

**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 STATEMENT OF UNDISPUTED
MATERIAL FACTS**

Respondent Darin Young, through his counsel Paul S. Swedlund, hereby submits the following statement of undisputed material facts in support of his motion to dismiss or for summary judgment.

1. On February 24, 1976, Roger Amiotte found a decomposing corpse at the base of a cliff about 150 feet from Highway 73 south of Kadoka. TRIAL 3 at 81-83, 106/11; TRIAL 4 at 65/11.
2. The body was haphazardly autopsied and the cause of death was ruled exposure. It was buried in an anonymous grave under the name Jane Doe. TRIAL 3 at 109/21, 110/10-22, 111/1, 126/4-21.
3. Two weeks later, the body was exhumed. It was identified as Annie Mae Aquash. A re-autopsy revealed that Aquash had been killed by a bullet from a .32 caliber revolver fired into the back of her head. TRIAL 3 at 115/23; TRIAL 4 at 49/13, 52/20, 202/10.

4. John Graham, a.k.a John Boy Graham, a.k.a. John Boy Patton, fired the pistol that ended Aquash's life.
5. In the summer of 1975, Aquash, an American Indian Movement (AIM) activist from Nova Scotia, was arrested in a tent full of weapons and explosives on the Rosebud Indian Reservation. She was to be tried in federal court in Pierre on or about November 24, 1975.
6. Despite being apprehended in Oregon on November 14, 1975, with a group of AIM leaders, some of whom escaped arrest by shooting it out with Oregon Highway Patrol troopers, the judge granted her release on bond pending her trial. TRIAL 4 at 220/15.
7. Aquash's unexpected release fueled ongoing AIM rumors that she was a government informant. TRIAL 4 at 211/4-212/10.
8. Aquash was not "interested in any way, shape, or form" in any plea bargain that required her to testify against her AIM brethren. TRIAL 4 at 224/25. Instead, even though she had been offered a misdemeanor plea bargain, on or about November 22, 1975, on the eve of her trial in federal court in Pierre, Aquash fled to Denver. TRIAL 3 at 190-94; TRIAL 4 at 70/16, 111/11, 203-14, 240/14, 263/10.
9. Angie Janis, also a member of AIM, lived with John Graham in Boulder, Colorado. TRIAL 4 at 69/1-7. Thelma Rios contacted Janis and told her that Aquash needed to be brought back to South Dakota because she was an informant. TRIAL 4 at 70/16, 110/16, 111/11.

10. Shortly after Thanksgiving Day, Graham, Theda Clarke, and others arrived at the Denver home of Troy Lynn Yellow Wood where Aquash was staying. TRIAL 4 at 111-14; TRIAL 7 at 24/13. Their purpose in coming to Yellow Wood's home was to discuss what they should do about the alleged informant in their midst. TRIAL 4 at 111-14.
11. One of the participants in the discussion, Ernest Vigil said "I don't know what you guys do about snitches, but this is how we handle it" as he drew his finger across his throat. TRIAL 4 at 116/11.
12. Aquash was detained in the basement while the group upstairs discussed her fate. TRIAL 4 at 72/14, 237/14.
13. A few minutes later, Arlo Looking Cloud came to Yellow Wood's house looking for a partying buddy. TRIAL 6 at 195/25. Clarke asked him to help her drive to Rapid City that night. TRIAL 6 at 196/12.
14. Yellow Wood knew Aquash was in peril. Aquash had told her that AIM leader Leonard Peltier had put a gun to her head and threatened to kill her at the AIM convention in Farmington, New Mexico, in June 1975 if she was an informant. TRIAL 4 at 111/11.
15. Yellow Wood tried to call the police, but Janis pushed the phone down and told her not to do that. TRIAL 4 at 120/18.
16. Yellow Wood pleaded with Janis to help her help Aquash but Janis refused. TRIAL 4 at 120/25.

17. Yellow Wood called the Denver AIM house hoping to find someone to help Aquash. TRIAL 4 at 118/7. She reached George Palfy, who came to Yellow Wood's house and tried to take Aquash away from Graham and his group. TRIAL 4 at 119/1, 235/24, 239/17.
18. More talk of killing Aquash was going on in the kitchen, where Vigil again said that "what we do with snitches is take them to the country and get rid of them" while he made a "throat slit gesture." TRIAL 4 at 241/23.
19. Looking Cloud went down to the basement and saw Graham tying Aquash's hand in front of her. TRIAL 5 at 238/8, 242/22, 263/21; TRIAL 6 at 197/6, 199/14.
20. Clarke and Graham flanked Aquash and marched her, sobbing, out of Yellow Wood's house, officiously ordering Yellow Wood to get out of their way. TRIAL 4 at 117/17, 121/7; TRIAL 5 at 96/9. Aquash cried out to Yellow Wood that "if they take me from here, you will never see me alive again." TRIAL 4 at 116/25.
21. Graham, Clarke, and Looking Cloud loaded Aquash into the cargo area of Clarke's red Ford Pinto station wagon to take her to Rapid City. TRIAL 4 at 122/12, 243/5; TRIAL 6 at 199-200. Aquash looked "resigned" and "defeated." TRIAL 4 at 122/16, 188/13.
22. As they left, Clarke drove, Graham rode in the passenger seat, and Looking Cloud sat in the back seat. TRIAL 4 at 244/7; TRIAL 6 at 199-

200. They drove to Rapid City without stopping and spent the night in Thelma Rios' apartment. TRIAL 6 at 200-02.

23. That night, Graham was heard engaging in sexual intercourse with the woman he had just forced, crying in fear of her life, from Yellow Wood's home and transported, bound, to Rapid City stuffed in the cramped cargo space of a compact station wagon. TRIAL 6 at 202/6, 206/5, 258/19.

24. A day or two later, Candy Hamilton saw Aquash at the Wounded Knee Legal Defense Offense Committee house in Rapid City. TRIAL 5 at 5/22. Aquash had been crying and looked serious and sad. TRIAL 5 at 12/12.

25. Though she was not bound or guarded when Hamilton saw her, Aquash did not feel free to leave. TRIAL 5 at 16/25, 48/14.

26. Hamilton argued with Clarke, Lorelei Means, and Bruce Ellison and told them that she could not believe that Aquash was a "snitch." TRIAL 5 at 16/7.

27. Aquash was taken to a room to face her AIM accusers. TRIAL 5 at 14/3-14, 15/15, 16/7.

28. Hamilton heard the voices of Thelma Rios, Lorelei Means, and Madonna Gilbert coming from the room. TRIAL 5 at 14/13. After Aquash entered that room, Hamilton never saw her again. TRIAL 5 at 15/12.

29. The next and last confirmed siting of Aquash alive occurred when Graham, Clarke, and Looking Cloud showed up at the rural home of Dick Marshall and Cleo Gates at 10:30 at night with Aquash as their prisoner. TRIAL 5 at 71/19, 72/5, 74/23, 77/8, 78/9. They wanted to keep Aquash tied up in Marshall's basement but Gates refused because she did not like what was going on. TRIAL 5 at 74/23, 75/1.
30. Clarke, Graham, Looking Cloud, and Marshall then adjourned to a bedroom and closed the door. TRIAL 6 at 214/23. Gates kept Aquash company in the living room.
31. In the bedroom, Marshall gave Clarke a silver revolver and a box of shells. TRIAL 6 at 215-16, 220/6.
32. At the time, Marshall was on bail for killing Martin Montileaux in the men's bathroom of the Longhorn Bar in Scenic by shooting him in the throat. *State v. Marshall*, 264 N.W.2d 911 (S.D. 1978).
33. Oblivious to what was really happening, Gates gave Aquash a pair of jeans and a shirt before Clarke, Graham, and Looking Cloud took her from the Marshall house into the cold night. TRIAL 5 at 78/1.
34. When Gates learned that Aquash had been killed, she felt terrible because "this is when that happened to her." TRIAL 5 at 78/25. Gates was right.
35. After leaving the Marshall home, Looking Cloud drove to Potato Creek for gas. TRIAL 6 at 218/9. From there they went to Wanbli, where Clarke took over the driving. They drove north toward Kadoka. TRIAL 6

at 221/18. Again, Clarke drove with Graham and Looking Cloud in the passenger and back seats and Aquash stuffed into the cargo space.

TRIAL 6 at 188/24, 211/2, 220/18.

36. Clarke stopped the car along the highway south of Kadoka. Graham exited the car and retrieved Aquash. Clarke told Looking Cloud to go with Graham. TRIAL 6 at 191/11.
37. According to Looking Cloud, Graham was “standing with Annie Mae” at the edge of the bluff as she prayed, “and then I seen him shoot her.” TRIAL 6 at 191/18, 192/4. Aquash dropped over the bank to the bottom of the cliff. TRIAL 6 at 192/22.
38. Looking Cloud asked for the gun and shot off the rest of the rounds because he was afraid he would be next. TRIAL 6 at 193/7.
39. From there the group drove back to Denver. TRIAL 6 at 222/7.
40. Darlene “Kamook” Ecoffey lived with AIM leader Dennis Banks from 1972 to 1989 as his common law wife. TRIAL 6 at 60/24. They had four children. In 1975, Kamook was herself involved in AIM. TRIAL 4 at 78/11; TRIAL 5 at 94/12; TRIAL 6 at 11/6.
41. Kamook knew Graham, Clarke, Looking Cloud, and Yellow Wood. TRIAL 5 at 96/1, 97/8, 98/12-15. She had heard the rumors that Aquash was an informant. TRIAL 5 at 98/24.
42. In October 1975, Kamook was traveling through Washington and Oregon in a motor home with Banks, her sister Bernie Nichols, Kenny Loud Hawk, Russ Redner, Leonard Peltier, and Aquash.

43. During the trip, Peltier said it had been he who had killed one of two FBI agents murdered on the Pine Ridge reservation in June of 1975. As Aquash watched, Peltier reenacted how one of the agents held his hand out, and described how the “motherfucker was begging for his life but I shot him anyway.” TRIAL 6 at 8/3.
44. Eventually, an Oregon Highway Patrol trooper pulled the motor home over and arrested most of its occupants.
45. Banks and Peltier escaped following a shootout with the officer. TRIAL 4 at 116/16, 220/15; TRIAL 6 at 67/10-14. The rest of the group was jailed.
46. When law enforcement eventually seized and searched the motor home, one of the dead FBI agents’ guns was found within. TRIAL 6 at 52/17.
47. While in jail, Aquash told Kamook about Peltier’s threat to kill her in New Mexico. TRIAL 5 at 104/15-105/13. Banks and Peltier had already told Kamook that they did not trust Aquash. TRIAL 6 at 32/16.
48. The distrust grew when AIM leaders learned shortly after the Oregon shootout that the motor home was pulled over on a tip from two unidentified FBI informants who had detailed information about the motor home and its occupants. TRIAL 6 at 69/12.

49. Banks trusted his wife and sister-in-law. TRIAL 6 at 10/5. Banks and Peltier trusted one another. TRIAL 6 at 50/19. By simple process of elimination, this revelation focused suspicion on Aquash.
50. Because Peltier had bragged to Aquash about executing an FBI agent, and because Aquash was facing up to 20 years for weapons charges in Pierre, her unexpected release pending trial less than 10 days after the Oregon shootout gave AIM leaders fresh cause to fear her possible cooperation with the government. TRIAL 5 at 208/1, 216/2; TRIAL 6 at 59/23.
51. Banks telephoned Kamook on February 24, 1976, the day Roger Amiotte found Aquash's body, and told her that Annie Mae's body had been found. Banks said this to Kamook two weeks before law enforcement authorities identified the body as Aquash's and released that information to the public. TRIAL 5 at 126/22.
52. If AIM's leadership were not complicit in some way in Aquash's murder through some foot soldier like Graham, it would not have known any sooner than the general public that the Jane Doe found dead in the Badlands was Annie Mae Aquash.
53. In 2002, before any charges were filed against either John Graham or himself, Arlo Looking Cloud called Annie Mae Aquash's daughter. TRIAL 7 at 77/4. He felt he owed it to her to tell her what had happened

to her mother, even though he implicated himself in aiding and abetting a murder. TRIAL 7 at 72-78.

54. According to Graham's petition for a writ of *habeas corpus* filed with this court, his state court *habeas corpus* claims are "identical to those raised herein."
55. Graham procedurally defaulted his appeal of the state court's denial of his *habeas corpus* claims.
56. Graham's state *habeas corpus* claims were adjudicated on their merits and rejected by the trial court. TRIMBLE ORDER, Motion Exhibit 1.
57. Graham petitioned the South Dakota Supreme Court for leave to appeal but failed to timely perfect the court's jurisdiction over his appeal of the state trial court's denial of his petition by timely serving his motion. PETITION FOR CERTIFICATE OF PROBABLE CAUSE, Motion Exhibit 2.
58. After observing that Graham had not timely served his certificate for leave to appeal on the state, the South Dakota Supreme Court gave Graham an opportunity to show cause for this failing. ORDER TO SHOW CAUSE, Motion Exhibit 3.
59. Graham's response to the show cause order did not identify any factor external to himself to explain his failure to timely serve his motion for leave to appeal. GRAHAM RESPONSE, Motion Exhibit 4; STATE'S RESPONSE, Motion Exhibit 5.

60. Graham blamed time pressures and his nominal *pro se* status. PETITION FOR CERTIFICATE OF PROBABLE CAUSE, Motion Exhibit 2 at 2, n. 2.
61. Graham's filings and response show that he knew of the statutory prerequisites for perfecting an appeal per SDCL 21-27-18.1 but he failed to follow them. GRAHAM RESPONSE, Motion Exhibit 4; PETITION FOR CERTIFICATE OF PROBABLE CAUSE, Motion Exhibit 2 at 2, n. 2.
62. After reviewing Graham's stated cause, the South Dakota Supreme Court determined that timely service was "a prerequisite to the Court's jurisdiction" and dismissed his appeal. ORDER DISMISSING APPEAL, Motion Exhibit 6.
63. In light of the South Dakota Supreme Court's clear and express rejection of Graham's appeal for his procedural failure to perfect the court's jurisdiction, his claims herein, which he admits are "identical" to his state claims, are defaulted. ORDER DISMISSING APPEAL, Motion Exhibit 6.
64. Graham's procedurally defaulted claims challenge only his *legal* innocence; he does not present *new* evidence establishing his *factual* innocence.
65. Graham's procedural default deprived the South Dakota Supreme Court of its due opportunity to resolve his constitutional allegations through its established review processes.

66. Graham's procedural default cannot be excused because (a) no factors external to himself caused his default, (b) he has not presented new evidence of actual innocence, and (c) he has not filed substantial claims.
67. Graham vaguely blames "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.
68. Graham 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. PETITIONER'S RESPONSE at 7.
69. 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. SDCL 21-27-18.1.
70. 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. ORDER DISMISSING APPEAL, Motion Exhibit 6.

71. 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.
72. The jurisdictional preconditions set in SDCL 21-27-18.1 are neither unclear nor onerous. SDCL 21-27-18.1.
73. An overview of Graham's claims reveals that he cannot show 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.
74. Graham's 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* (4th Ed. 2009) citing *Criminal Code of Canada*, R.S.C. 1985, c. C-46, §§ 222(1), 223(1).
75. 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, Reply Brief Exhibit 1.
76. Because the *act* of killing a defenseless woman by shooting her 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.

77. Graham has waived any challenge to the kidnapping instruction in his criminal case 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.
78. 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, Reply Brief Exhibit 2.
79. Graham’s criminal trial jury was instructed, consistent with the 1975 kidnapping statute, 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, Reply Brief Exhibit 3.
80. Graham has waived challenges to the alleged duplicity of the felony murder/kidnapping instruction in his criminal trial 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.
81. Though acquitted of premeditated murder, Graham’s kidnapping of Annie Mae Aquash exhibited a *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.
82. 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.

83. SDCL 22-16-9 was “saved” by SDCL 2-14-18 as to offenses committed prior to repeal. SDCL 2-14-18 provides 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.
84. There is no credible evidence that an FBI agent or a GOON squad killed Annie Mae Aquash.
85. If Aquash was an informant, as AIM believed, neither the FBI nor its GOON allies had a motive to kill one of their alleged informants. Alternatively, if Aquash was not an informant, the FBI had no motive to kill rather than apprehend a fugitive whom they could readily neutralize by sending her to federal prison for 20 years for possession of explosives. TRIAL 5 at 208/1, 216/2; TRIAL 6 at 59/23.
86. 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. TRIAL 4 at 116/25, 117/17, 121/7, 122/12, 243/5; TRIAL 5 at 96/9; TRIAL 6 at 199-200.
87. Accomplice testimony against Graham was adequately corroborated to sustain his conviction. *State v. Graham*, 2012 SD 42, ¶¶ 33-39, 815 N.W.2d 293, 306-07.
88. Graham’s criminal trial jury was given an appropriate cautionary instruction regarding accomplice testimony.

89. The state *habeas corpus* trial court did not appoint counsel on Graham's behalf.
90. Graham's initial review shadow counsel, Paul Wolf, blames himself for Graham's default. PETITIONER'S RESPONSE at 2.
91. Graham's default did not occur during the initial review collateral proceeding but during the appeal from that proceeding.
92. Graham has failed to demonstrate substantial claims or substantial ineffectiveness of his criminal trial or initial review *habeas corpus* counsel.
93. Graham's petition herein does not allege that claims concerning the ineffectiveness of his trial counsel were omitted from his state *habeas corpus* proceedings by reason of the absence or ineffectiveness of initial review counsel. Instead, Graham seeks to excuse a procedural default during his *appeal* from initial collateral review proceedings determined on their merits.
94. Graham's claims facially lack the substance necessary to meet any default exception.
95. Graham is not imprisoned for life for a trivial reason
96. Graham 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.
97. Graham appealed his conviction to the state's highest court and lost.

98. Graham petitioned for state *habeas corpus* relief and lost on the merits.
99. Graham 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.
100. The process afforded Graham to date has been substantial and all that was due.
101. Graham is not presently incarcerated without due process or in violation of the constitution.
102. Procedural default has the serious consequence 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.
103. 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.
104. Graham has not shown that his counsel's performance is inarguably deficient: (a) Graham was properly charged under the 1975 versions of the felony murder and kidnapping statutes; (b) Graham's jury was accurately instructed regarding the elements of felony murder and kidnapping; (c) Graham has no constitutional right to a conviction based on corroborated accomplice testimony as needed to bring such a claim herein; (d) Graham's jury was appropriately instructed on who qualified as an accomplice and to view accomplice testimony with caution; and (e)

Graham does not posit credible alternate perpetrator evidence overlooked by his defense team.

105. Even if the court could look past Graham's 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.

106. Graham's petition herein must be dismissed.

Dated this 10th day of January 2014.

Respectfully submitted,

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