

**UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION**

**JOHN GRAHAM,**

*Petitioner,*

v.

**DARIN YOUNG,** Warden, South  
Dakota State Penitentiary,

*Respondent.*

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CIV 13-4100

**RESPONDENT’S REPLY IN SUPPORT OF MOTION TO DISMISS  
OR FOR SUMMARY JUDGMENT**

Respondent, through his counsel Paul S. Swedlund, hereby files this reply in support of his motion to dismiss or for summary judgment. Petitioner’s response is long on argument but short on law. Graham does not refute respondent’s core charge that his claims are procedurally defaulted as a matter of law. Instead, Graham makes the equitable argument that it “would be manifest injustice if such a trivial reason were used to justify his life imprisonment” when he has allegedly “made such a strong showing” on the merits of his claims. PETITIONER’S RESPONSE at 4. Equity cannot overcome Graham’s default, however, because a cursory examination of his claims reveals that they are wholly devoid of merit, much less “strong.” Without either the law or equity on his side, Graham’s petition for *habeas corpus* herein must be denied.

## **STANDARD OF REVIEW**

First, it is necessary to examine the standard of review governing the disposition of Graham's claims. According to Graham, his state court *habeas corpus* claims are "identical to those raised herein." Federal *habeas corpus* review does not exist to relitigate state court decisions on their merits. *Harrington v. Richter*, 131 S.Ct. 770, 785 (2011).

Where, as here, a federal *habeas corpus* petitioner's claims have been "adjudicated on the merits in state court proceedings," federal review is "limited" to the constitutionality of the underlying state *habeas corpus* decision as opposed to the actual merits of a petitioner's claims. *Worthington v. Roper*, 631 F.3d 487, 495 (8<sup>th</sup> Cir. 2011). This focus on the state *habeas corpus* court's decision, rather than on the merits of a petitioner's claims, means that a federal *habeas corpus* petition "shall not be granted" unless the state's decision "was contrary to" or "an unreasonable application of clearly established federal law," or "was based on an unreasonable determination of the facts." 28 U.S.C. 2254(d); *Cullen v. Pinholster*, 131 S.Ct. 1388, 1398 (2011).

Clearly established federal law is the law "as determined by the Supreme Court of the United States." *Worthington*, 631 F.3d at 495. A state court decision is "contrary" to clearly established federal law only if it "arrives at a conclusion opposite that reached by [the United States Supreme] Court on a question of law" or "decides a case differently than [the United States Supreme] Court has on a set of materially indistinguishable facts." *Worthington*, 631 F.3d at 495, citing *Williams v. Taylor*, 120 S.Ct. 1495, 1523 (2000).

Federal review is “limited to the record that was before the state court” and no evidentiary hearing is permitted except in extraordinary circumstances. *Pinholster*, 131 S.Ct. at 1398, 1399 n. 4. Federal courts are not an “alternative forum” for *de novo* review of matters previously adjudicated at the state level. *Pinholster*, 131 S.Ct. at 1401. Rather, the state proceedings are the “main event” and state determinations stand unless the high review standards of 28 U.S.C. 2254(d)(1) and/or (2) are met. *Pinholster*, 131 S.Ct. at 1402.

Meeting the standard of an “unreasonable application” of federal law requires Graham to show that “there was no reasonable basis” for the state court’s decision according to governing federal constitutional principals in existence at that time. *Pinholster*, 131 S.Ct. at 1399, 1402. This means that the federal reviewing court defers to the “arguments or theories . . . that could have supported the state court’s decision” and sustains them if there is any possibility that another fairminded court could agree with those arguments or theories, even if the federal reviewing court itself might not. *Pinholster*, 131 S.Ct. at 1402; *Harrington*, 131 S.Ct. at 786.

Consistent with the notion that “[a]n *unreasonable* application of federal law is different from an *incorrect* application of federal law,” federal review of adjudicated state claims requires the petitioner to show that the state decision “was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Pinholster*, 131 S.Ct. at 1411; *Harrington*, 131 S.Ct. at 786. Thus, even if a federal *habeas corpus* court might itself have decided a case

differently had it been clothed in the state court judge's robe, it must sustain state court rulings that are in any way legally reasonable. *Pinholster*, 131 S.Ct. at 1411; *Worthington*, 631 F.3d at 495.

When it comes to Graham's allegations of ineffective assistance of his criminal trial and appellate counsel, federal courts are "doubly deferential" in their review of such claims. *Pinholster*, 131 S.Ct. at 1403. Deference is first given to counsels' decisions, which are presumptively the product of reasonable professional judgment. *Pinholster*, 131 S.Ct. at 1403. Deference is further accorded to the state court's findings that counsel performed effectively. Were federal *habeas corpus* claims reviewed in terms of whether counsels' performance failed to meet professional standards, it would be no different than the state court's *Strickland* adjudication of the petitioner's ineffectiveness claims. *Harrington*, 131 S.Ct. at 785. Since federal review is more limited, Graham must prove more than just error by his counsel, but error that is so inarguable that no reasonable state court would have found otherwise. *Pinholster*, 131 S.Ct. at 1403; *Harrington*, 131 S.Ct. at 788.

Surmounting this high bar is not meant to be "an easy task" for Graham. *Pinholster*, 131 S.Ct. at 1408; *Harrington*, 131 S.Ct. at 786. Unless Graham can fit his claims into one of 28 U.S.C. 2254(d)'s strict exceptions, his claims before this court are barred. *Harrington*, 131 S.Ct. at 787. As argued below, dismissal of Graham's petition is appropriate because he cannot show that any state court decision concerning either his claims or his procedural default is

contrary to or an unreasonable application of any decision of the United States Supreme Court. Fed.R.Civ.P. 12(b); Fed.R.Civ.P. 56.

### **ARGUMENT**

In an effort to lay blame for his default somewhere other than himself, Graham vaguely faults “prison mail procedures” for his failure to timely serve his motion for a certificate of probable cause per SDCL 21-27-18.1.

PETITIONER’S RESPONSE at 7. Graham’s argument ignores the fact that he did not default due to a failure to timely *file* his motion with the South Dakota Supreme Court, but his failure to simultaneously *serve* the motion on the appropriate parties at the time he filed it. Graham does not explain how the same “prison mail procedures” that permitted him to timely file his motion prevented him from timely serving it.

Graham read and complied with SDCL 21-27-18.1’s first sentence instructing him to file his motion within 20 days, but he failed to read or heed the second sentence instructing “[a]ny party filing a motion” to “serve a copy of the motion upon the opposing party.” The statute, by its terms, links the timing of service of the motion to its filing. The South Dakota Supreme Court has determined that effecting service at the time of filing is a precondition to perfecting the court’s jurisdiction over the action.

Graham may deem this precondition “trivial,” but the South Dakota Supreme Court is within its authority and power to establish the preconditions to its jurisdiction, just as it is without authority or power to act on matters outside its jurisdiction. Moreover, the jurisdictional preconditions set in SDCL

21-27-18.1 are neither unclear nor onerous. Thus, under *Coleman*, Graham's admitted failure to perfect jurisdiction over his state court appeal is an adequate state grounds for finding his claims procedurally defaulted. *Coleman v. Thompson*, 111 S.Ct. 2546, 2566 (1991).

Graham asks this court to look past his default to the alleged "strong showing" he has made on the merits of his claims. This tack is unavailing. A cursory overview of Graham's claims reveals that he cannot come close to showing that the state *habeas corpus* court's decision "is contrary to" or "an unreasonable application of clearly established federal law." 28 U.S.C. 2254(d); *Pinholster*, 131 S.Ct. at 1398. Graham's six claims – one attacking the criminal trial court's jurisdiction and five attacking his defense counsel's performance – are hereafter analyzed for their lack of merit in the order in which they appear in his petition.

**CLAIM 1: Graham Claims That The Criminal Trial Court Lacked Jurisdiction Because He Was Allegedly Extradited in Violation Of The US/Canada Extradition Treaty**

Graham raises an assortment of treaty challenges aimed at the criminal trial court's jurisdiction over him, all of which boil down to Graham's assertion that his extradition was improper because "felony murder" is not a crime under Canadian law. Murder need not be denominated as "felony murder" in Canada for Canada to extradite one of its citizens for a murder of that sort committed in the United States.

For extradition purposes, "[t]he law does not require that the name by which the crime is described in the two countries shall be the same; nor that

the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular *act* charged is criminal in both jurisdictions.” *Collins v. Loisel*, 42 S.Ct. 469, 470-71 (1922)(emphasis added). Extradition between two countries is appropriate if “the conduct involved is criminal in both countries,” even if each element of the offense purportedly committed is not identical to the elements of a similar offense in the extraditing country. *Russell v. United States*, 789 F.2d 801, 803 (9<sup>th</sup> Cir. 1986).

Thus, for example, the defendant in *Clarey v. Gregg*, 138 F.3d 764, 765 (9<sup>th</sup> Cir. 1998), was properly extradited for felony murder in the United States even though Mexico, like Canada, had no such specific offense. The *Clarey* court ruled that “Mexico’s homicide statute and the United States statute can both be used to punish the acts with which Clarey is charged – causing the death of Bishop by beating him during a robbery. The two laws are analogous because they both punish acts of the same general character – the taking of another’s life; no more is required . . . . The primary focus of dual criminality has always been on the conduct charged; the elements of the analogous offenses need not be identical.” *Clarey*, 138 F.3d at 766.

According to the foregoing authorities, so long as the *act* of shooting a defenseless woman in the back of the head at point blank range would have been criminal if committed in Canada, extraditing Graham for prosecution for felony murder in the United States does not offend dual criminality principles. Graham’s own cited authorities establish that murder is a criminal act in Canada. PETITIONER’S ATTACHMENT A: *R. v. Vaillancourt*, [1987] 2 SCR 636;

PETITIONER'S ATTACHMENT C: Roach, *Essentials of Canadian Law* (4<sup>th</sup> Ed. 2009) citing *Criminal Code of Canada*, R.S.C. 1985, c. C-46, §§ 222(1), 223(1). Canada's Minister of Justice was apparently satisfied that dual criminality requirements had been met when he signed the Consent to Waiver of Specialty authorizing Graham's extradition. EXTRADITION LETTER, copy attached as Exhibit 1. Thus, the state *habeas corpus* court's determination that Graham had been properly extradited, and that the criminal trial court had jurisdiction over him, is not contrary to or an unreasonable application of the United States Supreme Court's decision in *Collins*.

**CLAIM 2: Graham Claims That The Kidnapping Instructions Did Not Properly Describe The Offense**

Graham argues that the court's instruction to the jury on the elements of kidnapping was "fatally flawed" because it permitted him to be convicted of the offense if he kidnapped for a general, unspecified "purpose." According to Graham, this was contrary to the 2009 version of SDCL 22-19-1, which requires that one of five specific purposes must underlie the kidnapping, none of which were met in this case.

As the state *habeas corpus* trial court noted, Graham has waived this argument because he neither objected to the subject instruction at trial nor challenged it on direct appeal. *State v. Graham*, 2012 SD 42, ¶ 9, 815 N.W.2d 293, 298; *Ramos v. Weber*, 2000 SD 111, ¶ 8, 616 N.W.2d 88, 91. Even if one were to attribute this waiver to oversight by Graham's trial or appellate counsel, Graham cannot show that it would constitute ineffectiveness because the instruction was proper as a matter of law.

Graham's kidnapping argument is a variation of his Claim 4, wherein he argues that he could only be tried and convicted for violating the 2009 version of the state's criminal code rather than the version in effect in 1975 when he kidnapped and killed Annie Mae Aquash. As described in connection with the analysis of Graham's Claim 4 below, United States Supreme Court case law permitted Graham to be charged and tried for violations of the statutes as they existed in 1975 when Graham's criminal conduct occurred in 1975.

The 1975 version of SDCL 22-19-1 imposed liability for kidnapping on any person who abducts another "for ransom, reward, or otherwise." 1975 KIDNAPPING STATUTE, Exhibit 2. The "or otherwise" language "extends the prohibition [on kidnapping] to restraint in *any* case other than for ransom or reward." *State v. Strauser*, 63 N.W.2d 345, 347 (S.D. 1954)(emphasis in original). According to *Strauser*, the 1975 version of the kidnapping statute "was intended to and does outlaw kidnapping regardless of the *purpose* of the restraint." *Strauser*, 63 N.W.2d at 347. Thus, the *Strauser* court upheld kidnapping instructions that informed the jury that the defendant could be found guilty if he held his victim "for any purpose."

Consistent with *Strauser*, Graham's criminal trial jury was instructed that he could be found guilty of kidnapping if he seized, confined, abducted, or carried Annie Mae Aquash away for "ransom, reward, or other purpose." KIDNAPPING INSTRUCTION, Exhibit 3. According to *Strauser*, the words "purpose" and "otherwise" are interchangeable and appropriate for use in jury instructions or charging documents for an offense occurring in 1975 when a

kidnapper's purpose, like Graham's, was other than ransom or reward.

*Strauser*, 63 N.W.2d at 347. Since Graham has no grounds to claim that his jury was improperly instructed on the elements of kidnapping as that offense was defined in 1975, or that his trial and appellate counsel overlooked error in the instruction, the state *habeas corpus* court's decision is not contrary to, or an unreasonable application of, any federal constitutional law.

**CLAIM 3: Graham Claims That The Felony Murder Instruction Was Duplicitous Because It Merged The Elements of Murder And Kidnapping**

Graham argues that combining the elements of felony murder and kidnapping into a single indictment count and jury instruction is duplicitous. According to Graham, this alleged duplicity worked two injustices: (1) since he is purportedly not guilty of kidnapping because of the instructional error described in his Claim 2, he cannot be guilty of a kidnapping-based felony murder; and (2) the alleged duplicity prevented the jury from acquitting him of murder but finding him guilty of kidnapping.

As with his challenge to the kidnapping instruction, Graham has waived this argument because he neither objected to the subject instruction at trial nor challenged it on direct appeal. *Graham*, 2012 SD 42 at ¶ 9, 815 N.W.2d at, 298; *Ramos*, 2000 SD 111 at ¶ 8, 616 N.W.2d at 91. Even if one were to attribute this waiver to oversight by Graham's trial or appellate counsel, Graham cannot show that it would constitute ineffectiveness because the instructions were proper as a matter of law.

Graham's duplicity argument can be disposed of by reference to the United States Supreme Court's decision in *Schad v. Arizona*, 111 S.Ct. 2491 (1991).<sup>1</sup> In *Schad* the defendant, like Graham, was charged with both premeditated and felony murder but not for the robbery underlying the murder. *Schad* ruled that "premeditation" and "in the perpetration of . . . robbery" were not *elements* of the crime of first degree murder, they were two means of satisfying the *mens rea* element of first degree murder. *Schad*, 111 S.Ct. at 2499-2500, 2501. According to *Schad*, it was not necessary to charge these two means of perpetrating first degree murder in two distinct counts, even if a jury might convict for premeditated murder without unanimously agreeing on which of the two *mens rea* existed. *Schad*, 111 S.Ct. at 2503.

The same is true for Graham. Though acquitted of premeditated murder, Graham's jury found that his kidnapping of Annie Mae Aquash exhibited the *mens rea* of "reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death" sufficient to sustain a conviction for felony murder. *Schad*, 111 S.Ct. at 2503. After all, even if one does not in earnest intend to kill one's kidnapping victim at first, the risk of murder is so inherent in the act (because the victim can put the perpetrator in prison for a very long time if freed) that its mental culpability is equivalent to premeditation.

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<sup>1</sup> Graham's reliance on *Beck v. Alabama*, 100 S.Ct. 2382 (1980), is misplaced because he was never subject to the death penalty for murdering Aquash. Thus, *Beck's* concern with instructing on appropriate lesser included offenses so that a jury will not be left with only the alternatives of death or acquittal are not at issue here. *Schad*, 111 S.Ct. at 2505.

Nor does *Schad* require that a separately-charged kidnapping count and conviction underlie the felony murder conviction. Thus, for example, the court found no error when *Schad* was charged in an indictment for first degree premeditated and felony murder but not for the “lesser included” robbery underlying the felony murder, though this prevented the jury from finding that “at most [*Schad*] was a thief, not a murderer.” *Schad*, 111 S.Ct. at 2495. Thus, the state *habeas corpus* court’s rejection of Graham’s duplicity claim is not contrary to or an unreasonable application of *Schad* or any other United States Supreme Court authority.

**CLAIM 4: Graham Claims The Court Had No Jurisdiction To Try Him For For Violating A Statute That Was Repealed In 2005**

Graham was convicted of felony murder in violation of SDCL 22-16-9, which was the statute in effect at the time he killed Aquash. The statute was repealed in 2005. According to Graham, repeal of the statute without an express savings clause rendered it “a dead letter” that could not have been used to convict Graham in 2009. He argues that his 2009 conviction for violation of a repealed statute is void as a consequence.

At the time of Aquash’s murder, SDCL 22-16-9 held that:

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

The underlying felony supporting Graham’s conviction for murder under this statute was kidnapping, in violation of SDCL 22-19-1. The question is whether Graham could be charged, tried, and convicted in 2009 for violating the statute in effect in 1975, or whether he could only be charged and tried for violating a statute in effect in 2009.

The answer to this question is found in *State v. Means*, 268 N.W.2d 802 (S.D. 1978). In 1977, Russell Means was convicted of rioting to obstruct in violation of SDCL 22-10-4 for his role in protests at the Minnehaha County Courthouse in April of 1974. SDCL 22-10-4 was repealed in 1976. Like Graham, Means argued that he could not be charged and tried in 1977 for violating a statute that had been repealed in 1976.

The South Dakota Supreme Court disagreed. Citing *United States v. Reisinger*, 9 S.Ct. 99 (1888), the *Means* court found that SDCL 22-10-4 was “saved” by SDCL 2-14-18 as to offenses committed prior to repeal. *Means*, 268 N.W.2d at 820; *In re Tinklenberg*, 2006 SD 52, ¶ 17, 716 N.W.2d 798, 804 (not error to revoke insurance agent’s license under authority of repealed statute where misconduct occurred during time when statute was in force). SDCL 2-14-18, like its federal counterpart interpreted in *Reisinger*, states that the repeal of a statute by the legislature does not have the effect of releasing anyone from criminal “liability” incurred under the statute while it was effective, or foreclosing their prosecution after repeal.

So too for Graham. Like a mosquito trapped in amber, SDCL 2-14-18 perfectly preserves Graham’s liability for criminal offenses committed in 1975 just as it was when SDCL 22-16-9 was in effect.

Graham argues that *Reisinger* is archaic and discredited. For this proposition, he cites to Westlaw’s classification of lower court cases that have “disagreed” with or “declined” to follow *Reisinger* in certain unique fact situations. The same Westlaw page, however, posts cites to two modern-era

United States Supreme Court cases (and more than a hundred lower court cases) that continue to adhere to and apply *Reisinger* to situations like Graham's. WESTLAW POSTING, Exhibit 4; *Warden, Lewisburg Penitentiary v. Marrero*, 94 S.Ct. 2532 (1974); *Pipefitters Local Union No. 562 v. United States*, 92 S.Ct. 2247 (1972). Graham's argument is further discredited by the fact that the federal savings statute at issue in *Reisinger* is still in effect. 1 USC § 109. Thus, contrary to Graham's flimsy argument, *Reisinger* is alive and well in the canons of United States Supreme Court jurisprudence.

Graham's *Reisinger*-is-dead argument also seeks support from the obviously inapposite line of cases trying to sort out the unique and then-culturally sensitive question what remedies should be available to persons being prosecuted for or convicted of trespass for conducting sit-ins at lunch counters before the passage of the Civil Rights Act of 1964. *Bell v. Maryland*, 378 U.S. 226 (1964); *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964). Neither *Bell* nor *Hamm* involve the situation here where a defendant, like the *Reisinger* defendant, asks whether a statutory savings clause permits him to be convicted on a repealed statute for criminal liability incurred while the statute was yet effective.

In short, Graham cites no apposite authority for the proposition that *Reisinger*, and therefore *Means*, are contrary to or in violation of the constitution or federal law as needed to grant him a writ of *habeas corpus* herein. Accordingly, he was appropriately charged and convicted under the 1975 version of South Dakota's felony murder (and kidnapping) statute.

**CLAIM 5: Graham Claims His Trial Was Unfair**

**a. Graham Argues That The Jury Should Have Heard Unsubstantiated Alternate Explanations For Aquash's Murder**

According to Graham, his trial counsel was ineffective for failing to introduce evidence that an FBI agent or a GOON squad killed Annie Mae Aquash. Graham conjures these alternate theories up from commentary and speculation appearing in books written about events relating to the occupation of Wounded Knee in 1973.

Under South Dakota law, Graham's counsel had no obligation to defend Graham on these alternate perpetrator theories unless "evidence exist[ed] that demonstrat[ed] a third person was in the proximity of the crime, and had the motive and opportunity to commit the crime." *State v. Faulks*, 2001 SD 115, ¶ 22, 633 N.W.2d 613; *State v. Garza*, 1997 SD 54, 563 N.W.2d 406; *State v. Larson*, 512 N.W.2d 732 (S.D. 1994). South Dakota's test for admitting alternate perpetrator evidence is consistent with United States Supreme Court endorsements of similar tests. *Holmes v. South Carolina*, 126 S.Ct. 1727, 1733 (2006)(evidence that "raises a reasonable doubt" that a defendant rather than an alternate perpetrator committed an offense is admissible if it is not "so remote and lack[ing] such connection with the crime;" alternate perpetrator evidence "may be excluded where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote").

Graham's alternate perpetrator proof is so lacking in evidentiary support that his counsel cannot be said to have been ineffective for not introducing it. Should his counsel have sought to admit books, or called their authors to testify, in furtherance of this theory? Should his counsel have called the FBI agent to the stand expecting him to confess to killing Aquash? What actual *evidence* does Graham now proffer that either a rogue FBI agent or a GOON squad was in proximity to Aquash or the place where she was shot at the time she was killed, or that they had a motive more compelling than AIM's, or a better opportunity to shoot her in the head? What *evidence* does Graham provide to show that custody of Aquash switched from AIM to its rival, GOON? And, if Aquash was in AIM custody for being an FBI informant, would not the FBI and its ostensible GOON allies as likely rescued her from AIM as shoot her? What *evidence* does Graham proffer that sufficient alternate perpetrator evidence could even be mustered to satisfy the *Faulks* or *Holmes* standards?

The answer is none. Graham's alternate perpetrator theories are nothing more than a regurgitation of *post hoc* reservation mythology promoted in sensationalistic books written by AIM partisans. *Holmes*, 126 S.Ct. at 1733. Graham does not place any person with a motive and opportunity to kill Aquash in the proximity of where she was last seen alive or where her body was found. Graham does not explain the FBI's motive to kill one of their alleged informants, or, alternatively, the FBI's motive to kill a fugitive whom they already had dead-to-rights on a 20-year stint in a federal penitentiary for

possession of explosives. Graham's illogical and unsupported theories fail to raise reasonable doubt concerning his own guilt.

As noted below, however, there is sufficient evidence of Graham's motive to kill Aquash, and proximity to both her and the scene of the crime, to dispel any reasonable doubt about Graham's involvement in a kidnapping that ended in murder. Accordingly, Graham's trial counsel was not ineffective for failing to introduce Graham's alternate perpetrator theories, and the state *habeas corpus* court's decision so finding is not contrary to or an unreasonable application of the United States Supreme Court's decision in *Holmes*.

**b. Graham Argues That His Conviction Is Based Solely On Uncorroborated Accomplice Testimony**

Graham argues that he has been improperly convicted solely on uncorroborated accomplice testimony in violation of SDCL 23A-22-8. This very argument was addressed on its merits, analyzed at length, and rejected on direct appeal. *State v. Graham*, 2012 SD 42, ¶¶ 33-39, 815 N.W.2d 293, 306-07. The South Dakota Supreme Court's decision is quite obviously not contrary to or an unreasonable application of United States Supreme Court law because *Krulewitch v. United States*, 69 S.Ct. 716, 723 (1949), stated that "in federal practice there is no rule preventing conviction on uncorroborated testimony of accomplices." The uncorroborated accomplice rule is purely a creation of state law, and federal *habeas corpus* relief does not extend to errors of state law. *Lewis v. Jeffers*, 110 S.Ct. 3092, 3102 (1990). Accordingly, Graham has failed to state a claim for which relief may be granted.

**CLAIM 6: Graham Claims Ineffectiveness Of Counsel In The Aggregate**

Graham seeks refuge for his default in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), which held that “a procedural default will not bar a federal habeas court from hearing a *substantial* claim of ineffective assistance at trial if, in the [state’s] initial review collateral proceeding, there was not counsel or counsel in that proceeding was ineffective.” Graham points out that the state *habeas corpus* trial court did not appoint counsel on his behalf so that his default can be excused by this lack of representation. Alternatively, Graham’s initial review shadow counsel, Paul Wolf, dutifully throws himself on his sword and declares his own ineffectiveness in perfecting Graham’s appeal . . . again so that Graham’s default might be excused under *Martinez*. PETITIONER’S RESPONSE at 2.

*Martinez* does not control here for at least two reasons: (1) the default did not occur during the initial review collateral proceeding but during the appeal from that proceeding; and (2) the operative word in the *Martinez* exception is “substantial,” and Graham has utterly failed to demonstrate *substantial* ineffectiveness of his criminal trial counsel.

As respects the first point, *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987), held that there is no right to counsel in post-conviction, habeas corpus proceedings and that due process does not require that the state supply a lawyer. *Martinez* itself declined to find a *constitutional* right to effective assistance of initial review state *habeas corpus* counsel, or to appointment of counsel in initial review state *habeas corpus* proceedings. *Martinez*, 132 S.Ct.

at 1319. More to the point, *Martinez* expressly reaffirmed “the rule of *Coleman*,” which itself explicitly held that – no matter what constitutional concerns might surround the ineffectiveness of initial review state *habeas corpus* counsel when that proceeding is the prisoner’s first opportunity to contest the effectiveness of his criminal trial counsel – there is no “right to counsel to appeal a state collateral determination of his claims of trial error.” *Coleman*, 111 S.Ct. at 2568.

Here, as in *Coleman*, the procedural default is not the product of absent or ineffective counsel during the initial review state *habeas corpus* proceeding; Graham’s claims were examined on the merits and found lacking. Graham does not here, as in *Martinez*, seek to bring claims concerning the ineffectiveness of his trial counsel that were omitted from his state *habeas corpus* proceedings by reason of the absence or ineffectiveness of collateral review counsel; here Graham seeks to excuse a procedural default during his *appeal* from initial collateral review proceedings determined on their merits. Mr. Wolf has fallen nobly upon the grenade to no avail because the United States Supreme Court expressly does not recognize a constitutional right to effective assistance of initial review *habeas corpus* appellate counsel. *Coleman*, 111 S.Ct. at 2568. Thus, the South Dakota Supreme Court’s ruling that Graham failed to perfect that court’s jurisdiction over his appeal from the trial court’s denial of his petition for a writ is not contrary to, or an unreasonable application of, *Martinez*.

As respects the second point, the *Martinez* exception applies only to a “substantial” claim of ineffectiveness of trial counsel, “which is to say that the prisoner must demonstrate that the claim has some merit.” *Martinez*, 132 S.Ct. at 1318. As revealed above, Graham’s claims facially lack any merit. Thus, even if Graham’s indigency, or his shadow counsel’s ineffectiveness, are to blame for defaulting on SDCL 21-27-18.1’s service requirements, he cannot meet the *Martinez* exception by showing that he has lost claims of substance.

### **CONCLUSION**

Contrary to the spin he puts on his situation, Graham is not imprisoned for life for a “trivial” reason; he is imprisoned for murdering Annie Mae Aquash as determined at a public trial to a jury that was duly empaneled and presided over by a sanctioned court of law. He appealed his conviction to the state’s highest court and lost. He petitioned for state *habeas corpus* relief and lost on the merits. He sought to appeal the state court’s denial of his petition for a writ of *habeas corpus* but failed to secure appellate jurisdiction by failing to timely serve his motion for certificate of probable cause. Neither the cause nor the process afforded Graham to date have been trivial. That he can proceed no further at this time in his meritless attacks on his conviction does not mean that Graham is presently incarcerated without due process or in violation of the constitution, it simply means that Graham, for reasons not attributable to the state, defaulted on procedures necessary to proceed further in the state system.

It is black letter United States Supreme Court law that even “trivial” procedural defaults will preclude federal review of a petitioner’s *habeas corpus* claims. This is so because a “trivial” procedural default has the non-trivial effect of denying a state court the opportunity due it under our federal system to review and pass on the merits of a *habeas corpus* petitioner’s constitutional claims.

As respects his treaty claim, Graham has not shown that Canada could not prosecute his killing of Annie Mae Aquash as some form of murder as needed to prove his dual criminality claim. As respects his ineffective assistance of counsel claims, Graham has not shown that his counsel’s performance is inarguably deficient: (1) Graham was properly charged under the 1975 versions of the felony murder and kidnapping statutes; (2) Graham’s jury was accurately instructed regarding the elements of felony murder and kidnapping; (3) Graham has no constitutional right to a conviction based on corroborated accomplice testimony as needed to bring such a claim herein, and his jury was appropriately instructed on who qualified as an accomplice and to view accomplice testimony with caution even if he did; and (4) Graham does not posit credible alternate perpetrator evidence overlooked by his defense team.

In short, even if one were to forgive Graham’s glaring procedural default, Graham has fallen far short of meeting the high burden of demonstrating substantial claims whose disposition by the state court was contrary to, or an

unreasonable application of, United States Supreme Court law. Accordingly,  
Graham's petition herein must be dismissed.

Dated this 10<sup>th</sup> day of January 2014.

Respectfully submitted,

**MARTY J. JACKLEY**  
**ATTORNEY GENERAL**  
**STATE OF SOUTH DAKOTA**

A handwritten signature in black ink, appearing to read "Paul S. Swedlund", written over a horizontal line.

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