Seventh Judicial Circuit Court
PO Box 230
Rapid City SD 57709-0230
(605) 394-2571

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July 1, 2013

Mr. John Graham
SDSP
P.O. Box 5911
Sioux Falls, SD 57117-5911

Ms. Lara Roetzel
Pennington Co. State's Attorney
300 Kansas City Street, Suite 400
Rapid City, SD 57701

Re: Memorandum Decision and Order on Habeas Petition (Crim. File 09-3953)

Dear Counsel and Mr. Graham:

I received Petitioner's Application for Writ of Habeas Corpus on May 24, 2013. His judgment of conviction is dated January 26, 2011, and his appeal to the South Dakota Supreme Court was decided May 30, 2012. Therefore, his application is timely under SDCL 21-27-3.3. For the reasons set forth below, I am denying the Application for Writ of Habeas Corpus.

I. Procedural and Factual Background

In February 1976, Anna Mae Aquash's body was found at the bottom of a bluff in a remote area of the Badlands near Highway 73 between Kadoka and Wanblee. An autopsy indicated that she died from a single bullet wound to the head. In 2003, Petitioner Graham, a Canadian citizen, was charged in federal court with the premeditated murder of Aquash. In 2007, Graham was extradited to the United States from Canada on that charge. After protracted litigation in the federal courts, the federal premeditated murder charge was dismissed. See *United States v. Graham*, 572 F.3d 954 (8th Cir.2009). However, before Graham could return to Canada, he was indicted by a Pennington

County grand jury on state charges of premeditated murder and felony murder. The underlying felony was alleged to be the kidnapping of Aquash.

The State's theory of the case was that Aquash was kidnapped and murdered because leaders and members of the American Indian Movement (AIM) believed she was a federal government informant. In the 1970s, Aquash had been actively involved in AIM. In the summer of 1975, Aquash was arrested with several AIM leaders on federal charges involving the possession of explosives on the Rosebud Sioux Indian Reservation. Aquash was charged in federal court and released from custody. In October 1975, Aquash, along with other AIM members and leaders, traveled to Washington in a motor home. After spending some time in Washington, the group traveled to Oregon. While traveling in Oregon in November, the occupants of the motor home were involved in a shoot-out with the Oregon Highway Patrol. Aquash was arrested on additional charges and was returned to South Dakota to face the prior federal charges. Aquash was released again on the South Dakota federal charges, and she fled to Denver around November 25, 1975.

The State presented evidence that a few days after Aquash arrived in Denver, AIM leaders ordered Aquash to be taken to Rapid City to face the allegation that she was an informant for the government. Witnesses testified that Aquash's hands were tied, and she was forcibly taken to Rapid City by AIM members Graham, Arlo Looking Cloud, and Theda Clarke. There was also evidence that this group eventually obtained a gun, took Aquash to a bluff in the Badlands, and Graham shot her.

Graham was found guilty of felony murder, but was acquitted of premeditated murder. He was sentenced to life in prison without parole. Graham appealed to the South Dakota Supreme Court raising the following issues:

1. Whether the doctrine of specialty, arising under an extradition treaty with Canada, deprived the State of jurisdiction to try Graham on the state felony murder charge when he had been extradited to the United States on the federal charge of premeditated murder.

2. Whether the circuit court erred in allowing Looking Cloud's and Maloney's testimony restating Looking Cloud's 2002 telephonic statement to Maloney.

3. Whether the circuit court erred in allowing Yellow Wood's testimony that Aquash said that Peltier made a statement accusing Aquash of being an informant.

4. Whether the circuit court erred in allowing Ecoffey's testimony that Peltier, in the presence of Aquash, made a self-incriminatory statement admitting that he killed an FBI agent.

5. Whether there was sufficient evidence to convict Graham of felony murder.

6. Whether Graham's sentence of life imprisonment without parole was authorized by statute, and whether the sentence was cruel and unusual punishment under the Eighth Amendment.

The South Dakota Supreme Court affirmed his conviction on May 30, 2012 (2012 S.D. 42). This application for habeas corpus was received on May 24, 2013. Petitioner raises the following grounds for relief:

1. The Court had no jurisdiction to prosecute Graham for felony murder, because felony murder is not a crime in Canada, and is not an extraditable offense;

2. The jury did not find Graham guilty of kidnapping, because the jury instructions did not include every element of the offense;

3. Graham's felony indictment and jury instructions were duplicitous, merging kidnapping and felony murder into a single count;

4. Graham's felony murder conviction is void because it's based on a statute that was repealed in 2005.

5. Graham did not receive a fair trial.

II. ANALYSIS

A. Applicable Law

Habeas corpus does not substitute for direct appellate review. *Lawrence v. Weber*, 2011 S.D. 19, 797 N.W.2d 783; *Steichen v. Weber*, 2009 S.D. 4, 760 N.W.2d 381; *Erickson v. Weber*, 2008 S.D. 30 ¶7, 748 N.W.2d 739, 744. Habeas corpus can be used only to review (1) whether the Court has jurisdiction of the crime and of the person of the defendant; (2) whether the sentence was authorized by law; and (3) in certain cases, whether an incarcerated defendant has been deprived of basic constitutional rights. *Id*; SDCL §21-27-16. Furthermore, habeas corpus is not a remedy to correct irregular procedures nor may it be employed to review mere errors or irregularities in proceedings of the tribunal having jurisdiction over the person

and subject matter. *Lawrence*, 2011 S.D. 19 at ¶ 6, 797 N.W.2d 783, 785; *Piper v. Weber*, 2009 S.D. 66, ¶ 7, 771 N.W.2d 352, 355; *Krebs v. Weber*, 2000 S.D. 40, 608 N.W.2d 322; *Lindquist v. Bisch*, 1996 S.D. 4, 542 N.W.2d 138.

B. <u>Res Judicata/Waiver</u>

As to the issues already addressed by the Supreme Court, the doctrine of res judicata disallows reconsidering an issue that was actually litigated or that could have been raised and decided in a prior action. *Ramos v. Weber*, 2000 S.D. 111, 616 N.W.2d 88; *SDDS, Inc. v. State*, 1997 S.D. 114, ¶ 16, 569 N.W.2d 289, 295 (quoting *Hogg v. Siebrecht*, 464 N.W.2d 209, 211 (S.D.1990)).

> "The purpose behind the doctrine is to protect parties 'from being subjected twice to the same cause of action, since public policy is best served when litigation has a finality.' " Id. (quoting *Moe v. Moe*, 496 N.W.2d 593, 595 (S.D.1993)). This due process challenge could have been raised in the direct appeal along with the Eighth Amendment challenge. Under the doctrine of res judicata, we will not review successive attacks on a sentence, especially when all the grounds could have been raised in the earlier proceeding. *Davi v. Class*, 2000 SD 30, ¶ 50, 609 N.W.2d 107, 118; *Lodermeier*, 1996 SD 134, ¶ 24, 555 N.W.2d at 626; *Miller v. Leapley*, 472 N.W.2d 517, 519 (S.D.1991).

With these standards in mind, each of Petitioner's claims will be addressed.

1. The Court had no jurisdiction to prosecute Graham for felony murder, because felony murder is not a crime in Canada, and is not an extraditable offense;

This issue was raised on the direct appeal to the Supreme Court; therefore, the doctrine of res judicata does not allow the reconsideration of an issue that was actually litigated or that could have been raised and decided in a prior action. *Ramos v. Weber*, 2000 S.D. 111, 616 N.W.2d 88; *SDDS, Inc. v. State*, 1997 S.D. 114, ¶ 16, 569 N.W.2d 289, 295 (quoting *Hogg v. Siebrecht*, 464 N.W.2d 209, 211 (S.D.1990)).

> The rule is when a petitioner takes a direct appeal, he cannot thereafter, in a post-conviction proceeding, raise any matter of which he was aware at the time of the direct appeal but did not raise. *Miller v. State*, 338 N.W.2d 673, 675 (S.D.1983). "[W]here substantially the same issue was raised on direct appeal as in habeas review, 'the principle of res judicata is applicable to proceedings upon habeas corpus.' " *Scott v. Class*, 532 N.W.2d 399, 402 (S.D.1995) (quoting *Stumes v. Delano*, 508 N.W.2d 366, 370 (S.D.1993)).

Loop v. Class, 1996 SD 107, ¶24, 554 N.W.2d 189, 193. The South Dakota Supreme Court found specifically that Canada explicitly consented to the prosecution of Graham on the Pennington County indictment charging felony murder and it therefore had jurisdiction to try to matter. *State v. Graham*, 2012 S.D. 42, ¶12, 815 N.W.2d 293, 300.

2. The jury did not find Graham guilty of kidnapping, because the jury instructions did not include every element of the offense;

No objections were made to the court's jury instructions at the time of trial. Furthermore, this issue was not raised on the direct appeal. Therefore, the issue cannot be raised for the first time in a habeas proceeding. *Ramos v. Weber*, 2000 S.D. 111, 616 N.W.2d 88; *SDDS, Inc. v. State*, 1997 S.D. 114, ¶ 16, 569 N.W.2d 289, 295 (quoting *Hogg v. Siebrecht*, 464 N.W.2d 209, 211 (S.D.1990)).

3. Graham's felony indictment and jury instructions were duplicitous, merging kidnapping and felony murder into a single count;

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4. Graham's felony murder conviction is void because it's based on a statute that was repealed in 2005.

The State alleged that Aquash was murdered between December 10 and 12, 1975. In 1975, when the murder was committed, SDCL 22-16-9 read as follows:

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

The felony alleged to have been committed was kidnaping. In 1975, SDCL 22-19-1 provided:

> Whoever shall seize, confine, inveigle, decoy, kidnap, abduct or carry away any person and hold or detain such person for ransom, reward, or otherwise, except in the case of an unmarried minor by a parent thereof, shall be guilty of kidnaping and shall be punished:

> (1) By death, if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall direct that sentence of death be pronounced; or
>
> (2) By imprisonment in the state penitentiary for any term of years or for life, if the death penalty is not imposed.

Graham was indicted for the 1975 murder in 2009. He argues that SDCL 22-16-9 was repealed in 2005 with no saving clause therefore, making Graham's conviction void.

In *State v. Means*, 268 N.W.2d 802 (S.D. 1978), the South Dakota Supreme Court addressed a similar argument. In that case, Russell Means was charged with violating SDCL 22-10-4, a statute prohibiting riot and unlawful assembly. That statute was repealed in 1976. Means' indicted actions occurred in 1974. The Court held:

> Finally, defendant urges that the information against him be dismissed because SDCL 22-10-4 has been repealed without benefit of sufficient saving legislation.
>
> It is undisputed that defendant had been tried and judgment entered sometime prior to the adoption of the criminal code revision.
>
> As to this case, SDCL 2-14-18 operates to save the prosecution here at issue:
>
>> The repeal of any statute by the Legislature shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.
>
> In *United States v. Reisinger*, 128 U.S. 398, 9 S.Ct. 99, 32 L.Ed. 480 (1888), the United States Supreme Court, in interpreting language precisely the same as that found in SDCL 2-14-18, held **the criminal prosecution was preserved, even though the repealing act itself contained no express provision of the right to punish violations of it.** (emphasis added.)

Thus, Petitioner's argument has no merit and his conviction is not void.

5. Graham did not receive a fair trial.

Petitioner's final argument is that he did not receive a fair trial because the jury didn't hear the background of the case or any of Graham's witnesses and there was no evidence presented of his guilt other than the testimony of co-conspirators and informants.

a. Background of the case

Petitioner claims that he should have been able to present evidence that the FBI or Agent Price were responsible for Aquash's death. More specifically, he contends that trial counsel was ineffective for "failing to call any of the obvious witnesses or mention any of the well-known alternative theories of the murder[.]"

A petitioner shoulders a heavy burden of proof in an ineffective assistance of counsel claim. *Coon v. Weber*, 2002 S.D. 48, 11 N.W.2d 638, 642. "A claim of ineffective assistance of counsel presents a mixed question of law and fact and must be reviewed under the two-prong test announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)." *Dillon v. Weber*, 2007 S.D. 81, 737 N.W.2d 420, 424.

"Under the first prong, the petitioner must show that counsel's errors were so serious that he was not functioning as counsel guaranteed under the Constitution." Id. (citing *Denoyer v. Weber*, 2005 SD 43, 694 N.W.2d 848, 855 (citations omitted)). This requires a petitioner to demonstrate that counsel's representation failed to satisfy an objective standard of reasonableness. Id. (citing *Owens v. Russell*, 2007 S.D. 3, 726 N.W.2d 610). "The second prong 'requires a showing of serious prejudice such that the errors deprived the defendant of a fair trial.'" Id. (quoting *Denoyer*, 2005 S.D. at ¶19). Prejudice exists only where "there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different." Id. (citing *Owens*, 2007 S.D. at ¶¶ 8-9).

Petitioner has not met his burden showing that there is a reasonable probability that the result would have been different absent counsel's alleged errors.

> "Conjecture or speculation is not sufficient to establish the required prejudice flowing from the failure to call a witness to testify." *Id.* at 876. We have previously agreed with this proposition. As stated in *Siers v. Class*, "there is no prejudice if, factoring in the uncalled witnesses, the government's case remains overwhelming." 1998 S.D. 77, ¶ 27, 581 N.W.2d 491, 497 (citation omitted).

Knecht v. Weber, 2002 S.D. 21, 640 N.W.2d 491. Therefore, Petitioner's claim that he did not have a fair trial because he was not able to present evidence must also fail.

b. No evidence presented of his guilt

The South Dakota Supreme Court addressed this question on the direct appeal. *State v. Graham*, 2012 S.D. 42, ¶¶29-43, 815 N.W.2d 293, 306-307. The doctrine of res judicata does not allow the reconsideration of an issue that was actually litigated or that could have been raised and decided in a prior action. *Ramos v. Weber*, 2000 S.D. 111, 616 N.W.2d 88.

C. <u>Evidentiary hearing not required when Petition is Vague and Conclusory</u>

"South Dakota follows similar requirements in assessing the sufficiency of habeas corpus petitions. Allegations that are "unspecific, conclusory, or speculative" are insufficient to state a claim for relief. See *Jenner v. Dooley*, 1999 S.D. 20, ¶ 13, 590 N.W.2d 463, 469; see also *Sweeney v. Leapley*, 487 N.W.2d 617, 618 (S.D.1992) (stating that an evidentiary hearing is unwarranted where no substantial factual issues exist)." *State v. McColl*, 2011 S.D. 90, 807 N.W.2d 813. Furthermore, claims that are too vague or unsupported by factual allegations to evaluate for possible validity may be dismissed. The South Dakota Supreme Court has explained that if "an applicant's allegations are unspecific, conclusory or speculative, the court may rightfully entertain a motion to dismiss." *Jenner v. Dooley*, 1999 S.D. 20 ¶13, 590 N.W.2d 463, 469 (citing SDCL 21-27-5).

Additionally, analogous federal law rejects vague and conclusory petitions. The advisory committee notes to Federal Rule 4 explain that with regard to habeas petitions, "'notice' pleading is not sufficient, for the petition is expected to state facts that point to 'a real possibility of constitutional error.' *See Aubut v. State of Main*, 431 F.2d 688, 689 (1st Cir. 1970)." *Aubut* further noted that:

> Were the rule otherwise, every state prisoner could obtain a hearing by filing a complaint composed. . .of generalizations and conclusions. The petition should set out substantive facts that will enable the court to see a real possibility of constitutional error.

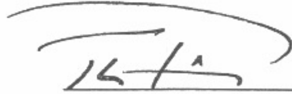
Id.

ORDER

Accordingly, the Petition is hereby DISMISSED in its entirety with prejudice. In addition, pursuant to SDCL 21-27-18.1, this Court finds that there is no appealable issue in this matter. A Certificate of Probable Cause that an appealable issue exists will not issue from this Court.

Dated this 1 day of July, 2013, at Rapid City, Pennington County, South Dakota.

BY THE COURT



Honorable Thomas L. Trimble
Seventh Judicial Circuit

ATTEST:____________________
Ranae Truman, Clerk of Court
By:____________________(Deputy)

Pennington County, SD
FILED
IN CIRCUIT COURT
JUL 01 2013
Ranae Truman, Clerk of Courts
By__________Deputy