

**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 BRIEF IN SUPPORT OF MOTION TO DISMISS
OR FOR SUMMARY JUDGMENT AND SUPPORTING BRIEF**

Respondent Darin Young, through his counsel Paul S. Swedlund, hereby files this brief in support of his motion to dismiss or for summary judgment. As demonstrated below, Graham has procedurally defaulted his claims herein. Accordingly, his petition should be summarily dismissed. Graham’s trial transcripts will be referenced as TRIAL followed by the volume number and a jump cite to the appropriate page/line.

FACTS

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. 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.

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. John Graham, a.k.a John Boy Graham, a.k.a. John Boy Patton, fired the pistol that ended Aquash's life.

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. 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.

Her unexpected release fueled ongoing AIM rumors that she was a government informant. TRIAL 4 at 211/4-212/10. In truth, 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.

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.

Shortly after Thanksgiving Day, Aquash watched nervously as Graham, Theda Clarke, and others arrived at the Denver home of Troy Lynn Yellow Wood where she 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. 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. Aquash was detained in the basement while the group upstairs discussed her fate. TRIAL 4 at 72/14, 237/14.

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.

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. 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. Yellow Wood pleaded with Janis to help her help Aquash but Janis refused. TRIAL 4 at 120/25. Yellow Wood called the 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. TRIAL 4 at 119/1, 235/24, 239/17. 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.

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. 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.

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. 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. That night, Graham was heard raping 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.

Shortly thereafter, 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. 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. 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. Aquash was taken to a room to face her high-and-mighty AIM accusers. TRIAL 5 at 14/3-14, 15/15, 16/7. 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.

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. 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.

In the bedroom, Marshall gave Clarke a silver revolver and a box of shells. TRIAL 6 at 215-16, 220/6. 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). Oblivious to what was really going down, 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. 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. 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.

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. According to Looking Cloud, he saw Graham "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. 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. From there the group drove back to Denver. TRIAL 6 at 222/7.

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. 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.

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. 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.

Eventually, an Oregon Highway Patrol trooper pulled the motor home over and arrested most of its occupants. 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. 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.

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.

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. Banks certainly 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 would have focused suspicion on Aquash. 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.

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. 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.

ARGUMENT

According to Graham's petition, his state court *habeas corpus* claims are "identical to those raised herein." This presents a problem for Graham because he procedurally defaulted his appeal of the state court's denial of his *habeas*

corpus claims. Because of this procedural default, Graham's claims herein must be dismissed.

A. Graham's Claims Herein Are Procedurally Defaulted

An application for a writ of *habeas corpus* filed in federal court "shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state." 28 U.S.C. § 2254(b)(1)(A). A prisoner must do more to exhaust state remedies than simply bypass available state process, he must *properly* exhaust them by giving "the state courts one full opportunity to resolve any constitutional issues [on the merits] by invoking one complete round of the state's established . . . review process" before presenting those same issues in a federal *habeas corpus* petition. *O'Sullivan v. Boerckel*, 119 S.Ct. 1728, 1732 (1999).

Defaulting on any available state remedy denies state courts the "first opportunity to review constitutional claims and provide any necessary relief," which therefore "precludes federal review of the [defaulted] claims." *O'Sullivan*, 119 S.Ct. at 1732; *Martinez v. Ryan*, 132 S.Ct. 1309, 1316 (2012). Default occurs when a petitioner has "failed to abide by a state procedural rule." *Martinez*, 132 S.Ct. at 1316.

The default analysis in this case is controlled by *Coleman v. Thompson*, 111 S.Ct. 2546, 2566 (1991). In *Coleman*, a capital murder defendant filed his appeal of a state court's denial of his petition for a writ of *habeas corpus* three days late. The state supreme court dismissed the appeal as untimely filed.

Coleman then filed a federal petition raising his same state claims. The federal trial court dismissed the petition as procedurally defaulted on the state level and the circuit court of appeals and the United States Supreme court affirmed.

Here, as in *Coleman*, Graham's state *habeas corpus* claims were heard on their merits and rejected by the trial court. TRIMBLE ORDER, Exhibit 1. As in *Coleman*, Graham petitioned for leave to appeal but failed to timely perfect his appeal of the state trial court's denial of his petition. PETITION FOR CERTIFICATE OF PROBABLE CAUSE, Exhibit 2. Having observed 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, Exhibit 3.

Cause excusing a procedural default is "something *external* to the petitioner, something that cannot be fairly attributed to him." *Coleman v. Thompson*, 111 S.Ct. 2546, 2566 (1991). A petitioner's own negligence does not qualify as "cause." *Martinez*, 132 S.Ct. at 1316. Rather, cause exists "only whe[n] a prisoner is impeded or obstructed in complying with the state's established procedures" through no fault of his own. *Martinez*, 132 S.Ct. at 1318.

Graham's response to the show cause order did not identify anything external to himself to explain his failure to timely serve his motion for leave to appeal. GRAHAM RESPONSE, Exhibit 4; STATE'S RESPONSE, Exhibit 5. Graham blamed time pressures and his nominal *pro se* status. PETITION FOR

CERTIFICATE OF PROBABLE CAUSE, Exhibit 2 at 2, n. 2. Yet Graham's filings and response show that knew of the statutory prerequisites for perfecting an appeal per SDCL 21-27-18.1, he just simply failed to follow them. *Stanley v. Lockhart*, 941 F.2d 707 (8th Cir. 1991)(*pro se* status did not excuse petitioner's defaulting on appeal deadline). 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, Exhibit 6.

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. *Coleman*, 111 S.Ct. at 2556.

B. Graham's Claims Do Not Demonstrate A Fundamental Miscarriage Of Justice

A federal court may hear a procedurally defaulted claim only if there is cause for the default and prejudice from a violation of federal law. *Martinez*, 132 S.Ct. at 1316. As noted above, such cause exists when "some objective factor external to the defense impeded [a petitioner's] efforts to comply with the state's procedural rules," such as "a showing that the factual or legal basis for a claim was not reasonably available to [a petitioner or his] counsel . . . or that 'some interference by officials' . . . made compliance impracticable." *Coleman*, 111 S.Ct. at 2566. The South Dakota Supreme Court's determinations that Graham failed to establish cause for his default, and that it lacked jurisdiction to hear his appeal, are "independent and adequate state ground[s]" to sustain

his conviction that preclude federal *habeas corpus* review of the petition filed herein. *Coleman*, 111 S.Ct. at 2557.

Without cause for the default, inquiry into the prejudice component of *Martinez's* conjunctive cause *and* prejudice exception ends. *Engle v. Isaac*, 102 S.Ct. 1558, 1575 n. 43 (1982); *Ashker v. Class*, 152 F.3d 863, 871 (8th Cir. 1998)(when petitioner “has not shown adequate cause to overcome the procedural bar . . . we need not consider the issue of actual prejudice”). Thus, Graham’s only remaining avenue of relief is to shoehorn his case into the narrow exception for excusing procedural default to prevent “a fundamental miscarriage of justice.” *Coleman*, 111 S.Ct. 2564; *Murray v. Carrier*, 106 S.Ct. 2639, 2649 (1986).

This remedy of last resort requires Graham to proffer “new evidence that ‘a constitutional violation has probably resulted in the conviction of one who is actually innocent.’” *Pitts v. Norris*, 85 F.3d 348, 350 (8th Cir. 1996); *Murray*, 106 S.Ct. at 2649. This exception “is concerned with claims of actual, not legal, innocence,” which is to say that Graham must proffer newly-discovered evidence exonerating him of the crime of which he stands convicted. *Pitts*, 85 F.3d at 350. A viable claim of actual innocence “requires [a] petitioner to support his allegation of constitutional error with reliable evidence,” such as credible admissions of guilt by another, trustworthy eyewitness accounts, or exculpatory scientific evidence. *Schlup v. Delo*, 115 S.Ct. 851, 865 (1995); *Sawyer v. Whitley*, 112 S.Ct. 2514, 2519 (1992).

For example, in *Pitts* the petitioner sought to fit a procedurally defaulted claim into the actual innocence exception by reframing it as “new” evidence of his counsel’s failure to effectively argue that Pitts was guilty of murder rather than felony murder. *Pitts*, 85 F.3d at 350. The *Pitts* court ruled that he could not meet the actual innocence exception because his claim of actual innocence was neither new nor evidence that he did not actually murder his victim. *Pitts*, 85 F.3d at 350-51.

So too for Graham. His procedurally defaulted claims challenge only his *legal* innocence; he does not present *new* evidence establishing his *factual* innocence. When Graham’s claims do no more than point to legal errors that allegedly occurred during the course of his criminal prosecution, he has not proffered the requisite proof of factual innocence permitting him to avail himself of the actual innocence exception. *Pitts*, 85 F.3d at 350-51.¹ Thus, there is nothing to excuse his procedural default of his claims herein.

CONCLUSION

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. Unlike Graham, Looking Cloud feels remorse.

¹ *Leake v. Symmes*, 2011 WL 6942906 at *5 (D.Minn.); *Gibbs v. United States*, 655 F.3d 473, 479 (6th Cir. 2011)(“procedural errors . . . only implicate legal, not actual, innocence”); *Davis v. Ryan*, 2013 WL 4854300 at *5 (D.Ariz.); *Coley v. Gonzales*, 55 F.3d 1385, 1387 (9th Cir. 1995); *Davis v. Ryan*, 2013 WL 4854300 at *5 (D.Ariz.); *Jones v. Fabian*, 2010 WL 2734299 at * 8 (D.Minn.); *Taylor v. Superintendent*, 2013 WL 1093093 at *2 (N.D.Ind.); *Hall v. Wilson*, 2011 WL 676935 at *3 (E.D.Ky.); *Pineda-Salgado v. Blair*, 2011 WL 2652565 at *7 (D.Ariz.).

Graham procedurally defaulted his claims herein by failing to timely perfect jurisdiction over his claims in the South Dakota Supreme Court. This deprived the state supreme court of its due opportunity to resolve his constitutional allegations through its established review processes. His procedural default cannot be excused.

Even if mere procedural errors were enough to permit inquiry into Graham's actual innocence under the exception, he cannot come within miles of making a clear and convincing case in light of his admission to kidnapping Annie Mae Aquash from Denver, disinterested witness testimony that Aquash was last seen alive as Graham's captive, testimony that Graham and his group had a gun matching the one used to kill Aquash, and his accomplice's heavily corroborated testimony that Graham kidnapped Aquash, dragged her before an AIM kangaroo court, and carried out AIM's order to kill her. Accordingly, Graham's petition for a writ of *habeas corpus* must be summarily denied.

Dated this 16th day of December 2013.

Respectfully submitted,

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