In the U.S. District Court
for the District of South Dakota

JOHN GRAHAM,	)	
	)	
Petitioner	)	
	)	No. 13-cv-04100-RAL
v.	)	The Honorable Lawrence L. Piersol
	)	
DARIN YOUNG,	)	
	)	
Respondent.	)	

Petitioner's Reply to Respondent's Answer

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SUMMARY OF ARGUMENT

Graham has already briefed the issues at bar in his Memorandum of Law at R. 5, which go to the Court's jurisdiction, Graham's actual innocence, and the ineffectiveness of Petitioner's counsel in not challenging the obvious constitutional issues in his indictment and jury instructions, and failure to call any witnesses or present any theory for the jury to consider in Graham's defense. Since the Respondent hasn't briefed any of these issues, Graham won't repeat his arguments herein. However, in the event the Court needs to resolve the threshold issue of Graham's failure to timely serve the Respondent in the South Dakota Supreme Court - an issue not even raised by Respondent in its Answer, R. 22. - Graham submits this Reply.

Graham served the Attorney General with his Motion for a Certificate of Probable Cause on August 8th, 2013, about two weeks after he filed the Motion with the S.D. Supreme Court. The apparently late service[1] is not an adequate state ground for not hearing his petition, since good cause exists to excuse the error, shown by Graham's good faith and diligence in attempting to properly serve the motion once the error was understood. Graham will be prejudiced, since he will spend the rest of his life in prison if the District Court doesn't hear his petition. It would be manifest injustice if such a trivial reason were used to justify his life imprisonment, especially when he has made such a strong showing that the Circuit Court had no jurisdiction to try him, that he is actually innocent, and that his appointed lawyer was ineffective. The Respondent's main argument to all of Graham's claims is that the Graham has waived or procedurally defaulted on them, by not raising them at trial or on direct appeal. The failure of timely service is analyzed the same way, in terms of procedural default. Therefore, the arguments made herein should be generally useful to the Court in evaluating the Repondent's arguments.

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[1] SDCL 21-27-18.1 does not state when service on the State's Attorney must be accomplished, but apparently, it must be simultaneously filed witht the court and served on opposing counsel. This appears to be the view of the South Dakota Supreme Court.

ARGUMENT

A. Graham's failure to timely serve a copy of his Motion for a Certificate of Probable Cause on Respondent is inadequate to justify imprisoning him for the rest of his life.

A federal court may issue a writ of habeas corpus freeing a state prisoner if the prisoner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).[2] However, the Court may not issue the writ if an adequate and independent state-law ground justifies the prisoner's detention, regardless of the federal claim. Wainwright v. Sykes, 433 U.S. 72, 81-88 (1977). One ground may be a state-law "procedural default," such as Graham's failure to serve a copy of his Motion for a Certificate of Probable Cause on the State's Attorney within the twenty day period in SDCL 21-27-18.1.[3] However, in certain circumstances, the State's assertion of such a ground is not "adequate," and consequently doesn't bar the assertion of the federal-law claim.[4] The U.S. Supreme Court has defined three situations in

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[2] 28 U.S.C. § 2254(d), restricts a federal court's review of a state prisoner's constitutional claims pursuant to the Antiterrorism and Effective Death Penalty Act ("AEDPA"). A state prisoner can secure Federal habeas relief if the decision by the state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." The legal and factual grounds for Graham's habeas corpus petition are set forth in its accompanying Memorandum of Law, R. 5.

[3] The law doesn't actually specify when service must be accomplished. SDCL 21-27-18.1 states that:

> However, a party may, upon the circuit court judge's refusal to issue a certificate of probable cause, file a separate motion for issuance of a certificate of probable cause with the Supreme Court within twenty days of the entry of the circuit judge's refusal. Any party filing a motion with the Supreme Court shall serve a copy of the motion upon the opposing party, who shall have ten days to respond.

This statute does not state when service of process on the State's Attorney must be accomplished. When Graham learned of this error and responded to the order to show cause on August 8, 2013, he also sent a copy of his Motion to the State's Attorney on the same day. See Exhibit 3, Affidavit of John Graham, and Declaration of Paul Wolf at ¶3. In his response to the SD Supreme Court's Order to Show Cause, Graham asked that the dismissal be without prejudice, Exhibit 1 at 2, but the court dismissed the case without stating whether the dismissal was with or without prejudice. See Exhibit 2.

[4] A federal habeas judge considers state law to determine whether there exists a procedural ground that might bar consideration of the prisoner's federal claim, but decides whether such a ground is adequate as a matter of federal law. Coleman v. Thompson, 501 U.S. 722, 750 (1991). Federal habeas courts apply federal standards to determine whether "cause and prejudice" excuse a "procedural default" in the same manner. Murray v. Carrier, 477 U.S. 478, 489 (1986) ("[T]he question of cause" is "a question of federal law"). Likewise, the Court applies federal standards to determine whether there has been a "fundamental miscarriage of justice." Schlup v. Delo, 513 U.S. 298, 314-317

which an otherwise valid state ground will not bar federal claims: (1) where the prisoner had good "cause" for not following the state procedural rule and was "prejudice[d]" by not having done so, Sykes, 433 U.S. at 87; (2) where failure to consider a prisoner's claims will result in a "fundamental miscarriage of justice," Coleman v. Thompson, 501 U.S. 722, 750 (1991); or (3) where the state procedural rule was not "`firmly established and regularly followed,'" Ford v. Georgia, 498 U.S. 411, 423-424 (1991).[5]

B. Graham has shown good cause for his error and that prejudice resulted.

Although "good cause" is a well established legal term, it lacks a precise definition.[6] The Eighth Circuit has held that "[t]he primary measure of good cause is the movant's diligence in attempting to meet the order's requirements." Morrison Enterprises, LLC v. Dravo Corp., 638 F.3d 594, 610 (8th Cir. 2011). The Third Circuit has stated that, in the context of Rule 4(m), which applies to service of process on the Defendant in a civil matter, good cause means "a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time specified in the rules." Petrucelli v. Bohringer and Ratzinger, 46 F.3d 1298, 1312 (3d Cir. 1995). "[T]he primary focus is on the plaintiff's reasons for not complying with the time limit in the first place." Id. In Maryland, the test for good cause is "whether the claimant prosecuted his claim with that degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances." Quigley v. United States, 865 F. Supp. 2d 685, 693 (D. Md. 2012). "[I]t generally signifies a sound basis or

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(1995). Since the constitutionality of Graham's custody is a federal question, the Court reviews these issues de novo, and owes no deference to the decisions of the South Dakota state courts.

[5] Graham doesn't argue this, and presumes that the Supreme Court of South Dakota ordinarily enforces SDCL 21-27-18.1, and ordinarily applies the same 20 day filing period to the time to serve opposing counsel.

[6] According to Black's Law Dictionary 623 (5th ed. 1979), good cause means a "[s]ubstantial reason, one that affords a legal excuse." This "depends upon [the] circumstances of [the] individual case" and "its existence lies largely in [the] discretion of [the] ... court." Id. Because it is difficult to clarify in concrete terms, "its meaning must be determined not only by [the] verbal context of statute in which [the] term is employed but also by [the] context of [the] action and procedures involved in type of case presented." Id.

legitimate need to take judicial action." In re Alexander Grant & Co. Litig., 820 F.2d 352, 356 (1lth Cir. 1987).

The phrase suggests that a common-sense approach be taken, such as in a decision whether to grant a protective order under Rule 26(c), which requires that "good cause" be shown for withholding materials from discovery. As in discovery rulings, the determination of whether "good cause" exists to forgive Graham's late service of process on the Respondent is within the discretion of the Court, and the Court should be guided by the interests of fairness and justice, balancing the State of South Dakota's interest in the enforceability of its procedural rules, with the de minimus nature of the late service, the fact that no harm resulted to the Defendant, the opaqueness of the statute, and the effect such a ruling will have on Graham, who should be a free man but will otherwise spend the rest of his life in prison.

Graham has shown good cause for the late service of process, and his error should be excused. See Graham's Response to the South Dakota Supreme Court's Order to Show Cause, attached hereto as Exhibit 1. Neither Graham nor Wolf wasted a single day in trying to meet the twenty day deadline. When Graham received the Order on July 3, 2013, he mailed it to Wolf the next available mail day, which was July 8th, 2013. Id. Due to prison mail procedures the envelope was postmarked July 10th, 2013. Graham described the Order to Wolf on the phone, but Wolf wanted to see it before sending Graham his response. Wolf received it on July 15, 2013, and sent it by Priority Mail to Graham the next morning, July 16, 2013. Id. Graham received the Motion on Thursday, July 18th 2013. Graham had until Saturday, July 20th to file it. Unsure whether anyone would be working in the mail room on Friday (the individual doesn't always work on Fridays), and since mail is not processed in the penitentiary on Saturdays, Graham sent the motion to the South Dakota Supreme Court the day he received it, without the

assistance of the prison legal assistance office, neglecting to serve a copy on the State's Attorney at that time. After sending it, Graham did not believe he needed to contact the prison legal assistance office. Two weeks later, when the S.D. Supreme Court pointed out the error and ordered Graham to show cause why he hadn't served the State's Attorney, Graham did so immediately. See Exhibit 3, Affidavit of John Graham, and Declaration of Paul Wolf at ¶ 3, attached hereto. Graham acted diligently and in good faith at all times.

Graham's procedural default in State Court was de minimus and caused no harm. He filed his Motion for a Certificate of Probable Cause in the S.D. Supreme Court on time, but failed to serve a copy on the Attorney General on time. In an ordinary civil matter, such an error would only result in a dismissal without prejudice. Ouzts v. Cummins, 825 F.2d 1276, 1278 (8th Cir. 1987).

In addition, consideration should be given to the fact that Graham is an indigent, pro se prisoner. Pro se plaintiffs should be afforded "special solicitude" when making procedural errors such as this, in much the same way that their pleadings are to be "liberally construed." Haines v Kerner, 4 US 519, 520 (1972); Baldwin Co. Welcome Center v. Brown 466 U.S. 147 (1984) ("pleadings shall be so construed as to do substantial justice"). Ruotolo v. Internal Revenue Service, 28 F.3d 6, 8-9 (2d Cir.1994), from the 2nd Circuit, provides a useful and persuasive analogy for the Court, in the context of the time limit for filing an opposition to a motion for summary judgment:

> Recognizing that the [plaintiffs] were acting pro se, the district court should have afforded them special solicitude before granting the IRS's motion for summary judgment. It had an obligation to make certain that the Ruotolos were aware of and understood the consequences to them of their failure to comply with the Local Rules. Moreover, the Ruotolos' explanation of their mistake illustrates their confusion over the nature of the summary judgment proceedings. …

> Because the IRS was allowed thirty days to file a summary judgment motion, the Ruotolos assumed they had thirty days to respond. We believe the district court should have expressly advised the Ruotolos that pursuant to the Local Rules their opposition to the IRS motion for summary judgment had to be submitted within 21 days of the IRS's filing of its motion. The court's failure to do so requires reversal.
>
> Throughout this litigation, it appears that the Ruotolos have otherwise diligently adhered to the filing procedures and the rules of the United States District Court for the District of Connecticut. Indeed unlike their IRS adversary, the Ruotolos' had not formally sought a single extension in this case, until their request for additional time to reply to the IRS's motion for summary judgment. It seems inequitable, then, that the Ruotolos' one misstep should result in the granting of summary judgment against them without at least their being allowed to respond.
>
> Therefore, because the Ruotolos did not understand the district court's procedure with respect to summary judgment motions, and because the district court did not expressly inform them of the consequences of not filing a timely response to the IRS's motion, the district court's order granting summary judgment for defendant must be reversed.

28 F.3d at 8-9. (citations omitted). Although the nature of the remedy in Ruotolo was equitable, the 2nd Circuit ordered reversal rather than leaving the matter in the discretion of the District Court. The argument for an equitable remedy is even stronger here, "since habeas corpus is, at its core, an equitable remedy, a court must adjudicate even [barred] claims when required to do so by the ends of justice."[7] Schlup v. Delo, 513 U.S. 298, 299 (1995).

The other element Graham must prove under Wainwright v. Sykes, 433 U.S. 72, 81-88 (1977), is prejudice. This is easily shown. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 ("AEDPA"), limits a prisoner to one Federal habeas corpus petition, and if Graham's petition is denied, he will have no other opportunity to raise these issues, and will spend the rest of his life in prison. Although the S.D. Supreme Court's decision, and denial

[7] The complete citation is as follows. "The societal interests in finality, comity, and conservation of scarce judicial resources dictate that a habeas court may not ordinarily reach the merits of successive or abusive claims, absent a showing of cause and prejudice. However, since habeas corpus is, at its core, an equitable remedy, a court must adjudicate even successive claims when required to do so by the ends of justice." Schlup v. Delo, 513 U.S. 298, 299 (1995). Graham is not making an abusive or successive claim, but even if he were, the Court would have the equitable power to hear it, if doing so were in the interest of justice. This is discussed in more detail in the next section.

of Graham's proffer in response to its order to show cause, Exhibit 2, is vaguely written, a fair reading of these orders is that his Motion was denied with prejudice.

C. Barring Graham's petition for failure to serve the State's Attorney on time would result in a fundamental miscarriage of justice.

Habeas corpus is essentially an equitable remedy. Schlup v. Delo, 513 U.S. 298, 299 (1995). The fundamental miscarriage of justice exception seeks to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case. Id. Justice Sandra Day O'Connor wrote that the Supreme Court had adopted the cause and prejudice standard in part because of its confidence that that standard would provide adequate protection to "`victims of a fundamental miscarriage of justice,'" Murray v. Carrier, 477 U.S. 478, 495-496 (1986) quoting Engle v. Isaac, 456 U.S. 107, 135 (1982). "`In appropriate cases,' the principles of comity and finality supporting the cause and prejudice analysis `must yield to the imperative of correcting a fundamentally unjust incarceration.'" Id., at 495, quoting Engle v. Isaac, 456 U. S., at 135; see Smith v. Murray, 477 U. S. 527, 537 (1986). In subsequent cases, the Supreme Court has consistently reaffirmed the existence and importance of the exception for fundamental miscarriages of justice. Sawyer v. Whitley, 505 U. S. 333, 334-338 (1992); McCleskey v Zant, 499 U. S. 494-495 (1991); Dugger v. Adams, 489 U.S. 401, 414 (1989). Justice O'Connor also held that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." Murray v. Carrier, 477 U.S. 478, 496 (1986); see Smith v. Murray, 477 U. S. at 537, quoting Carrier, 477 U. S. at 496. Unlike many habeas corpus petitioners, Graham maintains his innocence. He did not kill Ana Mae Aquash and the jury acquitted him of premeditated murder. The jury found him guilty of kidnapping her and imposed the felony

murder rule. However, Graham is also innocent of kidnapping, since the jury instructions did not list an element of the offence that the government would never have been able to prove, and the merging of kidnapping and felony murder into one count deprived the jury of the opportunity to find Graham guilty of kidnapping only. Since more than two months passed between the alleged kidnapping and when Aquash's body was found, these incidents were not necessarily related.

D. Graham's substantive claims are not waived since they are either non-waivable jurisdictional claims, or Constitutional claims based on his actual innocence.

Subject matter jurisdiction is not waivable. It involves a court's power to hear a case, it may be raised at any time. Kontrick v. Ryan, 540 U.S. 443 (2004). "The objection that a federal court lacks subject-matter jurisdiction ... may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." Arbaugh v. Y & H Corp., 546 U.S. 500 (2006). Graham's claim that the Circuit Court had no jurisdiction to try him for felony murder, because felony murder is not recognized in Canada and is therefore not an extraditable offense under the Extradition Treaty, is not waivable nor can it be procedurally defaulted. Likewise, the Circuit Court had no jurisdiction when it charged him with kidnapping using a repealed statute.

Graham's other claims are Constitutional. The waiver of a constitutional claim is a matter of federal law. The Court may review them if they fall within the "narrow class of cases ... implicating a fundamental miscarriage of justice." McCleskey v Zant, 499 U. S. 467, 494 (1991). Justice O.Connor wrote in Murray v. Carrier, 477 U.S. 478 (1986) that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." 477 U. S., at 496 (emphasis added). In Schlup v.

Delo, 513 U.S. 298, 324 (1995), the Supreme Court affirmed that "probably" or "more likely than not" was the standard to use in evaluating claims of actual innocence, rejecting its prior use of the "clear and convincing evidence" standard in Sawyer v. Whitley, 505 U. S. 333 (1992). Schlup 513 U.S. at 324.[8]

If a petitioner demonstrates that the totality of the evidence would probably have prevented the jury from finding him guilty beyond a reasonable doubt, the district court then considers, and reaches the merits of, all of the petitioner's procedurally defaulted habeas claims. 28 U.S.C.A. § 2254(d). Teleguz v. Pearson, 689 F.3d 322 (4th Cir. 2012). These claims need not be causally connected to the claim of actual innocence. If the district court makes the threshold determination that a reasonable juror would more than likely have had a reasonable doubt, it then considers the petitioner's procedurally defaulted claims. Rayner v. Mills, 685 F.3d 631 (6th Cir. 2012).

Grahram's actual innocence claim is based on the fact that at least 60 other people were killed on the Pine Ridge Reservation within a three-year period surrounding this incident, and that the first autopsy of Anna Mae Aquash, supervised by Agent David Price, inexplicably attributed her death to exposure, in what many residents believe was an attempt to "cover up" a murder they believed was committed by the FBI's surrogates, the Guardians of the Oglala Nation (GOONs). Four books have been written about this murder,[9] and the allegations against Agent Price have been litigated in the 8th Circuit, who unsuccessfully sued best-selling author Peter Matheissen for libel. The other sixty or so murders were of concern to the U.S. Civil Rights

[8] In Graham's Memorandum of Law, R. 5, he cited to Fay v. Noia, 372 U.S. 391 (1963). However, Fay may no longer be good law in light of the Supreme Court's holdings in Schlup v. Delo, 513 U.S. 298 (1995).

[9] In the Memorandum of Law at R. 5,, three books were mentioned, but there is also a fourth, called Ghost Rider Roads, by Antoinette Nora Claypoole (2nd Ed. 2013).

Commission,[10] but have never been adequately investigated. This fact alone - that the coroner and the supervising FBI agent conducted an autopsy which overlooked a bullet in the victim's head - would more likely than not have created a reasonable doubt as to the government's version of events, and particularly if any of the jurors had been native people. Moreover, Wilma Blacksmith could have testified that she saw Anna Mae Aquash after the alleged date of her murder, corroborating the testimony of Candy Hamilton. Once this procedural threshold is overcome, and it appears to the Court more likely than not the jury would have had a reasonable doubt, the Court may hear all of Graham's procedurally defaulted claims. Having presided over the trial of Arlo Looking Cloud, the Court should already be familiar with how credible his confession was, and the weakness of the government's case. It should not have taken much to raise a reasonable doubt in the jurors' minds.

Conclusion

The Petitioner has shown good cause for not timely serving his Motion for a Certificate of Probable Cause on the Respondent, because he was diligent and acting in good faith. It would also be a miscarriage of justice to keep him in prison for the rest of his life for making this mistake. This is not an adequate state ground for refusing to hear this petition.

Not having briefed any of the issues, and asking the Court not to hold a hearing, the Respondent invites the Court to simply rule that its jurisdiction is not waivable, that the Petitioner has made his case that felony murder isn't a crime in Canada, that the South Dakota Circuit Court had no jurisdiction to put him on trial for that offense, and order him released. It may also find that a conviction based solely on a repealed statute is null and void.

In the alternative, the Court may find that the unique circumstances of this case would more likely than not create a reasonable doubt in the mind of the jurors, in the context of sixty

[10] See U.S. Civil Rights Commission Report on Official Misconduct on the Pine Ridge Reservation, July 9, 1975

other murders, and an autopsy that seemed intended to cover it up. If the court finds that a jury would probably have had a reasonable doubt, it should consider all of the Petitioner's constitutional claims, which generally point to the need for a new trial. Finally, the Respondent's counter-claim for attorneys' fees is not properly made under Rule 13, is unsupported by law, and is intended only to intimidate the Petitioner.

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 22 th day of November, 2013, I filed the foregoing document with the clerk of the court through the Court's Electronic Case Filing (ECF) system, which will send notification to the attorneys of record for all other parties in this litigation.

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