

**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 ANSWER

Respondent Douglas Weber, by and through his counsel, Paul S. Swedlund, hereby answers the above-captioned matter as follows:

1. Respondent denies each and every fact, matter, or thing contained in the petition except as the same are hereinafter admitted, explained, or qualified.
2. The petition in this matter fails to state a claim for which relief may be granted and should, therefore, be dismissed.
3. The petition in this matter is, in some respects, vague and indefinite, and should be dismissed, or the petitioner should be required to make a more definite statement.
4. The rulings of the state courts in this matter, all of which denied relief to the petitioner, do not constitute an unreasonable application of existing United States Supreme Court precedent to the law or to the facts

in this matter and, therefore, no *habeas corpus* relief may be granted. 28 USC § 2254(d)(1) and (d)(2).

5. All factual determinations of the state courts are presumed correct under 28 USC § 2254(e)(1) and petitioner is unable to rebut this presumption.
6. The cause for petitioner's incarceration is that he was duly convicted of felony murder before the Circuit Court for the Seventh Judicial Circuit, Pennington County, South Dakota by virtue of a judgment of conviction and sentence dated January 28, 2011, and filed January 31, 2011, in the case of *State of South Dakota v. John Graham*, 51C09003953A0. Petitioner was sentenced to life imprisonment.
7. Graham's judgment and conviction are valid, unreversed, and have been upheld by the courts of the State of South Dakota.
8. The record of petitioner's criminal conviction and state habeas case are being sent to this court under separate cover. This is the only case of which respondent is aware in the South Dakota state courts in which petitioner challenged his convictions and continuing incarceration.
9. Respondent asks this court to take judicial notice of the above-mentioned files, transcripts and exhibits in these files, and that this court consider all of them in its ruling on this case, and that they be explicitly included in the record in this federal *habeas corpus* proceeding. This request for judicial notice includes Pennington County 51C09003953A0 as well as South Dakota Supreme Court files 25899

and 26760. Records of these proceedings and transcripts will be forwarded to the court's clerk under separate cover.

10. Petitioner's claims herein are procedurally defaulted, and may not now be asserted, because petitioner cannot show cause for failing to assert them in state court at the appropriate time, nor can he show prejudice from failing to assert them at the proper time. *Coleman v. Thompson*, 501 US 722 (1991).
11. In the alternative, petitioner cannot show that he is one who is factually innocent of the charges. Thus, petitioner's claims must be dismissed on their merits and with prejudice. *Coleman v. Thompson*, 501 US 722 (1991).
12. All of petitioner's contentions are without merit, and the entire petition should, therefore, be dismissed on the merits and with prejudice.
13. Respondent admits that petitioner is now incarcerated on the conviction and sentence set out above. Respondent has no information concerning any assistance he has received from any counsel except what Graham represents in Paragraph 1 of his petition.
14. Respondent admits the allegations made in Paragraphs 2, 4, 5, 6, 8, 11a, and 11b of Graham's petition. Respondent admits the allegations in Paragraph 3 of Graham's petition except that Graham was prosecuted by the Office of the Attorney General.
15. Respondent admits that petitioner filed for *habeas corpus* relief in the state court, that he did so within one year of the South Dakota

Supreme Court's decision on his direct appeal, that such relief was denied, and that he moved the South Dakota Supreme Court for a certificate of appealability as alleged as alleged in Paragraph 7 of his petition. Respondent denies that in doing so petitioner exhausted his state remedies and petitioner's allegations concerning the tolling effect of his motion for a certificate of probable cause to the South Dakota Supreme Court. Petitioner's claims herein are not barred by the statute of limitations.

16. Respondent denies Paragraph 9 of the petition because the claims herein are procedurally defaulted and because petitioner is in lawful custody as set forth herein.
17. Respondent denies Paragraphs 10 of the petition in its entirety.
18. Respondent denies Paragraphs 11c, 11d, 11e, 11f, 11g (except that the 1975 version of SDCL 22-16-9 was repealed in 2005), 11h (except that petitioner was represented by John Murphy), and 11i (except that Wilma Blacksmith did not testify).
19. Respondent is without sufficient knowledge to know what petitioner relies on for his allegation in Paragraph 12.
20. Respondent denies that petitioner is entitled to any relief in this court under any of the issues he has stated.
21. As respects petitioner's allegation that he was improperly extradited as alleged in Paragraphs 10, 11c, and 11d, whether denominated as "felony murder" or not, petitioner's murder of Annie Mae

Aquash would be a criminal offense under Canadian law for which he could be extradited. The Canadian government consented to Graham's prosecution under the treaty. Graham has waived this claim by failing to bring it on direct appeal on conjunction with his other treaty challenges. His counsel was not ineffective for failing to bring the claim because it is patently ridiculous to argue that Graham's murder of Annie Mae Aquash would be legal under Canadian law. Thus, Graham's counsel's conduct did not fail to meet objectively reasonable standards of attorney performance and his representation caused him no prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984).

22. As respects petitioner's allegations that his jury was improperly instructed on the underlying felony of kidnapping as alleged in Paragraphs 10 and 11e, the jury was properly instructed in this case under the 1975 version of SDCL 22-19-1. *State v. Strauser*, 63 N.W.2d 345, 347 (1954). Graham has waived this claim by failing to object to the instruction at the time it was proposed, and by failing to appeal the instruction on direct appeal. *State v. Graham*, 2012 SD 42, ¶ 9, 815 N.W.2d 293, 298; *Coleman v. Thompson*, 501 US 722 (1991). Graham's counsel was not ineffective for challenging the instruction at trial or on appeal because the instruction conforms to state law. Thus, Graham's counsel's conduct did not fail to meet objectively reasonable standards of attorney performance and his representation caused him no prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984).

23. As respects petitioner's allegations that his jury was improperly instructed concerning the elements of felony murder as alleged in Paragraphs 10 and 11f, the elements of murder and kidnapping were not improperly "merged" under the instruction because the offense of felony murder requires an allegation and proof of an underlying felony. *Schad v. Arizona*, 111 S.Ct. 2491 (1991); *Whalen v. United States*, 100 S.Ct. 1432 (1980). This underlying felony comprises the necessary *mens rea* for the offense of felony murder because the underlying felony carries with it a risk to human life even if Graham had not intended to kill Aquash when he kidnapped her. Graham has waived this claim by failing to object to the instruction at the time it was proposed, and by failing to appeal the instruction on direct appeal. *State v. Graham*, 2012 SD 42, ¶ 9, 815 N.W.2d 293, 298; *Coleman v. Thompson*, 501 US 722 (1991). Graham's counsel was not ineffective for not challenging the instruction at trial or on appeal because the instruction conforms to state law. Thus, Graham's counsel's conduct did not fail to meet objectively reasonable standards of attorney performance and his representation caused him no prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984).

24. As respects petitioner's allegations that he was convicted on a repealed statute as alleged in Paragraphs 10 and 11g, his liability under the 1975 version of SDCL 22-16-9 was not extinguished by the statute's repeal. SDCL 2-14-18; *State v. Means*, 268 N.W.2d 802 (S.D. 1978).

Graham's counsel was not ineffective for challenging the statute used to convict him because state law clearly enforces liability incurred under a repealed statute as the law existed at the time of the offense. Thus, Graham's counsel's conduct did not fail to meet objectively reasonable standards of attorney performance and his representation caused him no prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984).

25. As respects petitioner's allegations that his trial counsel was ineffective for not calling "background" witnesses, for not accepting assistance from outside attorneys as alleged in Paragraphs 10, 11h, and 11i, Graham's counsel was not ineffective for failing to advance a defense based on irrelevant speculation or conjecture lacking in proof. *State v. Luna*, 378 N.W.2d 229 (S.D. 1985); *State v. Larson*, 512 N.W.2d 732 (S.D. 1994); *State v. Garza*, 1997 SD 54, 563 N.W.2d 406; *State v. Faulks*, 2001 SD 115, 633 N.W.2d 613. The South Dakota Supreme Court found that sufficient evidence of Graham's guilt existed to sustain his conviction. Thus, Graham's counsel's conduct did not fail to meet objectively reasonable standards of attorney performance and his representation caused him no prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984).

26. Petitioner is not entitled to any relief based on any of the contentions in his petition. This court should dismiss or deny the petition with prejudice.

WHEREFORE, respondent requests relief from this court as follows:

- a. That the petition be dismissed or denied on the merits and with prejudice as to all allegations, and that petitioner take nothing hereby;
- b. That respondent have all costs, disbursements, and attorneys fees as appropriate herein;
- c. That this matter be decided on the papers in the file and that no hearings, whether evidentiary or oral argument, be held in this matter; and
- d. For such other and further relief as is just and equitable.

Dated this 4th day of November 2013.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL
STATE OF SOUTH DAKOTA



Paul S. Swedlund
ASSISTANT ATTORNEY GENERAL
paul.swedlund@state.sd.us
1302 East Highway 14, Suite 1
Pierre, SD 57501
(605) 773-3215

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 4th day of November 2013 a copy of the foregoing answer was served on petitioner's counsel Chase Iron Eyes and Paul Wolf via the CM/ECF electronic filing system.

A handwritten signature in black ink, appearing to read "Paul S. Swedlund", written in a cursive style.

Paul S. Swedlund