according to the provisions of this Treaty for any of the offenses listed in the Schedule annexed to this Treaty, which is an integral part of this Treaty, provided these offenses are punishable by the laws of both Contracting Parties by a term of imprisonment exceeding one year.

(2) Extradition shall also be granted for attempts to commit, or conspiracy to commit or being a party to any of the offenses listed in the annexed Schedule.

(3) Extradition shall also be granted for any offense against a federal law of the United States in which one of the offenses listed in the annexed Schedule, or made extraditable by paragraph (2) of this Article, is a substantial element, even if transporting, transportation, the use of the mails or interstate facilities are also elements of the specific offense.

### **Article 3**

(1) For the purpose of this Treaty the territory of a Contracting Party shall include all territory under the jurisdiction of that Contracting Party, including air space and territorial waters and vessels and aircraft registered in that Contracting Party or aircraft [sic] leased without crew to a lessee who has his principal place of business, or, if the

lessee has no such place of business, his permanent residence in, that Contracting Party if any such aircraft is in flight, or if any such vessel is on the high seas when the offense is committed. For the purposes of this Treaty an aircraft shall be considered in flight from the moment when power is applied for the purpose of the take-off until the moment when the landing run ends.

(2) In a case when offense 23 of the annexed Schedule is committed on board an aircraft at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation, such offense and any other offense covered by Article 2 committed against passengers or crew of that aircraft in connection with such [Page 6] offense shall be considered to have been committed within the territory of a Contracting Party if the aircraft was registered in that Contracting Party, if the aircraft landed in the territory of that Contracting Party with the alleged offender still on board, or if the aircraft was leased without crew to a lessee who has his principal place of business, or, if the lessee has no such place of business, his permanent residence in that Contracting Party.

(3) When the offense for which extradition has been requested has been committed outside the territory of the requesting State, the executive or other appropriate authority of the requested State shall have the power to grant the extradition if the laws of the requested State provide for jurisdiction over such an offense committed in similar circumstances.

#### Article 4

(1) Extradition shall not be granted in any of the following circumstances:

(i) When the person whose surrender is sought is being proceeded against, or has been tried and discharged or punished in the territory of the requested State for the offense for which his extradition is requested.

(ii) When the prosecution for the offense has become barred by lapse of time according to the laws of the requesting State.

(iii) When the offense in respect of which extradition is requested is of a political character, or the person whose extradition is requested proves that the extradition request has been made for the purpose of trying or punishing him for an offense of the above-mentioned character. If any question arises as to whether a case comes within the provisions of this subparagraph, the authorities of the Government on which the requisition is made shall decide.

(2) The provisions of subparagraph (iii) of paragraph (1) of this Article shall not be applicable to the following:

(i) A kidnapping, murder or other assault against the life or physical integrity of a person to whom a Contracting Party has the duty according to international law to give special protection, or any attempt to commit such an offense with respect to any such

person.

(ii) When offense 23 of the annexed Schedule, or an attempt to commit, or a conspiracy to commit, or being a party to the commission of that offense, has been committed on board an aircraft engaged in commercial services carrying passengers.

#### **Article 5**

If a request for extradition is made under this Treaty for a person who at the time of such request, or at the time of the commission of the offense for which extradition is sought, is under the age of eighteen years and is considered by the requested State to be one of its residents, the requested State, upon a determination that extradition would disrupt the social readjustment and rehabilitation of that person, may recommend to the requesting State that the request for extradition be withdrawn, specifying the reasons therefor.

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#### **Article 6**

When the offense for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for that offense, extradition may be refused unless the requesting State provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

#### **Article 7**

When the person whose extradition is requested is being proceeded against or is serving a sentence in the territory of the requested State for an offense other than that for which extradition has been requested, his surrender may be deferred until the conclusion of the proceedings and the full execution of any punishment he may be or may have been awarded.

#### **Article 8**

The determination that extradition should or should not be granted shall be made in accordance with the law of the requested State and the person whose extradition is sought shall have the right to use all remedies and recourses provided by such law.

#### **Article 9**

(1) The request for extradition shall be made through the diplomatic channel.

(2) The request shall be accompanied by a description of the person sought, a statement of the facts of the case, the text of the laws of the requesting State describing the offense and prescribing the punishment for the offense, and a statement of the law relating to the

limitation of the legal proceedings.

(3) When the request relates to a person who has not Yet been convicted, it must also be accompanied by a warrant of arrest issued by a judge or other judicial officer of the requesting State and by such evidence as, according to the laws of the requested State, would justify his arrest and committal for trial if the offense had been committed there, including evidence proving the person requested is the person to whom the warrant of arrest refers.

(4) When the request relates to a person already convicted, it must be accompanied by the judgment of conviction and sentence passed against him in the territory of the requesting State, by a statement showing how much of the sentence has not been served, and by evidence proving that the person requested is the person to whom the sentence refers.

#### **Article 10**

(1) Extradition shall be granted only if the evidence be found sufficient, according to the laws of the place where the person sought shall be found, either to justify his committal for trial if the offense of which he is accused had been committed in its territory or to prove that he is the identical person convicted by the courts of the requesting State.

(2) The documentary evidence in support of a request for extradition or copies of these documents shall be admitted in evidence in the examination of the request for extradition when, in the case of a request emanating from Canada, they are authenticated by an officer of the Department of Justice of [Page 10] Canada and are certified by the principal diplomatic or consular officer of the United States in Canada, or when, in the case of a request emanating from the United States, they are authenticated by an officer of the Department of State of the United States and are certified by the principal diplomatic or consular officer of Canada in the United States.

#### **Article 11**

(1) In case of urgency a Contracting Party may apply for the provisional arrest of the person sought pending the presentation of the request for extradition through the diplomatic channel. Such application shall contain a description of the person sought, an indication of intention to request the extradition of the person sought and a statement of the existence of a warrant or arrest or a judgment of conviction against that person, and such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offense been committed, or the person sought been convicted, in the territory of the requested State.

(2) On receipt of such an application the requested State shall take the necessary steps to secure the arrest of the person claimed.

(3) A person arrested shall be set at liberty upon the expiration of forty-five days from the date of his arrest pursuant to such application if a request for his extradition

accompanied by the documents specified in Article 9 shall not have been received. This stipulation shall not prevent the institution of proceedings with a view to extraditing the person sought if the request is subsequently received.

#### **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.

(2) The foregoing shall not apply to offenses committed after the extradition.

#### **Article 13**

(1) A requested State upon receiving two or more requests for the extradition of the same person either for the same offense, or for different offenses, shall determine to which of the requesting States it will extradite the person sought.

(2) Among the matters which the requested State may take into consideration are the possibility of a later extradition between the requesting States, the seriousness of each offense, the place where the offense was committed, the dates upon which the requests were received and the provisions of any [Page 12] extradition agreements between the requested State and the other requesting State or States.

#### **Article 14**

(1) The requested State shall promptly communicate to the requesting State through the diplomatic channel the decision on the request for extradition.

(2) If a warrant or order for the extradition of a person sought has been issued by the competent authority and he is not removed from the territory of the requested State within such time as may be prescribed by the laws of that State, he may be set at liberty and the requested State may subsequently refuse to extradite that person for the same offense.

#### **Article 15**

(1) To the extent permitted under the law of the requested State and subject to the rights of third parties, which shall be duly respected, all articles acquired as a result of the offense or which may be required as evidence shall, if found, be surrendered to the requesting State if extradition is granted.

(2) Subject to the qualifications of paragraph (1) of this Article, the above-mentioned articles shall be returned to the requesting State even if the extradition, having been agreed to, cannot be carried out owing to the death or escape of the person sought.

#### **Article 16**

(1) The right to transport through the territory of one of the Contracting Parties a person surrendered to the other Contracting Party by a third State shall be granted on request made through the diplomatic channel, provided that conditions are present which would warrant extradition of such person by the State of transit and reasons of public order are not opposed to the transit.

(2) The Party to which the person has been extradited shall reimburse the Party through whose territory such person is transported for any expenses incurred by the latter in connection with such transportation.

#### **Article 17**

(1) Expenses related to the transportation of the person sought to the requesting State shall be paid by the requesting State. The appropriate legal officers of the State in which the extradition proceedings take place shall, by all legal means within their power, assist the requesting State before the respective judges and magistrates.

(2) No pecuniary claim, arising out of the arrest, detention, examination and surrender of persons sought under the terms of this Treaty, shall be made by the requested State against the requesting State.

#### **Article 18**

(1) This Treaty shall be ratified and the instruments of ratification shall be exchanged at Ottawa as soon as possible.

(2) This Treaty shall terminate and replace any extradition agreements and provisions on extradition in any other agreement in force between Canada [Page 14] and the United States; except that the crimes listed in such agreements and committed prior to entry into force of this Treaty shall be subject to extradition pursuant to the provisions of such agreements.

(3) This Treaty shall enter into force upon the exchange of ratifications. It may be terminated by either Contracting Party giving notice of termination to the other Contracting Party at any time and the termination shall be effective six months after the

date of receipt of such notice.

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IN WITNESS WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed this Treaty.

DONE in duplicate, in the English and French languages, each language version being equally authentic, at Washington this third day of December, one thousand nine hundred seventy one.

MITCHELL SHARP

For the Government of Canada

WILLIAM S. ROGERS

For the Government of the United States of America

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### **Schedule**

1. Murder; assault with intent to commit murder.
2. Manslaughter.
3. Wounding; maiming; or assault occasioning bodily harm.
4. Unlawful throwing or application of any corrosive substances at or upon the person of another.
5. Rape; indecent assault.
6. Unlawful sexual acts with or upon children under the age specified by the laws of both the requesting and requested States.
7. Willful nonsupport or willful abandonment of a minor when such minor is or is likely to be injured or his life is or is likely to be endangered.

8. Kidnapping; child stealing; abduction; false imprisonment.
9. Robbery; assault with intent to steal.
10. Burglary; housebreaking.
11. Larceny, theft or embezzlement.
12. Obtaining property, money or valuable securities by false pretenses or by threat of force or by defrauding the public or any person by deceit or falsehood or other fraudulent means, whether such deceit or falsehood or any fraudulent means would or would not amount to a false pretense.
13. Bribery, including soliciting, offering and accepting.
14. Extortion.
15. Receiving any money, valuable securities or other property knowing the same to have been unlawfully obtained.
16. Fraud by a banker, agent, or by a director or officer of any company.
17. Offenses against the laws relating to counterfeiting or forgery.
18. Perjury in any proceeding whatsoever.
19. Making a false affidavit or statutory declaration for any extrajudicial purpose.
20. Arson.
21. Any act done with intent to endanger the safety of any person travelling upon a railway, or in any aircraft or vessel or other means of transportation.
22. Piracy, by statute or by law of nations; mutiny or revolt on board a vessel against the authority of the captain or commander of such vessel.
23. Any unlawful seizure or exercise of control of an aircraft, by force or violence or threat of force or violence, or by any other form of intimidation, on board such aircraft.

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24. Willful injury to property.
25. Offenses against the bankruptcy laws,
26. Offenses against the laws relating to the traffic in, production, manufacture, or

importation of narcotic drugs, Cannabis sativa L., hallucinogenic drugs, amphetamines, barbiturates, cocaine and its derivatives.

27. Use of the mails or other means of communication in connection with schemes devised or intended to deceive or defraud the public or for the purpose of obtaining money or property by false pretenses.

28. Offenses against federal laws relating to the sale or purchase of securities.

29. Making or having in possession any explosive substance with intent to endanger life, or to cause severe damage to property.

30. Obstructing the course of justice in a judicial proceeding, existing or proposed, by:

a) dissuading or attempting to dissuade a person by threats, bribes, or other corrupt means from giving evidence;

b) influencing or attempting to influence by threat, bribes, or other corrupt means a person in his conduct as a juror; or

c) accepting a bribe or other corrupt consideration to abstain from giving evidence or to do or to refrain from doing anything as a juror.

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**Exchange of notes between the Government of Canada and the  
Government of the United States of America amending the treaty on  
extradition of December 3, 1971**

*The Ambassador of Canada to Secretary of State of the United States of America*

Washington, D.C., June 28, 1974

No. 126

EXCELLENCY,

I have the honour to refer to the Treaty on Extradition between the Government of Canada and the Government of the United States signed at Washington on December 3, 1971 and to subsequent discussions between representatives of our two governments concerning the amendment of the said Treaty.

Further to those discussions I now have the honour to propose that the said Treaty be amended as follows:

(1) That Article 4(2) (i) of the Treaty shall be amended to read: "A kidnapping, murder,

or other assault against the life or physical integrity of a person to whom a Contracting Party has the duty according to international law to give special protection, or any attempt or conspiracy to commit, or being a party to the commission of, such an offence with respect to any such person."

(2) That clause 26 of the Schedule annexed to the Treaty shall be amended to read: "Offences against the laws relating to the traffic in, production, manufacture or importation of drugs listed in Schedule I to the Single Convention on Narcotic Drugs of March 30, 1961"<sup>1</sup> and of drugs listed in Schedules I, II and III to the Convention on Psychotropic Substances of February 21, 1971."

If this proposal meets with the approval of your government, I have the further honour to propose that this Note, which is authentic in English and in French, and your reply shall constitute an amendment to the Treaty on Extradition between Canada and the United States referred to above, which shall come into force on the date of the entry into force of the said Treaty and which shall be considered an integral part of the said Treaty.

Accept, Excellency, the assurances of my highest consideration.

[FROM:] M. CADIEUX,  
Ambassador.

[TO:] The Honourable  
Henry A. Kissinger,  
Secretary of State,  
Washington, D.C.

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*The Acting Secretary of State of the United States of America to the Ambassador of  
Canada*

Washington, July 9, 1974

EXCELLENCY:

I have the honor to refer to your Note of June 28, 1974, in the English and French languages, relating to amendment of the Treaty on Extradition between the United States of America and Canada, signed at Washington December 3, 1971.

On behalf of the United States of America I confirm the understanding set forth therein and consider that your Note and this reply constitute an Agreement between the United States and Canada on this matter.

Accept, Excellency, the renewed assurances of my highest consideration.

[FROM:] For the Secretary of State

JOSEPH JOHN SISCO  
Acting Secretary

[TO:] His Excellency  
Marcel Cadieux,  
Ambassador of Canada.

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No. 15678. TREATY ON EXTRADITION BETWEEN THE UNITED STATES OF AMERICA AND CANADA. SIGNED AT WASHINGTON ON 3 DECEMBER 1971<sup>1</sup>

N° 15678. TRAITÉ D'EXTRADITION ENTRE LES ÉTATS-UNIS D'AMÉRIQUE ET LE CANADA. SIGNÉ À WASHINGTON LE 3 DÉCEMBRE 1971<sup>1</sup>

PROTOCOL AMENDING THE ABOVE-MENTIONED TREATY, AS AMENDED. SIGNED AT OTTAWA ON 11 JANUARY 1988

PROTOCOLE MODIFIANT LE TRAITÉ SUSMENTIONNÉ, TEL QUE MODIFIÉ. SIGNÉ À OTTAWA LE 11 JANVIER 1988

Came into force on 26 November 1991 by the exchange of the instruments of ratification, in accordance with article IX (2).

Entré en vigueur le 26 novembre 1991 par l'échange des instruments de ratification, conformément au paragraphe 2 de l'article IX.

*Authentic texts: English and French.*

*Textes authentiques : anglais et français.*

*Registered by Canada on 27 January 1995.*

*Enregistré par le Canada le 27 janvier 1995.*

<sup>1</sup> United Nations, *Treaty Series*, vol. 1041, p. 57.

<sup>1</sup> Nations Unies, *Recueil des Traités*, vol. 1041, p. 57.

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

The Government of Canada and the Government of the United States of America;

Desiring to make more effective the Extradition Treaty between the Contracting Parties, signed at Washington on December 3, 1971, as amended by the agreement effected by an Exchange of Notes on June 28 and July 9, 1974 (hereinafter referred to as "the Extradition Treaty");

Have agreed as follows:

ARTICLE 1

Article 2 of the Extradition Treaty is deleted and replaced by the following:

"Article 2

- (1) Extradition shall be granted for conduct which constitutes an offense punishable by the laws of both Contracting Parties by imprisonment or other form of detention for a term exceeding one year or any greater punishment.
- (2) An offense is extraditable notwithstanding
  - (i) that conduct such as interstate transportation or use of the mails or of other facilities affecting interstate or foreign commerce, required for the purpose of establishing jurisdiction, forms part of the offense in the United States, or
  - (ii) that it relates to taxation or revenue or is one of a purely fiscal character."

ARTICLE II

The SCHEDULE to the Extradition Treaty, as amended, is deleted.

ARTICLE III

Paragraph (2) of Article 3 of the Extradition Treaty is deleted. Paragraph (3) of Article 3 of the Extradition Treaty is amended to read as follows:

- "(2) When the offense for which extradition is requested was committed outside the territory of the requesting State, the executive or other appropriate authority of the requested State shall grant extradition if the laws of the requested State provide for jurisdiction over such an offense committed in similar circumstances. If the laws in the requested State do not so provide, the executive authority in the requested State may, in its discretion, grant extradition."

ARTICLE IV

Paragraph (2) of Article 4 of the Extradition Treaty, as amended, is deleted and replaced by the following:

- "(2) For the purpose of this Treaty, the following offenses shall be deemed not to be offenses within subparagraph (iii) of paragraph 1 of this Article:
- (i) An offense for which each Contracting Party has the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to its competent authorities for the purpose of prosecution;
  - (ii) Murder, manslaughter or other culpable homicide, malicious wounding or inflicting grievous bodily harm;
  - (iii) An offense involving kidnapping, abduction, or any form of unlawful detention, including taking a hostage;
  - (iv) An offense involving the placing or use of explosives, incendiaries or destructive devices or substances capable of endangering life or of causing grievous bodily harm or substantial property damage; and
  - (v) An attempt or conspiracy to commit, or counselling the commission of, any of the foregoing offenses, or aiding or abetting a person who commits or attempts to commit such offenses."

ARTICLE V

Article 7 of the Extradition Treaty is deleted and replaced by the following:

"Article 7

When the person sought is being proceeded against or is serving a sentence in the requested State for an offense other than that for which extradition is requested, the requested State may surrender the person sought or postpone surrender until the conclusion of the proceedings or the service of the whole or any part of the sentence imposed."

ARTICLE VI

Paragraph (3) of Article 11 of the Extradition Treaty is deleted and replaced by the following:

- "(3) A person arrested shall be set at liberty upon the expiration of sixty days from the date of arrest pursuant to such application if a request for extradition and the documents specified in Article 9 have not been received. This stipulation shall not prevent the institution of proceedings with a view to extraditing the person sought if the request and documents are subsequently received."

ARTICLE VII

The Extradition Treaty is amended by adding the following after Article 17:

"Article 17 bis

If both contracting Parties have jurisdiction to prosecute the person for the offense for which extradition is sought, the executive authority of the requested State, after consulting with the executive authority of the requesting State, shall decide whether to extradite the person or to submit the case to its competent authorities for the purpose of prosecution. In making its decision, the requested State shall consider all relevant factors, including but not limited to:

- (i) the place where the act was committed or intended to be committed or the injury occurred or was intended to occur;
- (ii) the respective interests of the Contracting Parties;

- (iii) the nationality of the victim or the intended victim; and
- (iv) the availability and location of the evidence."

#### ARTICLE VIII

Notwithstanding paragraph (2) of Article 18 of the Extradition Treaty, this Protocol shall apply in all cases where the request for extradition is made after its entry into force regardless of whether the offense was committed before or after that date.

#### ARTICLE IX

- (1) This Protocol shall be subject to ratification in accordance with the applicable procedures of the Government of the United States and the Government of Canada and instruments of ratification shall be exchanged as soon as possible.
- (2) The Protocol shall enter into force upon the exchange of instruments of ratification.

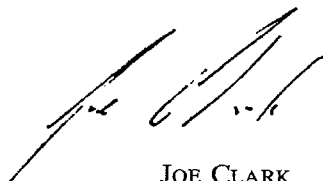
*[For the testimonium and signatures, see p. 416 of this volume.]*

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Protocol.

EN FOI DE QUOI, les soussignés, dûment autorisés par leurs Gouvernements respectifs, ont signé le présent Protocole.

DONE in duplicate at *Ottawa*, this *11<sup>th</sup>* day of *January* 1988, in the English and French languages, the two texts being equally authentic.

FAIT en double exemplaire à *Ottawa*, ce *11<sup>ième</sup>* jour de *janvier* 1988 en français et en anglais, chaque version faisant également foi.



JOE CLARK

For the Government  
of Canada

Pour le Gouvernement  
du Canada



GEORGE P. SHULTZ

For the Government  
of the United States of America

Pour le Gouvernement  
des Etats-Unis d'Amérique