

**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 Motion to File a Sur-reply; or in the Alternative,
to Strike Parts of Respondent's Reply, Exhibits and Statement of Facts.**

Comes now the Petitioner, to move the Court to allow the Petitioner to make a Sur-reply to arguments made for the first time in the Respondent's Reply, R-33; or in the alternative, pursuant to Fed. R. Civ. p. 12(f), to Strike parts of the Reply, R-33, the Exhibits attached thereto, and Statement of Undisputed Material Facts, R-34.

Issues may not be raised for the first time in a reply brief. American Wildlands v. Kempthorne, 530 F.3d 991, 1001 (D.C. Cir. 2008). In American Wildlands, the D.C. Circuit applied the concept of waiver to hold that the appellant had "forfeited" an issue by not raising it in its opening brief. 530 F.3d at 1001. Considering an argument made for the first time in a reply is manifestly unfair, since the non-movant has no opportunity for a written response. Herbert v. National Academy of Sciences, 974 F.2d 192, 196 (D.C. Cir. 1992). It also entails the risk of an improvident or ill-advised opinion on the issue presented. McBride v. Merrill Dow and Pharmaceuticals Inc., 800 F.2d 1208, 1211 (D.C. Cir. 1986)

The Respondent made only one argument in its Motion to Dismiss or for Summary Judgment, R-31; that Petitioner procedurally defaulted by not simultaneously serving on the Respondent a Motion for a Certificate of Probable Cause when it was filed in the South Dakota Supreme Court. In its Reply, the Respondent has finally addressed the core issues in Graham's Petition, R-5, but does so in a way that deprives Graham of an opportunity to respond. Ironically, the Respondent isn't following the rules of civil procedure for its motion to dismiss, which is based on Graham's alleged procedural error.

Moreover, the Respondant had failed to attach a statement of material facts not genuinely in dispute to its motion for summary judgment, R-31, as required by Local Rule 56.1(A). That Rule states that:

All motions for summary judgment shall be accompanied by a separate, short, and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. Each material fact shall be presented in a separate numbered statement with an appropriate citation to the record in the case.

The "undisputed material facts"¹ filed with Respondent's Reply, R-34, are not even relevant to Respondent's motion or related to service of process in the SD Supreme Court. By raising new issues in its Reply and attaching a statement of facts to support those arguments to the Reply, rather than the Motion, the Respondent would deprive the Petitioner of the opportunity to state which facts are in dispute. This is in addition to Respondent's new arguments regarding the standard of review, and new arguments addressing each of Graham's claims, which encompass the first 17 pages of Respondent's

¹ Moreover, the Respondent cannot in good faith tell the Court that these facts are not genuinely in dispute, when the jury acquitted Graham of premeditated murder. This merits Rule 11 sanctions. The only logical interpretation of the jury's felony murder verdict is that the jury believed that Graham kidnapped Aquash, and imposed the felony murder rule based on the kidnapping. So how can the Respondent say it is not genuinely in dispute that Graham drove Aquash to the edge of a cliff, put a gun to her head, and shot her? If the jury believed that, they would have convicted Graham of First Degree Murder.

Reply. R-33. The Respondant only "replies" to the procedural default on pages 18-20, which encompass about 10% of its brief. Id.

Graham should be given the opportunity to respond in a Sur-reply, particularly because the Respondent cannot prevail on its dual criminality and repealed statute arguments, and it is upon these jurisdictional bases that the habeas corpus petition should be decided, rather than on some procedural reason.

The Standard of Review

In its Reply, the Respondent first addresses the standard of review set forth in the habeas corpus petition. R. 5. Both parties agree that the court may review a claim that (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. 28 U.S.C. § 2254 (d). All of Graham's claims are based on "clearly established law" by the Supreme Court. His extradition arguments are based on U.S. v. Alvarez-Machain, 504 U.S. 655 (1992). The claim that the jury instructions should not have included the language "or other purpose" is based on In re Winship, 397 U.S. 358 (1970). Graham's duplicity argument, that he had the right to be found guilty of kidnapping only, is based on Beck v. Alabama, 477 U.S. 625 (1980). His arguments on the effect of the repeal of a statute are based on Bell v. Maryland, 378 U.S. 226 (1964) and Hamm v. City of Rock Hill, 379 U.S. 306 (1964). His procedural default arguments are based on Wainwright v. Sykes, 433 U.S. 72 (1977) and a line of Supreme Court cases following Sykes. To be sure, Graham has cited to many other authorities, but all of his claims are based on Supreme Court precedents.

The Defendant quotes at length from Cullen v. Pinholster, 131 S.Ct. 1388 (2011), an ineffective assistance of counsel case holding that Strickland v. Washington, 446 U.S. 668 (1984) was the clearly established Federal law that the Court should use. "The benchmark for judging any claim of ineffectiveness of counsel must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 446 U.S. at 686. There seems to be no disagreement on this. While Justice Thomas may have used some harsh language in the Pinholster case, Graham is not bringing any claims that are not based on clearly established Supreme Court precedents.

A. Claim 1. The trial court lacked jurisdiction because Canada has no law comparable to felony murder.

The Respondent's dual criminality argument begins as follows:

"[S]o long as the act of shooting a defenseless woman in the back of the head at point blank range would have been criminal if committed in Canada, extraditing Graham for prosecution for felony murder in the United States does not offend dual criminality principles."

Respondent's Reply, R. 33 at 7. This argument misses the point entirely. The jury acquitted Graham of premeditated murder. Driving someone to the edge of a cliff and shooting her in the back of the head is premeditated murder. The jury found that Graham didn't do that, at least beyond a reasonable doubt. However, if Graham committed a felony, such as kidnapping, which led to the kidnapping victim's death, this conduct would not constitute murder in Canada, because under Canadian law, any kind of murder requires the *mens rea* of at least subjective foreseeability. Later in its brief, the Respondent argues that:

As respects his treaty claim, Graham has not shown that Canada could not prosecute his killing of Annie Mae Aquash as some form of murder as needed to prove his dual criminality claim.

R. 33 at 21. But Graham *has* shown this. Graham provided the Court with Canadian Supreme Court precedent which held that under Canadian law, murder requires a *mens rea* of at least subjective foreseeability. R. v. Martineau, [1990] 2 S.C.R. 633. Graham has also offered the Court the expert testimony of a Canadian attorney and former crown prosecutor, Howard Rubin, who has argued before the Canadian Supreme Court 25 times, and can come to South Dakota for oral argument if the Court finds his testimony helpful. In Martineau, the majority of the Supreme Court of Canada held that for a murder conviction it was a constitutional requirement that the crown prove beyond a reasonable doubt subjective knowledge of the likelihood that death would ensue, and that for constitutional reasons it was not sufficient to employ a *mens rea* or mental state of the lesser of two recognized standards, objective foreseeability of death. See Exhibit 2 to R-5. Justice L'Heureux-Dubé dissented and would have permitted the lower standard of objective foresight of death, but this was in dissent and the current state of the law in Canada has ever since been that the Criminal Code of Canada must provide for proof of a subjective knowledge that the associates of the accused in a kidnapping or any other similar felony murder offense must lay down a requirement for murder of subjective knowledge, and it is impermissible for there to be a felony murder kidnapping law in Canada. See Declaration of Howard Rubin, Exhibit 2 at 2.

The crime of felony murder was defined in the jury instructions in Graham's case as follows:

7. **MURDER WHILE IN THE COMMISSION OF ANY FELONY** is the killing of another human being while in the commission of a felony, to-wit: kidnapping.

Exhibit 5 to R.-5 at 4. (emphasis in original) The lack of any *mens rea* requirement for felony murder in South Dakota is spelled out clearly on page 10 of the jury instructions, which stated:

While Mr. Graham must be shown to have specifically intended to kidnap Anna Mae Aquash, he may be found guilty of murder while in the commission of a felony, such as kidnapping, even if the killing was unintentional, accidental, negligent or by another accomplice.

Exhibit 5 to R.-5 at 10. This requires neither subjective, nor objective intent, and is a rule of strict liability. The Respondent doesn't dispute that Vaillancourt and Martineau represent the current state of Canadian law on felony murder. And despite the Respondent's superior resources, it has failed to find any expert on Canadian law to rebut what is commonly known among Canadian lawyers: Canada has no felony murder rule.

The Respondent also fails to counter Graham's argument that he has standing under the extradition treaty to raise this issue, or that as a basic principle of law, the Court's jurisdiction is not waivable. Or that the issue of dual criminality was never actually litigated or decided in prior proceedings. Or that the US-Canada Extradition Treaty prohibits prosecution of a person unless the crime is a crime in both the sending and receiving states. Therefore, this issue should be easily resolved in Graham's favor, resulting in Graham's release. Instead, the Respondent argues that:

Canada's Minister of Justice was apparently satisfied that dual criminality requirements had been met when he signed the Consent to Waiver of Specialty authorizing Graham's extradition.

R. 33 at 8. The Canadian Minister of Justice has no authority to waive Graham's legal rights. The Canadian Minister of Justice is a prosecutor, not a judge. He is comparable

to the Attorney General of the United States, and can only determine whether Canadian prosecutors will cooperate with their American counterparts. Graham never waived his rights under the Extradition Treaty. Therefore, this argument has no merit.

The Respondent relies on a 9th Circuit case, Clarey v. Gregg, 138 F.3d 764 (9th Cir. 1998). In Clarey, the relator was extradited from the US to Mexico for beating a Bishop to death during the course of a robbery. The victim was bound and gagged and left for dead, and subsequently died. The court found that the requirement of dual criminality was met because Clarey's acts, which constituted "simple homicide" in Mexico, would also constitute felony murder in the United States. Id. at 765. This is exactly opposite to Graham's case, where Graham's conduct would not constitute any kind of murder in Canada. The 9th Circuit further held that "differences between statutes aimed at the same category of conduct do not defeat dual criminality," id. at 765, because "Mexico's homicide statute and the United States [felony murder] statute can both be used to punish the acts with which Clarey is charged..." Id. at 766. This is not persuasive at all when applied to the facts of Graham's case because Graham's alleged conduct would not constitute any kind of murder in Canada under Vaillancourt and Martineau.

B. Claim 2. The jury instructions did not include every element of the offense because Graham could not be charged under a repealed statute.

The Respondent doesn't dispute that under the version of South Dakota's kidnapping statute as it was when he was indicted in 2009, his alleged conduct would not have constituted kidnapping. The Respondent bases its argument on the same argument it makes for Claim 4 infra, that the elements of kidnapping as they existed in 1975 are applicable. The Respondent relies on State v. Strauser, 63 N.W.2d 345, 347 (S.D. 1954),

which held that the 1975 version of South Dakota's kidnapping statute imposed criminal liability on one who abducts another for "ransom, reward or otherwise." Id. The Respondent admits that in 2005, the South Dakota legislature narrowed the definition of kidnapping to a list of several enumerated purposes. R. 33 at 8. The Respondent is asking the Court to rule against the obvious legislative intent to more precisely define what kidnapping is. The Court should not make such an interpretation. Graham will address this in more detail in § D infra.

C. Claim 3. Graham had the right to have the jury consider whether he was guilty of kidnapping only.

Related to its argument that recklessness is a standard used in Canada for murder (its is not, see § A supra), the Respondent also claims that "Graham's jury found that his kidnapping of Annie Mae Aquash exhibited the *mens rea* of 'reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death' sufficiend to sustain a conviction for felony murder." R. 33 at 11, citing Schad v. Arizona, 111 S.Ct. 2491, 2503 (1991). This is a false statement. The Respondent is quoting from Schad, not the jury instructions in Graham's case. A review of the jury instructions, Exhibit 5 to R-5 at 10-11, shows that the jury only had to find that the kidnapping was intentional, but said nothing about reckless disregard for human life. The *mens rea* for felony murder in the jury instructions would have allowed for a conviction for an accidental death. Graham was never found to have exhibited a reckless disregard for human life, so Schad is inapplicable.

Graham's argument is also distinguishable from Schad because the jury in Graham's case had no opportunity to consider whether the kidnapping and murder were even related. Aquash's body was found more than two months after Graham was seen

with her in Denver, and the only witness connecting these events was the discredited Arlo Looking Cloud. Moreover, the autopsy results contradict the Respondent's version of events, and the FBI agents present at the autopsies were never questioned about this.²

D. Claim 4. The court had no jurisdiction to charge Graham under a repealed statute.

In defense of the trial court's reliance on State v. Means, 268 W.W.2d 802 (S.D. 1978) which in turn relied on U.S. v. Reisinger, 9 s.Ct. 99 (1888) the Respondent cites to Warden, Lewisburg Penitentiary v. Marrero, 417 U.S. 653 (1974) and Pipefitters Local Union No. 562 v. United States, 407 U.S. 385 (1972).³ Neither case directly relies on Reisinger and neither is on point because they were not situations where a person was charged with an offense that had been repealed by the legislature.

The citation to Pipefitters Local Union No. 562 refers to Footnote 44, where the court attempts to infer the legislative intent of Congress in repealing a criminal statute, and quotes from U.S. Representative Hansen regarding the effect of the Federal Savings Clause. 407 U.S. at 434 n. 44. "Obviously, the members of the joint Senate-House conference committee were not concerned about the suggested effect of this amendment on pending cases." Id., citing 118 Cong. Rec. 329. A fair construction of the remark noted by the Court was that under the Federal Savings Clause, only pending criminal prosecutions would not abate. Graham was not charged until 2009 with the kidnapping

² Graham has not accused Agent Price or any other FBI agent of murdering Ms. Aquash. The accusation is that the first autopsy was intended to "cover up" a murder to make it look like a death from natural causes. This is not a conspiracy theory. It is a fact that Aquash's cranium was opened in the first autopsy, and her brain examined, yet no bullet is mentioned in the autopsy report. It is also true that, once exhumed, a large amount of fluid leaked from wound in the head out onto the table. A black mark from gunshot residue was obvious in the second autopsy, as was damage to the skull. These are not just mistakes and raise serious questions that should have been addressed at trial. Many other such problems are listed in the attached Statement of Facts Genuinely in Dispute.

³ The government also relies on the Federal Savings Clause, 1 USC § 109, but this is not applicable because Graham's conviction was based on South Dakota state law, which has its own savings clause.

law that was repealed in 2005, so his prosecution was not pending. Moreover, this Court should also look to the intent of the South Dakota's legislature, and find that it intended to eliminate the language "or other purpose" from its kidnapping statute and replace it with a list of prohibited reasons for detaining a person. Thus, Pipefitters Local Union No. 562 can be fairly read to suggest the Court look to legislative intent.

Later in the same footnote, the Court explained why it followed Reisinger instead of Hamm v. Rock Hill, 379 U.S. 306 (1964), the authority Graham relied on in his Petition, R. 5, distinguishing technical and perhaps inadvertent abatements, from abatements evincing legislative intent. The Court noted that because the superceding law "retains the basic offense - contributions or expenditures by labor organizations in connection with federal elections are still forbidden so long as they are paid for from actual or effective dues or assessments." Here, the conduct of detaining a person for "any other purpose" is no longer criminal in South Dakota, and Reisinger doesn't apply.

The issue in the other case cited by Respondent, Warden, Lewisburg Penitentiary v. Marrero, was whether the repeal of a criminal statute, which among other things, prohibited parole for certain offenses, would make a prisoner convicted under the repealed statute eligible for parole. The penalty in Marrero had already been incurred, or in the language of South Dakota's general savings clause, had "vested." It was not a pending case. Again, the Court looked to legislative intent to determine whether Congress intended to allow the parole of persons convicted under the abolished statute, and found none. Both cases suggest that the South Dakota's change in its kidnapping statute require the court to apply the version in effect in 2009 to Graham's case.

E. Claim 5. Graham's alternative explanations are not unsubstantiated.

Graham is attaching three exhibits hereto to prove that his alternative explanations are not unsubstantiated. Exhibits 1 and 2 are the first and second autopsies of Aquash, respectively. Graham will not take up the Court's time by analyzing the serious problems with the first autopsy in this sur-reply. They are detailed to some extent in the attached Statement of Material Facts Genuinely in Dispute. Faculty members of the School of Medicine and Health Sciences of the University of North Dakota have told us there are "indeed major issues," with these autopsies, but are unable to properly interpret them without photographs of the body, which the Respondent should have. Graham doesn't know who killed Aquash, but there is no explanation for the first autopsy's determination that Aquash died of exposure, which was overseen by FBI agents who should have testified about it. It is even more alarming that this never came up in Graham's own trial.

The Respondent argues that "if Aquash was in AIM custody for being an FBI informant, would not the FBI and its ostensible GOON allies as likely rescued her from AIM as shoot her?" The government's theory that unknown or unidentified persons in AIM considered Aquash to be an informant is also based on Kamook Ecoffey, whose common law husband had a sexual relationship with Aquash at the time. At the time of her death, Aquash was a fugitive from the FBI and Graham was her bodyguard. She was being transported from one safe house to another to prevent the FBI from finding her. It is not unlikely that Aquash was killed by a GOON, since approximately 60 persons were killed on the Pine Ridge Reservation during a three year period surrounding the date of Aquash's death, which was the subject of a report by the U.S. Civil Rights Commission. This is not a conspiracy theory either; those individuals are dead, and for the most part,

the murders were never investigated. Whatever may have happened to Anna Mae Aquash, the FBI considered it another "reservation murder" and oversaw an autopsy apparently designed to mask the cause of death. When this didn't work, and after decades of public pressure related to the Leonard Peltier case, the Respondent has blamed it on AIM. Graham was also offered the opportunity to blame other AIM members for the murder in exchange for his freedom, but refused. Graham is in prison because unlike these other individuals, it is not in Graham's character to blame others for a crime about which he knows nothing in order to save himself.

The Respondent also argues that the Court has no power to review errors of state law, such as the rule against convictions based solely on uncorroborated informant and accomplice testimony, citing Lewis v. Jeffers, 110 S.Ct. 3092 (1990). Graham doesn't dispute this, but the fact that there was no other evidence against Graham is still an important factor in assessing whether he received a fair trial or whether he was "actually innocent."

Finally, Graham is also attaching hereto a Statement of Material Facts Genuinely in Dispute; however, the facts listed by the Respondent are totally irrelevant to the issue in its Motion (service of process) and only tangentially relevant to one of the sub-issues in the habeas corpus petition itself: that Graham's counsel was ineffective for not calling any witnesses. It's not clear what the Court is supposed to do with these lists of facts, but had they been attached to the Respondent's Summary Judgment Motion, Graham would have been required to submit his own list of facts in dispute.

Conclusion

The Respondent cannot show that the trial court had jurisdiction to try Graham for felony murder, or that Canada has any concept of murder analogous to felony murder. Neither did the trial court have jurisdiction to charge him under a repealed kidnapping statute, which the South Dakota legislature clearly intended to narrow in order to exclude conduct such as Graham's. The Court's jurisdiction is not waivable. The other glaring problems in this case should all be considered in the aggregate, and show that Graham's trial counsel was constitutionally ineffective in defending him, and that Graham has made a strong case of his actual innocence. For these reasons, the Court should grant Graham's *habeas corpus* petition and order him to be released.

Respectfully submitted,

/s/ Paul Wolf

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January 16, 2014

Certificate of Service

I hereby certify that on the 19 th day of January, 2014, 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.

/s/ Chase Iron Eyes

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CLINICAL PATHOLOGY
SCOTTSBLUFF, NEBRASKA 69361

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PM-20-76

PATIENT'S NAME AQUASH, Anna Mae

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DATE RECEIVED February 25, 1976

DATE REPORTED March 15, 1976

PATIENT'S ADDRESS Date of Death: Unknown
Date Posted: February 25, 1976 1 pm

DOCTOR Department of Law & Order
Pine Ridge, South Dakota

The body was first seen at the Pine Ridge Indian Hospital about 1:00 P. M. February 25, 1976. The body was understood to have been discovered at the foot of an embankment near Wamblee, South Dakota.

CAUSE OF DEATH: Exposure

FINAL DIAGNOSES: 1. Frostbite of nose, fingers, and toes
2. Old surgical removal of gallbladder
3. Partial destruction of soft tissues by small animals
4. Vaccination scar of right arm
5. Abdominal adhesions

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The body was that of a well-developed and well-nourished young adult Indian female, measuring 64 inches in length, and weighing approximately 105 pounds. The body was clothed in a down jacket, whose outer shell was red, and whose inner one was blue. A print blouse was also on the body, as well as blue jeans, panties, socks, and shoes. A kotex pad was in the crotch of the panties. The clothes were soiled, but showed no other distinctive findings. The pockets were empty. There was a silver and turquoise bracelet on the left forearm, which was removed and turned over to the criminal investigators of the BIA.

The following criminal investigators of the BIA were present at the autopsy:
 of the Sisseton Agency; of the Fort Berthold Agency;
and of the Pine Ridge Agency.

It is estimated that the body had been dead about 7 to 10 days. Death had occurred with the body lying on its left side, so that the left side of the face had somewhat edematous congested tissues with a mottled sloughing skin surface, while the right side of the face was dried, showed early mummification, and was relatively bloodless. The tip of the nose had been destroyed and the tissues were dessicated, of a dark slate color, and had the appearance resembling frostbite. The right ear had been partially destroyed by small animals. The optic globes were collapsed and the eyes could not be examined. The periorbital skin was not remarkable except for post mortem changes.

Following the results of the dental examination. (Left upper 3rd molar taken as Tooth #1)

Tooth #1: Missing	Tooth #17: Missing
Tooth #2: Present	Tooth #18: Present
Tooth #3: Present	Tooth #19: Missing
Tooth #4: Present	Tooth #20: Present
Tooth #5: Present	Tooth #21: Present
Tooth #6: Present	Tooth #22: Present
Tooth #7: Present	Tooth #23: Present
Tooth #8: Missing	Tooth #24: Present
Tooth #9: Missing	Tooth #25: Present
Tooth #10: Missing	Tooth #26: Present
Tooth #11: Present	Tooth #27: Present
Tooth #12: Present	Tooth #28: Present
Tooth #13: Present	Tooth #29: Present
Tooth #14: Present	Tooth #30: Present
Tooth #15: Missing	Tooth #31: Missing
Tooth #16: Missing	Tooth #32: Missing

There was a partial plate containing artificial teeth to replace #8, 9, and 10, which was secured to appropriate teeth by metal clips.

The body was cold to the touch, and rigor mortis was absent. There was considerable dessication of the fingers of the hands, which were of a dark brown to slate color, showed early mummification, and discoloration compatible with frostbite. The covered portions of the body showed post mortem suffusions of the dependent areas and over the trunk were traces of dye from the shirt. There were areas of sloughing of the skin with vesicle formation filled with bloody fluid. The toes had the appearance of frostbite with hemolytic staining of the subcutaneous tissues and dessication and early mummification of the tips of the toes. The external genitalia were those of a normal female.

In addition to destruction of most of the pinna of the right ear, there was a large area of the right calf in which the soft tissues had been destroyed. The lesion had the appearance of having been produced by small animals.

Examination of the external aspects of the body revealed nothing to suggest lesions of the bony skeleton, nor was there any evidence of physical injury of an ante mortem nature. The external genitalia were those of a normal adult female.

There was an old vaccination scar on the lateral aspect of the upper right arm. There was pigmentation of the areola about the nipples of the breasts compatible with a previous pregnancy. There was an old healed surgical scar of the right upper quadrant of the abdomen, as well as pigmentation of the lower abdominal midline such as is seen following pregnancy.

ABDOMEN: The midline fat measured 1 cm in thickness. The peritoneal surfaces were dull and lusterless from post mortem changes, and old fibrous adhesions bound the pylorus of the stomach and the hepatic flexure of the colon to the gallbladder area of the liver. There had been an old surgical removal of the gallbladder. The other abdominal viscera occupied their normal positions.

CHEST: The left chest cavity contained 350 cc's of hemolyzed blood. The pleural

surfaces were smooth and stained by hemolyzed blood. The pleural surfaces of the right chest cavity were smooth, but somewhat dull and lusterless from post mortem changes. Either lung lay free. The mediastinum contained a normal amount of fat. The pericardial sac contained a scanty amount of hemolyzed blood.

NECK: The soft tissues of the neck appeared normal. The posterior pharynx, larynx, and upper trachea had a congested dull red mucosa. There was no obstruction to the air passages. The hyoid bone and laryngeal cartilages were intact.

HEAD: The scalp and skull appeared normal. The dura had a dull, lusterless inner surface. The venous sinuses were patent.

BRAIN: The brain weighed an estimated 1300 grams. It showed extensive post mortem changes and had a dull greyish-brown surface. The lepto meninges, however, appeared intact. There was nothing in the appearance of the brain to suggest gross ante mortem pathology.

HEART: The heart weighed 250 grams. Except for post mortem changes, the various chambers and valvular structures appeared normal.

The aorta and its major branches appeared normal except for hemolytic staining of the intima.

LUNGS: The right lung was subcrepitant, had a dull grey pleural surface, and a similar-colored cut surface.

LEFT LUNG: The left lung was boggy and non-crepitant in consistency, had a dark red pleural surface, and a similar-colored cut surface that exuded a large amount of bloody material.

LIVER: The liver weighed 1200 grams and grossly appeared normal except for post mortem changes. The capsular surface was smooth and of a dull greyish brown color. The gallbladder had been surgically removed. The common bile duct appeared intact.

SPLEEN: The spleen weighed 75 grams and grossly appeared normal except for post mortem changes.

PANCREAS: The pancreas weighed 50 grams and showed extensive post mortem changes.

ADRENALS: The adrenals weighed 20 grams together and appeared normal except for post mortem softening of the medulla.

KIDNEYS: The right kidney weighed 130 grams. It was softer than normal in consistency and had a thin capsule that stripped with ease from a smooth congested surface. The cut surface showed the usual structural details and appeared normal except for post mortem changes. The left kidney grossly resembled the right.

INTERNAL GENITALIA: The vagina contained a scanty amount of creamy pink-stained material. The cervix was symmetrical. The uterus was small, symmetrical, and the uterine cavity was lined by a thin, tan endometrium. The adnexa of either side appeared normal.

G. I. TRACT: The G. I. Tract appeared normal throughout except for post mortem changes. The stomach contained 100 cc's of dark bloody material of non-descript odor. There were post mortem changes in the gastric mucosa of a non-specific appearance. The appendix was present.

BLOOD TYPE: O. The Rh factor could not be determined because of complete hemolysis of the blood.

BLOOD ALCOHOL: Negative

TOXICOLOGY: Drug scan by gas liquid chromatography negative for:

1. Narcotics
2. Analgesics
3. Tranquilizers
4. Stimulants
5. Hypnotics

ACID PHOSPHATASE: The vaginal contents were strongly positive for acid phosphatase.

MICROSCOPICS:

HEART: There are extensive post mortem changes. The structure is not otherwise remarkable.

LUNGS: There are extensive post mortem changes, with groups of alveoli containing varying amounts of granular fluid, macrophages filled with ingested brown pigment and debris.

LIVER: There are extensive post mortem changes. I find no pathognomonic abnormal findings.

SUMMARY: Death is felt to be due to exposure. It is understood that a subsequent examination revealed a bullet wound of the head, which I inadvertently overlooked. Although there were extensive post mortem changes in the brain, I found nothing in the examination of the brain to indicate involvement of this organ by the bullet tract.

The strong acid phosphatase of the vaginal contents would indicate recent sexual intercourse. The external genitalia, however, showed no evidence of injury to indicate that this was accomplished by physical force.

AUTOPSY REPORT

NAME: AQUASH, Anna Mae AGE: 30 SEX: F
RACE: American Indian PLACE OF AUTOPSY: Pine Ridge United States
Public Health Service Hospital, Pine Ridge, South Dakota AUTOPSY NO:
PA76-5 TIME OF AUTOPSY: 10:30 a.m. on March 11, 1976

Witnessing the autopsy are William B. Wood, Special Agent, Federal Bureau of Investigation and J. Gary Adams, also Special Agent, Federal Bureau of Investigation.

HISTORY: The patient is a 30 year old American Indian female who is reported by Investigator Wood to have been found a short distance off Highway 73 between Kadoka, South Dakota and Wanblee, South Dakota on the 24th of February 1972. An autopsy was performed on February 25, 1976 at the Pine Ridge United States Public Health Service Hospital in Pine Ridge, South Dakota. A copy of the report of that autopsy is unavailable at the time of this re-examination. A permit for this autopsy has been granted by the next-of-kin through [redacted] of Rapid City, South Dakota. The body is identified by Investigators Wood and Adams.

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EXTERNAL APPEARANCE: The body arrives in a pine vault. Within the vault is a grey fabric covered casket. The body lies in the casket and is covered with clear plastic drapes, white plastic drapes, and a brown stained white sheet.

The body is that of an adult female and is partially decomposed. The skin appears to be of light tan color. The hair is straight, black and approximately shoulder length. The entire body is covered with pungent white powdered embalming compound, which has an odor consistent with paraformaldehyde and paradichlorobenzene. The body appears to have been previously autopsied. There is a string suture present in the scalp and a sutured Y-shaped incision over the chest and abdomen. There is a healed vertically oriented surgical incision on the right upper quadrant of the abdomen beginning 2 cm. to the right of the umbilicus and 3 cm. above the level of the umbilicus. The incision runs vertically in a parasagittal superior direction and ends near the costal margin, and measures 7 cm. in length. The hands have been amputated at the wrists bilaterally. There is a great deal of skin slippage present over the entire body and beneath the slipped epidermis, the underlying tissue is grey to white in color. There is apparent anthropophagy as evidenced by a defect in the right ear lobe measuring approximately 2 x 2 cm. with curled, somewhat gnawed appearing edges. There is a semi-circumferential area of tissue loss on the right lower extremity in an area measuring 22 cm. in height and approximately 15 cm. in width. This area begins just below the level of the right patella and is also consistent with anthropophagy.

The external genitalia appear normal.

The hands are received from Investigator Wood in widemouth screw top glass jars. The hands are surrounded by a small quantity of reddish colored crystals which have a strong chemical odor. Both hands are of normal size and configuration. All digits have been severed from the hand, typically through the middle phalanges at varying distances from the fingertips. All fingers show distinct finger print ridges although the finger pads appear somewhat wrinkled. The fingernails appear normal and are trimmed back to the level of the fingertips.

The feet appear normal. There is no evidence of blistering, excoriation or other injury to the epidermal surfaces of the feet. The toes are desiccated but appear to be intact.

On the posterior neck, 4 cm. above the base of the occiput and 5 cm. to the right of the midline is a 4 mm. perforation of the skin with a 2 mm. rim of abrasion surrounded by a 1.5 x 2.2 cm. area of blackish discoloration. Surrounding this is an area of reddish discoloration measuring 5 x 5 cm. The area is grossly compatible with a gunshot entrance wound.

The globes of the eyes are shrunken and appear desiccated. In the left temporal area located midway between the anterior edge of the left ear and the outer canthus of the left eye and centered approximately 3 cm. above the line joining the outer canthus of the left eye and the upper most edge of the left ear is an area of reddish discoloration of the skin measuring approximately 5 x 5 cm. A firm nonfluctuant mass is palpable beneath the skin in this area.

The teeth appear to be in relatively good repair. The two medial upper incisors, and the right lateral upper incisor are absent. The gingiva is well healed over this gap. A partial denture brought to the autopsy room from elsewhere in the hospital fits into the oral cavity and complements the missing teeth. The lateral margins of the mouth have been incised and extended laterally to points approximately 5.0 cm. anterior to the earlobes. These incisions appear to be post mortem.

INTERNAL EXAMINATION: The subcutaneous fat of the abdomen measures to approximately 1.5 cm. in thickness. The interior of the body is cool to the touch and is substantially below ambient room temperature, but is not frozen. The subcutaneous fat is firm but is normally translucent. The organs are distributed somewhat randomly within the body cavity. The lungs are located within the thoracic cavities. The cerebral tissue is located within the right thoracic cavity posteriorly. The abdominal organs are present within the abdomen in random positions. The heart is present in the right upper quadrant. The gastrointestinal tract has been excised from the posterior abdominal wall and has not been opened. The right and left kidneys are undissected and are in their respective retroperitoneal locations. The adrenals are bilaterally present in their normal anatomic positions and are undissected. The urinary bladder is unopened. The internal genitalia lie in anatomic position and are undissected except for a sagittal

midline incision in the fundus of the uterus exposing the myometrium and endometrial cavity. The anterior chest flap has been dissected free from the clavicles and the anterior aspect of the neck structures is visible. The trachea has been opened anteriorly with a vertical incision up to the level of the thyroid cartilage. The soft tissues of the neck are somewhat darkly discolored.

THORAX: The intercostal spaces appear normal. The ribs show no gross evidence of fracture or other abnormality. The thoracic aorta has been opened anteriorly. There is minimal atheromatous streaking with no significant encroachment upon the lumen, and no evidence of calcification, ulceration or other abnormality.

HEART: The heart weighs 200 grams. It is a deep greyish-brown in color. There appears to be a normal amount of epicardial fat. There are serial transsections of the coronary arteries. The left ventricle measures to 1.0 cm. in thickness; the right ventricle measures to 0.5 cm. in thickness. The heart has been opened along the normal blood flow paths. The pulmonic valve is 6 cm. in circumference; the tricuspid valve 13 cm. in circumference; the mitral valve 12 cm. in circumference; and the aortic valve is 8 cm. in circumference. On cut section the myocardium is of uniform gray-brown color.

LUNGS: The right and left lungs weigh 350 and 300 grams respectively. Both lungs have been severed at the hilus. The air passageways and pulmonary artery are unopened and unremarkable upon being opened. The lung parenchyma has been minimally incised. Parallel incisions of the pulmonary parenchyma bilaterally reveal no unusual features. A deep red-brown fluid is expressable from the cut surface.

ADRENALS: As noted above both adrenals are present in their respective normal anatomic positions. On cut section the adrenals appear to be autolyzed.

GASTROINTESTINAL TRACT: The esophagus appears normal. The stomach is unopened and upon opening contains approximately 5 cc. of mucoid reddish material. The gastric mucosa is deep red in color and numerous small whitish flecks are present on the mucosal surface, and appear to be integral in the mucosal structure. The duodenum likewise contains similar small whitish flecks within the mucosa and no food material is present within the lumen. There is no material present within the duodenum. There are numerous small sutures present in the mesentery of the small bowel in the form of small tight knots with transparent mesenteric tissue covering them. These are consistent with previous surgical intervention in the abdomen. The appendix cannot be identified.

NECK AND MEDIASTINUM: As noted above the trachea has been opened in its anatomic position with a vertical anterior incision which exposes a normal tracheal lumen free of obstruction or other irregularity. The thyroid gland cannot be identified. The soft tissues of the neck are discolored a reddish-black. Further dissection is made up to the hyoid bone and the hyoid bone is removed. The muscles surrounding the hyoid bone are of uniform reddish-brown color. The hyoid is intact and shows no evidence of fracture, cartilagenous dislocation or hemorrhage.

LIVER: The liver weighs 950 grams. The gallbladder is not present in the gallbladder bed. The liver capsule is normal in appearance. The liver parenchyma is incised at one point only. Serial parallel incisions of the liver parenchyma reveal a uniform red-brown to gray color throughout. The liver is of soft consistency and there is no evidence of nodularity or decreased friability.

SPLEEN: The spleen weighs 110 grams. The splenic capsule is taut. On cut section the spleen is of uniform dark red-brown color throughout. The follicular pattern is not visible on the cut surface.

KIDNEYS: As noted above, the kidneys lie undissected in their respective kidney beds. On removal, the right and left kidneys weigh 160 and 180 grams respectively. The capsule strips easily bilaterally leaving a smooth surface. On cut section the cortico-medullary architecture appears normal. The kidneys are soft in consistency and grossly appear to be autolyzed.

URINARY BLADDER: The urinary bladder contains an estimated 100 cc. of transparent red tinged fluid with a uriniferous odor. The bladder mucosa grossly appears normal.

INTERNAL GENITALIA: The uterus measures 8 x 5 x 3.5 cm. As noted above there is a vertical sagittal midline incision exposing the uterine cavity and myometrium. The myometrium measures to 1.4 cm. in thickness and is of uniform yellow-tan color throughout. The ovaries bilaterally measure 3 x 1.5 x 1.5 cm. Grossly, no structural abnormalities are noted. The vagina appears normal.

PANCREAS: A small fragment of grey lobulated tissue of extremely soft consistency, grossly consistent with pancreas is found among the organs within the body.

HEAD: The scalp has been opened with a para-coronal incision joining the mastoid areas. The inner aspect of the scalp and galea contains an area of reddish discoloration measuring 3 x 3 cm. in the superior

portion of the right temporalis muscle a distance of 11 cm. above the superior surface of the right ear. In the midline 11 cm. above the bridge of the nose, near the area of the coronal suture is a faint 4 x 4 cm. area of reddish discoloration. There is an additional 5 x 5 cm. area of subgaleal reddish discoloration surrounding and located just medial to the gunshot wound described above. These discolorations are present in the galea as well as the subcutaneous tissue of the scalp. The calvarium has been opened with a typical autopsy saw incision. The superior dura has been removed and cannot be identified. The tentorium is partially intact.

Centered 5 cm. posterior to the posterior most edge of the foramen magnum in the midline and 4 cm. to the right of the midline is an 0.9 cm. x 0.9 cm. perforation of the inner and outer tables of the skull with internal flaring of the margin. This is grossly consistent with an inshoot wound of the skull. The overlying posterior fossa dura shows a corresponding 0.9 cm. perforation with a faint black 0.1 cm. rim of circumferential staining.

There is a perforation of the medial petrous portion of the left temporal bone 2.0 cm. posterior to the sella turcica, and 5.0 cm. medial to the left outer table of the skull.

There is a slightly irregular 1.0 x 1.0 cm. defect at the junction of the extreme anterior left temporal bone in the left middle fossa and the lateral edges of the greater and lesser wings of the left sphenoid bone. All three bone perforations are collinear.

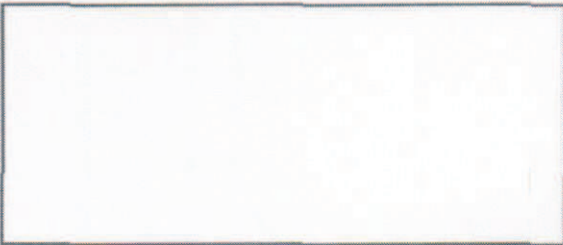
Removed from the hemorrhagic appearing temporalis muscle at this point is a metallic pellet dark grey in color grossly consistent with lead. On one small portion a copper colored film is visible. Occasional land and groove marks are present on the pellet. The dimensions of the pellet are approximately 0.7 x 0.7 x 1.2 cm. The pellet is placed in a box and turned over to Investigator William Wood.

There is no other evidence of skull fracture. The orbital plates are intact.

BRAIN: 1000 grams of grey semi-fluid amorphous tissue, grossly compatible with cerebral tissue is identified in the right thoracic cavity. No structural details are visible. A portion is retained for attempted fixation and subsequent examination.

CAUSE OF DEATH: Gunshot wound of head with loose contact entrance wound in the base of the right occiput, and projectile recovered in the region of left temporal muscle.

2. Perforation of left petrous pyramid.
3. Perforation, greater wing of left sphenoid.
4. Subgaleal hemorrhage.
5. Moderate post mortem decomposition.
6. Status post cholecystectomy.
7. Post mortem anthropophagy.



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