In the Circuit Court of the
Seventh Judicial Circuit of South Dakota

JOHN GRAHAM, Petitioner	)	
v.	)	Civ. No. _____
DOUG WEBER, acting in his capacity as the warden of the South Dakota State Penitentiary, Respondent.	)	

Memorandum of Law in Support of Petitioner's Application for the Writ of Habeas Corpus.

John Graham ID # 4321
Pro se
South Dakota State Penitentiary
PO Box 5911
Sioux Falls, SD, 57117-5911

May ___, 2013

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Factual Summary

In 2003, John Graham, a Southern Tutchone aboriginal man from the Yukon Territory of Canada, was charged in South Dakota District Court with the premeditated murder of Anna Mae Aquash in December of 1975. In 2007, Graham was extradited from Canada to the United States on that charge. After protracted litigation in the federal courts, the charge was dismissed.[1] However, before Graham was returned to Canada, he was indicted by a Pennington County grand jury on state charges of both premeditated murder and felony murder.[2] Graham was found guilty of felony murder, but was acquitted of premeditated murder. He was sentenced to life without parole, and is currently serving this sentence in the South Dakota State Penitentiary in Sioux Falls. Graham appealed a number of issues related to the admissibility of evidence to the Supreme Court of South Dakota, which are not reargued here, as well as challenging his extradition on the basis of specialty, and was denied relief on May 30, 2012.

Summary of Argument

The Court had no jurisdiction to try Graham for felony murder because Graham's prosecution was prohibited by the Extradition Treaty between the United States and Canada. This treaty contains a dual criminality provision, which requires that an offense be an offense in both countries. Felony murder isn't a crime in Canada. The government relied on the treaty as its basis for extradition, and the Court must enforce the treaty terms as Federal law. The South Dakota State Court had no jurisdiction to put Graham on trial for felony murder, the only crime of which he was convicted.

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[1] See United States v. Graham, 572 F.3d 954 (8th Cir. 2009).

[2] For felony murder, Graham was charged under SDCL 22-16-9 (1975), and in two separate counts based on alleged underlying offenses of kidnapping (22-19-1) and rape. The government dropped the count based on rape.

Graham's conviction was also fatally flawed because the jury instructions failed to list all of the elements of kidnapping. South Dakota's kidnapping statute, § 22-19-1, requires that the detaining or transporting of the victim occur for one of five specifically enumerated purposes, includng ransom or reward or as a shield or hostage; to facilitate the commission of a felony or flight thereafter; to inflict bodily injury or terrorize; to interfere with any government function; or to entice away a child under 14 years of age. The jury instructions in Graham's case listed the elements as being "for the purpose of ransom, reward or other purpose." This "or other purpose" language negates one of the essential elements of the crime.

What was Graham's alleged purpose in kidnapping the victim? The prosecution said that AIM believed Anna Mae Aquash was an FBI informant, and were confining her to prevent her from escaping, until at some point someone gave an order to kill her. None of these enumerated purposes could even apply. The jury acquitted Graham on the charge of first degree murder, and it's a fair inference that they did so because they didn't believe Graham had the requisite mens rea to kill her, and was not a part of any conspiracy to murder her. This rules out the only two possible purposes under § 22-19-1, to facilitate a felony or flight thereafter, or to inflict bodily injury. If the jury thought Graham's purpose in kidnapping Aquash was to inflict bodily injury, they would have found him guilty of premeditated murder. None of the enumerated purposes would work, so this flaw in the jury instructions was not harmless error.

Third, Graham's indictment and jury instructions were so flawed as to be unconstitutional. Both were duplicitious because they combined felony murder and kidnapping into one count. Graham had the constitutional right to have the jury consider

whether he was guilty of kidnapping only, and by extension, whether they thought the kidnapping was connected to her death. Moreover, South Dakota Code § 23A-8-2 (4) prohibits charging more than one offense in a single count. That's because it's unconstitutional and confusing to the jury.[3] The felony murder statute upon which Graham's conviction was based, South Dakota Code § § 22-16-9, was repealed in 2005. This law was a dead letter when Graham was first charged with felony murder in 2009, and this is the only crime he was convicted of. Graham's conviction based on this indictment violates his Due Process rights.

Finally, there's an obvious alternative theory as to what happened to Anna Mae Aquash, that the jury should have had the opportunity to consider. The Aquash murder occured in the context of approximately sixty others on the Pine Ridge reservation in the mid 1970s, many of which were attributed to an armed organization called the Guardians Of the Oglala Nation (GOON). This group was organized and run by the FBI to enforce Federal law on the reservation. The jury would have been alarmed to learn that in the first autopsy of Anna Mae Aquash, supervised by FBI Agent David Price, the coroner found that she died from freezing to death, and not from the gunshot wound to her head, as a second autopsy determined was the real reason. This alone would have created a reasonable doubt as to the government's version of events. The murder of Anna Mae Aquash is still unsolved, and the most likely explanation is still that one of the FBI's GOONs killed her, and that AIM is being blamed in order to "close" this case and absolve the FBI of responsibility.

[3] Kidnapping and felony murder have different mens rea requirements, and it's confusing to merge the elements of both into one count.

Argument

I. The Trial Court had no jurisdiction to prosecute Graham for felony murder because felony murder is not a crime in Canada, and his prosecution was prohibited by the Extradition Treaty between the U.S. and Canada.

A. Felony Murder is not a crime in Canada.

Felony murder is not a crime in Canada. See Exhibit 2, R. v. Vaillancourt, [1987] 2 S.C.R. 636, which is the lead case in Canada on felony murder.[4] In Vaillancourt, the Supreme Court of Canada considered whether 213(d) of the Canadian Criminal Code was constitutional, and held that it was not. Section 213(d) provided that:

> "Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit ... robbery ... whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if ... he uses a weapon or has it upon his person during or at the time he commits or attempts to commit the offence ... and the death ensues as a consequence."

Vaillancourt at 2. This is the paradigm fact pattern for felony murder. The court's reasoning was as follows:

> Under section 7, if a conviction will result in a deprivation of the life, liberty or security of the person of the accused, then Parliament must respect the principles of fundamental justice. One of these principles is that a minimum mental state is an essential element of an offence. However, because of the special nature of the stigma attached to a conviction for murder, the principles of fundamental justice require a mens rea reflecting the particular nature of that crime. While the current view of the justices is that such a conviction cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight, for the purpose of this appeal, it is sufficient to say that, as a principle of fundamental justice, there cannot be a conviction in the absence of proof beyond a reasonable doubt of at least objective forsaeability.[5]

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[4] Some Courts require expert witnesses to interpret foreign law. Graham is indigent and unable to hire experts, and asks the Court to make this interpretation itself, since the Canadian system is similar to our own and because the Vaillancourt case is so easy to understand.

[5] Many U.S. jurisdictions impose a requirement of forseeability on the felony murder rule as well. The Vaillancourt case was dismissed because the murder was not objectively forseeable. However, even had it been objectively forseeable, there would still need to be some subjective forseeability, whether it be recklessness, or something else.

Id. Forseeability may be analogous to recklessness, or to the concept of forseeability in negligence law, but however its defined, it's not strict liability or transferred intent, which are the mens rea theories used in the United States to justify the felony murder rule. Because Canada has no such crime or concept in their criminal law, the dual criminality provision of the treaty should have prohibited Graham's extradition.

B. The U.S. - Canada Extradition Treaty contains a "dual criminality" provision that prohibits prosecution unless an offense is an offense in both sending and receiving states.

On Jan. 11, 1988, the U.S.-Canada Extradition Treaty, 27.1 U.S.T. 983 (1976) was amended to include a "dual criminality" provision. See Protocol Amending the Extradition Treaty Between Canada and the United States of America, No. 15678, Exhibit 3 at 21. That is, a person may only be extradited pursuant to the treaty for an offense that is a crime in both countries. Id. Article 1 of the Protocol states that:

> "Article 2 of the Extradition Treaty is deleted and replaced by the following:
>
> "Article 2
>
> (1) Extradition shall be granted for conduct which constitutes an offense punishable by the laws of both Contracting Parties by inprisonment or other form of detention for a term exceeding one year or any greater punishment. ..."

Article II of the Protocol states that "[t]he SCHEDULE to the Extradition Treaty, as amended is deleted." Id., Exhibit 3 at 21.[6] Although felony murder was arguably never an extraditable offense, since it was never listed in the schedule of extraditable offenses, the replacing of this schedule with a dual criminality provision leaves no room for doubt.

[6] Prior to 1988, the Extradition Treaty contained a list of extraditable offenses, which did not include felony murder. Id at 17. The amended treaty, as it was when the US requested Graham's extradition on Oct 3, 2008, is the applicable version. However, regardless of which version was in force, Graham's extradition violated it.

See M. Cherif Bassiouni, International Extradition: United States Law and Practice 465-472 (4th Ed. 2001). Dual criminality, also referred to as double criminality and double incrimination, is a basic principle of extradition law that requires that an offense be an offense in both countries in order for extradition to occur. Id. at 465. The concept is implied in extradition treaties listing extraditable offenses, although in the instant case, it was made explicit through the 1988 Protocol. Id.

C. Graham has standing to challenge his extradition under the U.S. - Canada Extradition Treaty.

In reaching its holding on specialty, State of South Dakota v. John Graham, 815 N.W.2d 293 (2012), the South Dakota Supreme Court erroneously said that a relator has no standing[7] to challenge his extradition under an extradition treaty where the surrendering state waives its objections. See Exhibit 4. First, the SD Supreme Court confused two distinct legal concepts: specialty and dual criminality. Second, it ignored the clear language in two U.S. Supreme Court opinions, Rauscher and Alvarez Machain, discussed supra, which explicitly held that relators have standing to assert violations of extradition treaties. There is nothing in either opinion suggesting that prosecutors in Canada and the U.S. can agree to deprive a person of their rights under the treaty. Instead, it cited to a case from the Southern District of New York, Antwi v. United States,

[7] Graham has constitutional standing, and the argument is in the nature of prudential standing, and the "zone of interests" of the extradition treaty. Generally, the Constitution requires three elements for standing: (1) injury in fact, (2) causation, and (3) redressability. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102-03 (1998) Injury in fact is a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical. Id. at 103 (quotation marks omitted) (citing Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)). Causation is "a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant." Id. (citing Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)). Redressability is a likelihood that the requested relief will redress the alleged injury. Id. (citing Warth v. Seldin, 422 U.S. 490, 505 (1975)). The constitutional requirements for standing are clearly met here. The injury is Graham's illegal and ongoing incarceration. The United States is causing the injury by detaining him. The injury may be redressed by vacating Graham's conviction and setting him free.

349 F. Supp. 2d 663, 671 (S.D.N.Y. 2004), and to dicta in United States v.Thirion, 813 F.2d 146, 151 (8th Cir. 1987). The comment in Thirion was dicta because Thirion was tried only for those crimes for which he was extradited. Thirion at 153.

"The doctrine of dual or double criminality is distinct from the doctrine of specialty." United States v. Gallo-Chamorro, 48 F.3d 502, 507 (11th Cir.1995). While specialty is a principle of international comity, dual criminality is an enforceable provision of the U.S.-Canada Extradition Treaty. Specialty refers to the custom of not putting a person on trial for an offense other than that for which he was extradited. The dual criminality provision of the treaty requires that an offense be an offense in both the sending and receiving states. While specialty focuses on the conduct itself, "[d]ouble criminality refers to the characterization of the relator's criminal conduct insofar as it constitutes an offense under the law of the respective states .... no state shall use its processes to surrender a person for conduct which it does not characterize as criminal." United States v. Herbage, 850 F.2d 1463, 1465 (11th Cir.1988) (quoting Bassiouni, International Extradition, at 359-360; see United States v. Gallo-Chamorro, 48 F.3d 502, 504 (11th Cir.1995).

For more than 100 years it has been the law that relators have standing to raise violations of extradition treaties. The reason is simple: unlike most other kinds of treaties, extradition treaties are self-executing. In U.S. v. Rauscher, 119 U.S. 407 (1886), the Supreme Court first held that a relator has standing under an extradition treaty because extradition treaties are self-executing law. cf. Ker v. Illinois,[8] 119 U.S. 436 (1886) (When a treaty has not been invoked, a court may properly exercise jurisdiction

[8] The Ker and Rauscher cases were decided on the same day in 1886, and distinguish extradition from what is commonly known as rendition.

even though the defendant's presence is procured by other means.) The Court distinguished U.S. treatment of a self-executing treaty with that of some other countries, where a treaty is considered as a contract between states. The Court in Rauscher explained that under the U.S. Constitution, a self-executing treaty is the law of the land and the equivalent of an act of Congress. Rauscher, 119 U.S. at 418. The Rauscher court held that the rights described in the treaty are conferred on both the extradited individual and on the respective governments:

> A treaty, then, is a law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which **the rights of the private citizens** or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

Rauscher, 119 U.S. at 418-419. (emphasis added) Moreover, the Court said that it was "impossible to conceive" of an exercise of jurisdiction which could ignore a provision of an extradition treaty and not imply a "fraud upon the rights of the party extradited ..." Rauscher, 119 U.S. at 422. Finally, the court concluded that the rule of specialty is "conclusive upon the judiciary of **the right conferred upon persons** brought from a foreign country into this [country] under such proceedings." Id. at 424. (emphasis added) This has not only been the law for more than 200 years,[9] it is also a basic

[9] It has always been the law that self-executing treaties can create rights enforceable by individuals. See, e.g., Clark v. Allen, 331 U.S. 503 (1947) (individuals can enforce treaty protections); The Paquete Habana, 175 U.S. 677 (1900); Hilton v. Guyot, 159 U.S. 113, 163 (1895); U.S. v. Rauscher, 119 U.S. 407, 419 (1886) ("The treaty ... being ... the supreme law of the land, of which the courts are bound to take judicial notice, and to enforce in any appropriate proceeding the rights of persons growing out of that treaty..."); Owings v. Norwood's Lessee, 9 U.S. (5 Cranch) 344, 348-49 (1809) (Marshall, C.J.) ("The reason for [art. III § 2, cl. 1] ... was, that all persons who have real claims under a treaty should have their causes decided by the national tribunals ... Whenever a right grows out of, or is protected by, a treaty ... whoever may have this right, it is to be protected").

principle of extradition treaties in international law.[10] A right without a remedy is no right at all.

Because extradition treaties are self-executing, they become law upon ratification by the Senate, and no enabling legislation is ever enacted. A review of the treaty language will confirm that no reference is made to enabling legislation, as can be found in other kinds of treaties. In addition, the U.S.-Canada Extradition Treaty is incorporated within 18 U.S.C. 1381 as self-executing law. As a fully self-executing treaty, the U.S.-Canada Extradition Treaty is recognized by our Constitution as the "supreme law of the land." U.S. Const., Art. III § 2, cl. 1. It is in supremacy parity with an Act of Congress in any American court. When a self-executing treaty and a federal statute conflict, "the one last in date will control the other." Whitney v. Roberton, 124 U.S. 190, 194 (1888). The U.S.-Canada Extradition Treaty has not been superceded by any other Federal law, so any state action in conflict with this treaty is illegal.

The U.S. Supreme Court recently affirmed this old rule, again holding that a defendant may not be prosecuted in violation of the terms of an extradition treaty. United States v. Alvarez-Machain, 504 U.S. 655 (1992). Alvarez-Machain followed Ker instead of Rauscher, because Alvarez-Machain was also a rendition case, where a suspect in a criminal case was essentially kidnapped and brought into the U.S. with no legal process

[10] See Oppenheim on International Law, 9th Ed., § 622 Effect of treaties upon individuals:

"The binding force of a treaty and its effects concern in principle the contracting states only, and not their nationals. This rule can, as has been said by the Permanent Court of International Justice, be altered by the express or implied terms of the treaty, when its provisions become self-executory (even, occasionally, as regards persons who are not nationals of the contracting state concerned). Otherwise, if treaties contain provisions affecting the rights and duties of persons or bodies under the jurisdiction of the contracting states, each contacting state is bound to take such steps as are necessary, according to its internal law, to ensure that their rights and duties are consistent with the requirements of the treaty. According to the laws of some states, the official publication of a treaty may be sufficient for this purpose, but in other countries other steps are necessary, such as the enactment of a statute by Parliament." (citations omitted)

whatsoever. But the Supreme Court in Alvarez-Machain based its analysis on the text of the U.S.-Mexico Extradition Treaty, and whether it prohibited rendition; ie, transfer of persons over the border without reliance on the treaty. "Thus, the language of the Treaty, in the context of its history, does not support the proposition that the Treaty prohibits abductions outside of its terms." Alvarez-Machain at 666. "We conclude, however, that respondent's abduction was not in violation of the Extradition Treaty between the United States and Mexico, and therefore the rule of Ker v. Illinois is fully applicable to this case." Id. at 670.

In Graham's case, the Court should also begin by looking at the U.S.-Canada Extradition Treaty and the dual criminality provision in it. Using the analysis in Alvarez-Machain, the Court should follow Rauscher, rather than Ker, since Graham was extradited pursuant to an extradition treaty. Unfortunately, the Federal Circuits have clouded this issue, with four circuits holding that a relator has standing to raise the issue of specialty, and three circuits holding that he does not.[11] The Eighth Circuit has not yet

[11] The Third, Ninth, Tenth, and Eleventh Circuits have held that a relator has standing to assert a violation of an extradition treaty, on either dual criminality or specialty grounds. See U.S. v. Riviere, 924 F.2d 1289 (3rd Cir. 1991) (relator had standing protest violation of rule of specialty, but when a surrendering state expressedly waives its right to enforce the principle, the relator no longer has a right inuring to his benefit; extradition warrant included waiver of "any and all Rights of Objection and Protest of the Government of Dominica"); United States v. Merit, 962 F.2d 917, 921 (9th Cir.1992) ("[a]lthough the government argues that Merit lacks standing to protest his extradition as a violation of the treaty, in this circuit 'the person extradited may raise whatever objections the rendering country might have'"); United States v. Khan, 993 F.2d 1368 (9th Cir.1993) (reversing defendant's conviction for violation of the dual criminality principle); United States v. Levy, 905 F.2d 326 (10th Cir. 1990) (ruling on the merits of defendant's dual criminality argument without explicit discussion of standing); Gallo-Chamorro v. U.S., 233 F.3d 1298 (11th Cir. 2000) (standing to assert violation of extradition treaty on dual criminality grounds); United States v. Puentes, 50 F.3d 1567, 1575 (11th Cir.), cert. denied, 516 U.S. 933 (1995) (standing to assert a violation of a doctrine of specialty provision of extradition treaty); U.S. v. Herbage, 850 F.2d 1463 (11th Cir. 1988).

On the other hand, the Second, Fifth and Sixth Circuits have held that he does not. Fiocconi v. Attorney General of the United States, 462 F.2d 475 (2nd Cir. 1972), cert. denied, 409 U.S. 1059 (1972) (defendant lacked standing to challenge prosecution for offense not listed in extradition treaty); U.S. v. Kaufman, 874 F.2d 242, 243 (5th Cir. 1989) (per curiam) (stating that only offended national that is a party to a treaty may complain of a breach of the treaty); Demjanjuk v. Petrovsky, 776 F.2d 571, 583-84 (6th Cir. 1985) (expressing doubt that the individual has standing on the grounds that "[t]he right to insist on application of

decided on this issue, and the Court should follow the Supreme Court holdings in Rauscher and Alvarez-Machain to find that Graham has rights under the U.S.-Canada Extradition Treaty.

The 8th Circuit did decide a similar issue in United States v. Thirion, 813 F.2d 146 (8th Cir. 1987), noting that the doctrine of specialty was based on international comity (rather than based on a treaty provision), and that "[w]hile the asylum country may consent to extradite the defendant for offenses other than those expressly enumerated in the treaty, United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir.1986), it did not do so here." Thirion at 151. This is dicta because the foreign government in the Thirion case, Monaco, did not purport to waive Thirion's rights, Thirion was not prosecuted for any offense outside the extradtiion treaty, and the court did not rely on Najohn in reaching its decision. The Eighth Circuit should avoid citing to Najohn in the future, since Najohn is no longer good law. Subsequent to Najohn, two other 9th Circuit decisions established the rule that a court is deprived of jurisdiction over an extradited defendant if either: (1) the transfer of the defendant violated the applicable extradition treaty, or (2) the United States government engaged in “misconduct ‘of the most shocking and outrageous kind’ ” to obtain his presence. U.S. v. Anderson, 472 F.3d 662, 666 (9th Cir. 2006); United States v. Matta-Ballesteros, 71 F.3d 754, 762-764 (9th Cir. 1995). Therefore, as we stated supra at n 10, the Ninth Circuit can be counted as one of those recognizing recognizing a relator's rights under an extradition treaty, and the Eighth Circuit should no longer find Najohn to be persuasvie.

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the principle of specialty belongs to the requested state, not to the individual whose extradition is requested") cert denied, 475 U.S. 1016 (1986).

The Extradition Treaty vests Graham himself with rights that Canadian prosecutors can't waive. Only Graham could do that. The Canadian Extradition Act § 72 provides a procedural mechanism for a relator to waive extradition.[12] The provision provides that a person may, at any time after arrest or appearance, waive extradition in writing and before a judge. Graham never did that. Had he done so, § 72(2)(a) requires that a judge before whom this waiver is given must inform the relator of the consequences of the waiver. Id. This law and this procedure would be pointless if the Canadian Minister of Justice could waive the relator's rights.

Finally, the Trial Court abused its discretion by reviewing in camera a letter from the Canadian Minister of Justice purporting to waive Graham's rights. This was not only grossly unfair, but also an abdication of Canada's duties to its native peoples. Graham is not a Canadian citizen; his status is that of an aboriginal or First Nations person. Because of the legal relationship between the Canadian government and its indigenous peoples, the Canadian government should be acting as Graham's fiduciary.[13]

Graham's trial attorney, John Murphy, was ineffective in argung the extradition issue to the S.D. Supreme Court. In contrast to the detailed legal analysis herein, Mr. Murphy cited to only one extradition case, Johnson v. Browne, 205 U.S. 309 (1907), which is so far disconnected from the current state of extradition law, the S.D. Supreme Court was essentially left on its own to figure it out. No one seemed to notice that the real issue was dual criminality, not speciality, and that felony murder is not a crime in

[12] Online at http://laws-lois.justice.gc.ca/eng/acts/E-23.01/

[13] R. v. Sparrow (1990) 56 C.C.C. (3d) 263 (S.C.C.); see PRB 00-09E The Crown's Fiduciary Relationship with Aboriginal Peoples, Mary C. Hurley, Law and Government Division of the Canadian Parliament, 10 August 2000, online at http://www.parl.gc.ca/content/LOP/ResearchPublications/prb0009-e.htm.

Canada. As a result, the S.D. Supreme Court has issued an opinion which directly contradicts two opinions of the U.S. Supreme Court.

II. The jury did not find Graham guilty of kidnapping, because the jury instructions didn't allege every element of the offense.

The jury instructions in Graham's case were fatally flawed because they failed to include all of the elements of kidnapping, the underlying offense. Graham had the right to have every element of the offense of kidnapping proved beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). Criminal statutes must be strictly constructed in favor of the defendant. Commonwealther v. Wotan, 422 Mass. 740 (1996). The crime of kidnapping requires that the confinement or removal of the victim be done for one of several enumerated purposes. The definition goes as follows:

> 22-19-1. Kidnapping--Aggravated kidnapping in the first degree--Class of felony. Any person who, either unlawfully removes another person from the other's place of residence or employment, or who unlawfully removes another person a substantial distance from the vicinity where the other was at the commencement of the removal, or who unlawfully confines another person for a substantial period of time, with any of the following purposes:
>
> (1) To hold for ransom or reward, or as a shield or hostage; or
>
> (2) To facilitate the commission of any felony or flight thereafter; or
>
> (3) To inflict bodily injury on or to terrorize the victim or another; or
>
> (4) To interfere with the performance of any governmental or political function; or
>
> (5) To take or entice away a child under the age of fourteen years with intent to detain and conceal such child;
>
> is guilty of kidnapping in the first degree. Kidnapping in the first degree is a Class C felony, unless the person has inflicted serious bodily injury on the victim, in which case it is aggravated kidnapping in the first degree and is a Class B felony.

The instructions given to the jury were not accurate because instead of listing these reasons, broadened them to include any other purpose, thereby negating one of the essential elements of the crime. Jury instruction #3 was as follows:

> The elements of kidnapping, each of which the state must prove beyond a reasonable doubt, are, at the time and place alleged:
>
> 1. The defendant did seize, confine, kidnap, abduct or carry away Anna Mae Aquash
>
> 2. The seizing confining, kidnapping, abducting or carrying away of Anna Mae Aquash was for the purpose of ransom, reward **or other purpose**.

See Jury Insruction #3, Exhibit 5 at 10-11. (emphasis added) This "or other purpose" language negates one of the essential elements of of the crime. The prosecution had to prove one of the purposes listed as an element of the crime.

This error in the jury instructions was not harmless. The prosecution did not show any purpose to kidnap the victim that would fall within § 22-19-1. According to the prosecution, unnamed members of the American Indian Movement believed that Anna Mae Aquash was an FBI informant, and told Graham to confine her to prevent her from escaping. Clearly, purposes number (1), (4) and (5) could not apply to Graham's case. The only two possible purposes under § 22-19-1 would be either (2) to facilitate a felony or flight thereafter, or (3) to inflict bodily injury. However, the jury acquitted Graham on the charge of first degree murder, and it's a fair inference that they did so because they didn't believe Graham had the requisite mens rea to kill her (or inflict bodily injury), and was not a part of any conspiracy to murder her. The jury did not believe Looking Cloud's story that he and Graham drove Aquash to the edge of a cliff and executed her. That was the government's theory of premeditated murder. Since the prosecution put on no evidence supporting any of the enumerated motives, a directed

verdict in favor of acquittal should have been ordered. The error in the jury instructions doesn't just merit a new trial; it shows why the case should have been dismissed.

The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In re Winship, 397 U.S. 358 (1970) One of those purposes in § 22-19-1 must be proven to satisfy this element of the offense. The government's own theory of the events[14] and of Graham's alleged motives does not state a prima facie case for kidnapping. Absent a finding of one of these motives, Graham's conduct would not have constituted a crime.

III. Combining felony murder with kidnapping in one count was duplicitious and violated Graham's rights under the Sixth Amendment of the U.S. Constitution.

Exhibits 5 and 6, attached hereto, are Graham's jury instructions and indictment in South Dakota State Court. In both of them, the crimes of kidnapping and felony-murder are combined into one count. This is known as duplicity, and is unconstitutional. Whether Graham's indictment and jury instructions were duplicitious are legal questions reviewed de novo. United States v. Smith, 39 F.3d 119, 122 (6th Cir.1994). While other pleading objections must be raised before trial, the failure to properly charge an offense can first be raised post-conviction. See Wayne LaFave, Criminal Procedure § 19.3(a) (4th Ed. 2004).

An indictment is duplicitous if it "joins in a single count two or more distinct and separate offenses." U.S. v. Campbell, 279 F.3d 392, 398 (6th Cir. 2002). Duplicity is unconstitutional because a "jury may find a defendant guilty on the count without having

[14] Graham is certainly not conceding that the prosecutor's version of events was true. Graham was Anna Mae Aquash's friend and was protecting her.

reached a unanimous verdict on the commission of any particular offense." Id, citing United States v. Shumpert Hood, 210 F.3d 660, 662 (6th Cir. 2000). By collapsing separate offenses into a single count, duplicitous indictments "prevent the jury from convicting on one offense and acquitting on another." Id. Duplicitous indictments implicate the protections of the Sixth Amendment guarantee of jury unanimity and are unconstitutional. Id. Although there appears to have been no prior litigation of this issue in South Dakota State Court, duplicity has been recognized in dicta in South Dakota, see State v. Muhm, 775 N.W.2d 508, 514 (S.D. 2009), and is prohibited by S.D. Code § 23A-8-2 (4), which prohibits the charging of a "compound crime."

Both Graham's indictment and the instructions given to the jury, Exhibits 5 and 6, combined felony murder and kidnapping into a single count. The jury was given no option to convict Graham of the lesser included offense of kidnapping, which is unconstitutional as well. Beck v. Alabama, 447 U.S. 625, 630 (1980) (in capital felony-murder case, unconstitutional not to allow jury to consider convicting defendant of robbery only) Providing the jury with the option of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable doubt standard. Id.

Under the repealed S.D. law, to be guilty of felony-murder, the defendant must have caused a death while engaged in the perpetration of an underlying felony. State v. Rough Surface, 440 N.W.2d 746, 759 (S.D. 1989). The issue of causation is critical. In many jurisdictions, the death must have been the "natural and probable consequence" of the defendant's conduct. When death occurs only as a consequence of some intervening act following the defendant's conduct, the issue is frequently put in terms of whether the

intervening cause was "foreseeable." State v. Glover, 330 Mo. 709 (1932) (firefighter death in arson case foreseeable); Commonwealth v. Moyer, 357 Pa. 181 (1947) (armed robbery set into motion a "chain of events which were or should have been within his contemplation.")

Here, the jury found Graham not guilty of premeditated murder. They found that he did not intend to kill Aquash, and did not believe the story told by co-defendant Arlo Looking Cloud. What, then, was Graham's mens rea? If Graham didn't intend to kill Aquash, the jury might have evaluated whether the kidnapping and murder of Aquash were related. There was no actual evidence that they were. These errors, in the indictment and jury instructions, were not harmless and warrant reversal.

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

The felony murder statute under which Graham was charged, § 22-16-9 of the South Dakota code, was repealed in 2005. It was a dead letter and could not have been applied to Graham's case four years later. Graham was first charged with felony murder on Sept 9, 2009. Senate Bill 43 repealed this section, which is reproduced in Exhibit 7, attached hereto. The pertinent section reads as follows:

> "Section 158. That § 22-16-9 be repealed.
>
> ~~22-16-9. Homicide is murder in the second degree when perpetrated without any design to effect death by a person engaged in the commission of any felony other than as provided in § 22-16-4.~~"

See Exhibit 7, Senate Bill No. 43 (Eightieth Legislative Assembly, 2005) at 23. (strikethrough of text in original).[15]

[15] Senate Bill No. 43 is also online at: http://legis.state.sd.us/sessions/2005/43.htm The enrolled (final) version of the bill is online at http://legis.state.sd.us/sessions/2005/bills/SB43enr.pdf. The Senate version

A. The effect of repealing South Dakota's felony murder law was to divest the State of the right to proceed under the statute, which, except as to proceedings passed and closed, is considered as if it had never existed.

The issue of retroactive application of a repealed statute was addressed by the South Dakota Supreme Court in Schultz v. Jibben, 513 N.W.2d 923, 924-925 (S.D. 1994). Where there is no savings clause within the statute itself, and no general saving statute applies, the effect of repealing a statute is to destroy the effectiveness of the repealed act in futuro and to divest the right to proceed under the statute, which, except as to proceedings passed and closed,[16] is considered as if it had never existed. Jibben, 513 N.W.2d at 924-925; State Highway Comm'n v. Wieczorek, 248 N.W.2d 369, 373 (S.D. 1976) ("The repeal of a statute has the effect, except as to transactions passed and closed, of blotting it out as completely as if it had never existed, and of putting an end to all proceedings under it. ... Every right or remedy created wholly by statute subsequently repealed falls with the repeal of the act which created it.") There is no savings clause in Senate Bill 43, and the statute doesn't vest anyone with rights.

The SD Supreme Court's detailed opinion in Jibben relied on an analysis made by the Supreme Court of Colorado. In Vail v. Denver Bldg. & Const. Trades Council, 108 Colo. 206, 210 (1941),[17] that court held that "[t]he general rule is that powers derived

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has been chosen as an Exhibit herein to show the stricken felony murder law, at page 23. In the final version, on p 42 it says only that "Section 158. That § 22-16-9 be repealed."

[16] Even if Graham had been charged with felony murder before the statute was repealed (he was not), the general rule is that the repeal of a statute would cancel an action brought pursuant to that statute, unless the action is permitted to survive by the operation of a saving clause, or by the vesting of a right under the statute. Jibben at 925; Wieczorek at 373.

[17] The Colorado Supreme Court in Vail analyzed cases in a variety of to reach this conclusion. "The rule as above stated is supported by a legion of authorities, among which are Moss v. Smith, 171 Cal. 777, 155 P. 90; McNabb v. President, etc., of Village of Tonica, 103 Ill.App. 156; Wilson v. Head, 184 Mass. 515, 69 N.E. 317." Id. It was also guided by the treatise, Endlich on Interpretation of Statutes, pages 683, 684, §§ 479, 480, for the principle that: 'Wherever the jurisdiction exercised in proceedings depends wholly upon statute, and the statute is repealed, … the jurisdiction is gone, and with it the whole proceeding, imperfect at the time of the repeal or expiration, falls to the ground, unless there be a reservation as to pending rights

wholly from a statute are extinguished by its repeal. … And it follows that no proceedings can be pursued under the repealed statute, though begun before the repeal, unless such proceedings be authorized under a special clause in the repealing act." citing Flanigan v. Sierra County, 196 U.S. 553 (1905). See 82 C.J.S. § 437 ("As a general rule the repeal of a statute imposing a liability, by a subsequent act containing no saving clause, operates to release all liabilities incurred under the repealed statute where no proceedings have been commenced to enforce such liability ... unless vested rights have been acquired under the statute prior to its repeal.")

The South Dakota legislature repealed its felony murder law four years before Graham was charged under it in 2009.[18] South Dakota's felony murder law could have no retroactive application. Senate Bill No. 43 contained no retroactivity language, and South Dakota's general savings statute doesn't apply. Therefore, the Court had no jurisdiction to charge Graham under it.

B. No savings provision exists that would permit the use of the repealed felony murder law to Graham's case.

Exhibit 7 contains the entire text of South Dakota Senate Bill No. 43, which repealed SD 22-16-9 (the felony murder law). A review of this Exhibit reveals that no savings provision exists anywhere in it. This is true for Section 158, which repeals the felony murder law, and for the rest of the Bill as well, as there is no mention in any section of any savings provisions or of retroactivity of any part of the Bill. Since there is no savings provision in Senate Bill 43 itself, the next question is whether South Dakota's

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or causes. … The same rule applies to rights and remedies founded solely upon statute, and to suits pending to enforce such remedies. If, at the time the statute is repealed, the remedy has not been perfected or the right has not become vested, but still remains executory, they are gone.' Vail at 211.

[18] Graham had been charged with premeditated murder only, and not felony-murder, in Federal court. There is no relation-back doctrine to apply since the felony-murder charge was never made in Federal court.

general savings statute applies, and would permit the continued enforcement of this law for crimes occurring before the law was repealed. South Dakota's general savings statute, SD Codified L § 2-14-18, reads as follows:

> 2-14-18. Penalties and liabilities surviving repeal of act. 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.

SD Codified L § 2-14-18. By its terms, the general savings clause only applies to sustaining an action for the enforcement of penalties and liabilities already incurred.[19] It does not provide for the retroactive application of the law in new cases involving facts occurring before the law was repealed. It does not apply to anything in Senate Bill 43.

V. Graham didn't get a fair trial.

A. The jury didn't hear the background of this case, or any of Graham's witnesses.

There's an alternative theory as to what happened to Anna Mae Aquash that the jury should have had the opportunity to consider. The Aquash murder occurred in the context of approximately sixty-three well-documented deaths on the Pine Ridge reservation during a three year period, and many more than that, for one reason or another, were never reported. Price v. Viking Press, 625 F.Supp. 641, 643 (D.Minn. 1985). Many people in the Pine Ridge community attributed them to an armed

[19] In addition, the savings clause is applicable to sustain rights of a private nature only, as opposed to rights of a public nature. Wieczorek at 373. A right of action in favor of the public may be destroyed, since no rights vested in private persons would in this way be impaired. Id. The criminal laws are in the realm of public law, not private law.

organization called the Guardians Of the Oglala Nation (GOON), which was organized and run by the FBI to enforce Federal law on the reservation.[20]

The jury would have been alarmed to learn that in the first autopsy of Anna Mae Aquash, supervised by FBI Agent David Price, the coroner found that she died from freezing to death, and not from the gunshot wound to her head, as a second autopsy determined was the real reason.[21] This alone would have created a reasonable doubt as to the government's version of events, particularly in the context of a series of 60 murders.

Agent Price, who knew Aquash personally and once allegedly threatened her life, was widely believed responsible by people on the Pine Ridge reservation at the time. At least three books have been written about this, including In the Spirit of Crazy Horse by Peter Matheissen, The Unquiet Grave by Steve Hendricks, and The Life and Death of Anna Mae Aquash by Johanna Brand. Peter Matthiessen's book was the subject of a meritless defamation suit by Agent Price, that cost Viking Press more than a million dollars to defend before it was dismissed. See David Price v. Viking Penguin, Inc. and Peter Matthiessen, 881 F.2d 1426 (8th Cir. 1989) According to Price, the "book accuses him of, among other things, complicity in the murder of an AIM member [Anna Mae Aquash] and in the alleged coverup of that murder, knowingly suborning perjury,

[20] On March 1, 1976, just a week after Anna Mae Aquash was found, Jimmy Eagle's old partner, Hobart Horse, was shot and killed in yet another unsolved murder. Mr. Eagle was suspected of stealing a pair of cowboy boots, and the FBI's attempt to arrest him led to the deaths of two FBI agents named Jack Coler and Ronald Williams. Price v. Viking Press, 625 F.Supp. at 643. The murder of the two FBI agents had nothing whatsoever to do with John Graham or Anna Mae Aquash, yet the FBI tries to inject it into Graham's case for the prejudicial effecct. Fifty-seven of the other murders are described in a letter sent to the FBI, online at http://www.fbi.gov/minneapolis/about-us/history-1/copy_of_report-for-pine-ridge-indian-reservation-south-dakota, yet apparently are not "cold cases" of interest to the FBI.

[21] The first autopsy also determined that the date of death to be about 7-10 days prior to the discovery of Aquash's body on Feb. 24, 1976. The reliability of this estimate, from a coroner who didn't take into account the bullet in the victim's head, is doubtful. However, it does corroborate the testimony of Candy Hamilton, a prosecution witness who testified that she was in contact with Aquash long after she'd supposedly been killed, and a Feb 18, 1976 FBI memo in which one of Agent Price's informants reports that he saw Aquash on Feb 12, 1976. These two "sightings" of the victim occured about two months after the prosecution said she was killed and disconnect the alleged kidnapping from the murder.

violating constitutional rights by illegal investigative and harassment activities, failing to investigate major crimes on Pine Ridge, and threatening witnesses with physical harm." Price v. Viking Press, 625 F.Supp. 641, 643 (D.Minn. 1985)

Agent Price was available as a witness, and named as one by both prosecution and defense, but was never called. In fact, Graham's court-appointed attorney called no witnesses, even though Mr. Price, Mr. Peterson (the coroner who performed the second autopsy) and other crucial witnesses were available.[22] The jury never heard about any of this, even though it's been litigated in the Eighth Circuit and is well known on Pine Ridge. The widespread belief on the Pine Ridge Reservation, that the FBI, if not Mr. Price himself, was responsible, is reflected in Exhibit 8, a letter from U.S. Attorney Karen Schrier to Denver D.A. Robert Whitney:

> Another potential downside to federal prosecution of the case is that it may be seen as a coverup. Over the years, numerous individuals have alleged that the victim was either killed by the FBI or was killed as a result of FBI actions. Prosecution of members of the American Indian Movement for the homicide could be seen as an effort on the part of the federal government to hide the role of the FBI in Aquash's death.
>
> The primary reason for declination of this matter in this office, however, was simply insufficiency of the evidence.

B. Graham's conviction was based soley on uncorroborated co-conspirator and informant testimony.

There was no physical evidence of any kind in Graham's case that would connect him to the murder. The only people who could have had personal knowledge of the

[22] In addition to failing to call any of the obvious witnesses or mention any of the well-known alternative theories of the murder, Graham's trial attorney never moved the court for a change in venue, despite Graham's urging him on this point. The majority white community in Pennington County discriminates against Native Americans, and many harbor negative views of the American Indian Movement in particular.

murder, as it was described, were Arlo Looking Cloud, who recanted his confession, and Theda Clark, who for unknown reasons, wasn't called as a witness, and has now died.

The witnesses who claimed to have seen Graham detaining Aquash were all potential accomplices to the crime, but no other evidence corroborated their testimony. Jury instruction number 8 told the jurors to consider Arlo Looking Cloud as an accomplice, implying that the other witnesses against him were not, and that the jury need only corroborate Looking Cloud's testimony. See Exhibit 5, Jury Instructions. Every witness who was present at Troy Lynn Yellow Wood's house, where Aquash was allegedly kidnapped by Graham, was a potential accomplice to the kidnapping. Their testimony may have been mutually-corroborating,[23] but that is all, and it is insufficient as a matter of law to sustain a conviction. State v. Dominiak, 334 N.W.2d 51, 54 (S.D. 1983) (as a matter of law, testimony of one accomplice is insufficient to corroborate the testimony of another accomplice).

The prosecution also grossly mischaracterized the evidence relating to the events at Troy Lynn Yellow Wood's house, in both his opening and closing statements.[24] For example, in the prosecutor's closing statement, he said that "[a]t Troy Lynn's, with all the people present and the throat slashing, who was not present at the time? Arlo Looking

[23] Specifically, George Palfy, Arlo Looking Cloud and Angie Begay testified that they saw Aquash tied up as she left Yellow Wood's house. Looking Cloud has subsequently renounced this confession. Yellow Wood testified that Aquash was not tied up, and that George Palfy accompanied them in the car. Angie Begay lived with Graham, and had a baby with AIM leader Dennis Banks, whom Anna Mae Aquash said she was in love with. Begay has also worked for Robert Ecoffey, the lead investigator in this case, for 20 years. Her biases are unclear and her relationships with these people should have been brought out on cross-examination. This crucial detail - whether Aquash was a prisoner of AIM with her hands tied, or whether AIM was hiding her as a fugitive from the FBI - was only supported by uncorroborated accomplice testimony of witnesses like these.

[24] Graham's attorney John Murphy objected to the prosecution's closing arguments. "Mr. Murphy: Objection your honor mistatement of the facts. The Court: I think that's the jury's decision to make as to whether the statement is an accurate recollection of the facts. They have their notes and they have their recollection independent of mine." State's Closing Statement at 82.

Cloud. Theda Clarke and John Graham were there." However, no witness testified that John Graham was at this meeting. Closing Statement at 20. The prosecutor also misstated the testimony of Troy Lynn, who testified that she saw Aquash at her house but that Aquash was not tied up. "Who else told you that? George Palfey, and Troy Lynn She's tied up. She's in the back of the hatchback." Closing Statement at 77. And he misstated the testimony of Candy Hamilton: "Remember Candy Hamilton described Annie Mae's crying. And eventually gave it up that Annie Mae wasn't free to leave. The kidnapping continuing." (closing statement at p 77) However, when Candy Hamilton testified, she said that Anna Mae Aquash was free to leave. "Q. So she really was free to walk away from the situation? A. Yeah. ... Q. She was not tied up? A. No. Q. There was nobody else in the kitchen guarding here, correct? A. No. Q. You would never have stopped her from walking out the back door? A. No." See Transcript, State Witness Candy Hamilton, Vol. 5 p. 48-49. These were not harmless mistakes. Graham's conviction turned on whether Aquash was with him volunarily, or as his prisoner. Moreover, no missing witness instructions were given for David Price, or for other key witnesses who were mentioned but didn't testify, such as Thelma Rios, Frank Dillon, Dino Butler or Serle Chapmann. The prosecution's opening and closing statements were misleading in this way.

The story that unnamed co-conspirators thought Aquash was an informant and ordered her killed came from Kamook Ecoffey, the wife of lead investigator Robert Ecoffey. Ms. Ecoffey was paid $42,000 to wear a wire and record conversations with other AIM members. She once recorded a conversation between herself and co-defendant Arlo Looking Cloud, who is related to her by blood, in which looking Cloud

asks who he's supposed to implicate. "Only John Boy" was her response. Graham's appointed counsel should have moved for a mistrial when Kamook Ecoffey was seen talking to the prosecutor, Mr. Jackley, during a break while she was still under oath giving testimony. (Trial Transcript Vol. 6 of 10 pp. 102-103.) Her husband, Robert Ecoffey was also seen talking to Mr. Jackley, the prosecutor during a break while he was still under oath. (Trial Transcript Vol. 7 of 10 p. 123.) Another informant named Serle Chapman was paid approximately $100,000 but broke down during the related trial of Richard Marshall, and was not called as a witness. He was referred to in both the prosecution's opening and closing arguments, and the jury should have been given a missing witness instruction. In addition, I believe that Angie Begay Janis, George Palfey, Troy Lynn Yellow Wood and Arlo Looking Cloud all received immunity agreements in exchange for their testimony, and should have been cross examined on this. There was no evidence whatsoever of Graham's guilt, other than the testimony of these co-conspirators and informants.

Conclusion

The murder of Anna Mae Aquash is still unsolved. Much as many people would like to put this mystery to rest once and for all, blaming it on John Graham won't do that, any more than an autopsy indicating that Anna Mae Aquash died of exposure. Graham's prosecution was political in nature, and this is proven by Attorney General Marty Jackley's personal participation in it. And not only political, but historical, as this case seeks to rewrite history in a way absolving the FBI of responsibility, and deflecting attention from the scores of unsolved murders that the FBI isn't nearly as interested in. For these reasons, the Court should feel no remorse in vacating Graham's conviction,

since it was violative of the Extradition Treaty, based on jury instructions that didn't allege all the elements of the offense, and was duplicitious and based on a repealed statute.

Respectfully submitted,

_____

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