

**JUDGEMENT OF THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT
(JANUARY 28, 2019)**

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THOMAS EDWARD NESBITT,

Plaintiff-Appellant,

v.

SCOTT FRAKES,

Defendant-Appellee.

No. 18-3015

Appeal from U.S. District Court for the
District of Nebraska-Lincoln (4:18-cv-03057-RGK)

Before: COLLOTON, SHEPHERD, and
ERICKSON, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

Appellant's motion for appointment of counsel is denied as moot.

App.2a

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals,
Eighth Circuit.

January 28, 2019

**JUDGEMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA
(JUNE 19, 2018)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

THOMAS NESBITT,

Petitioner,

v.

SCOTT FRAKES,

Respondent.

No. 4:18CV3057

Before: Richard G. KOPF,
Senior United States District Judge.

IT IS ORDERED that the Petitioner's motion
(filing no. 11) is denied.

DATED this 19th day of June, 2018

BY THE COURT

/s/ Richard G. Kopf
Senior United States District Judge

**MEMORANDUM AND ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA
(MAY 30, 2018)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

THOMAS NESBITT,

Petitioner,

v.

SCOTT FRAKES,

Respondent.

No. 4:18CV3057

Before: Richard G. KOPF,
Senior United States District Judge

Mr. Nesbitt, an inmate in the custody of the State of Nebraska, has brought a habeas corpus action. He styles his petition as one brought under § 2241. I construe the petition under the provisions of 28 U.S.C. § 2241(c)(3). I conduct an initial review of the petition under 28 U.S.C. § 2243. Moreover, Rule 1(b) of the *Rules Governing Section 2254 Cases in the United States District Courts* allows me to apply Rule 4 of those rules to a section 2241 petition. I now dismiss this matter.

Nesbitt has been here many times before. He lost his initial attack on his conviction and life sentence for murder. *Nesbitt v. Hopkins*, 907 F. Supp. 1317, 1319 (D. Neb. 1995), *aff'd*, 86 F.3d 118 (8th Cir. 1996) (holding that: (1) petitioner was not put twice in jeopardy by state's first-degree premeditated murder prosecution after directed verdict was entered on felony murder count; (2) first-degree premeditated murder and felony murder were not same offense; and (3) state court's denial of petitioner's request for post-conviction bail did not deprive him of due process.) Subsequently, he was bounced at least twice before for filing a successive petition without making the required showing or obtaining authorization from the Eighth Circuit Court of Appeals, and the Court of Appeals has affirmed those denials. *See Nesbitt v. Houston*, 4:10CV3099; *Nesbitt v. Houston*, 8:13CV075.

The petition rambles but essentially challenges this Court's prior decisions and the Court of Appeals' prior decisions. The petition is successive and no permission has been granted by the Court of Appeals to file a successive petition. 28 U.S.C. § 2244 (b)(1). (Emphasis added.) *See Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005) (Under provision of Antiterrorism and Effective Death Penalty Act (AEDPA) governing second or successive habeas petitions, if the claim presented in the second or successive petition was also presented in the prior petition, the claim must be dismissed.)

Even if Nesbitt could somehow avoid the bar of § 2244 (b)(1), he would be required to seek the permission of the Court of Appeals to commence this second action. 28. U.S.C. § 2444(b)(2) & (3)(A) He has not done so, and this matter must be dismissed on that basis as well. *Burton v. Stewart*, 549 U.S. 147, 152 (2007) (the

district court lacked jurisdiction to entertain habeas petition since prisoner did not obtain order authorizing him to file second petition).

Although Nesbitt sought relief under 28 U.S.C. § 2241, he must obtain a certificate of appealability if he wishes to appeal. *See* 28 U.S.C. § 2253; Fed. R. App. P 22(b)(1) Rule 1(b) and Rule 11(a) of the *Rules Governing Section 2254 Cases in the United States District Courts*. The standards for certificates (1) where the district court reaches the merits or (2) where the district court rules on procedural grounds are set forth in *Slack v. McDaniel*, 529 U.S. 473, 484-485 (2000). I have applied the appropriate standard and determined that Petitioner is not entitled to a certificate of appealability.

IT IS ORDERED that the petition for writ of habeas corpus is denied and dismissed. No certificate of appealability has been or will be issued. If Nesbitt attempts to appeal this matter, I herewith certify that any appeal is not taken in good faith. Judgment will be entered by separate document.

DATED this 30th day of May, 2018.

BY THE COURT

/s/ Richard G. Kopf
Senior United States District Judge

**ORDER OF THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT DENYING
PETITION FOR REHEARING
(MARCH 27, 2019)**

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THOMAS EDWARD NESBITT,

Appellant,

v.

SCOTT FRAKES,

Appellee.

No. 18-3015

On Appeal from U.S. District Court for the
District of Nebraska-Lincoln (4:18-cv-03057-RGK)

The petition for rehearing *en banc* is denied. The
petition for rehearing by the panel is also denied.

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals,
Eighth Circuit

March 27, 2019

**APPELLANT'S VERIFIED PETITION FOR PANEL
REHEARING AND FOR REHEARING EN BANC
WITH STAY OF MANDATE
(FEBRUARY 24, 2019)**

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

IN RE, THOMAS NESBITT,

Petitioner-Appellant,

v.

SCOTT FRAKES,

Respondent-Appellee.

Case No. 18-3015

To: Panel Judges, Colloton, Shepherd, Erickson, and
Entire Court.

COMES NOW the pro se pauper prisoner Appellant in above-captioned 28 U.S.C. § 2241(c-3) meritorious and justiciable Habeas case, and upon the Court's 1-28-19 Overlooked, Conflicting and Misapprehended Manifest Miscarriage of Justice wrongful Panel Decision, hereby necessarily timely files per F.R.A.P., Rules 35(a & b-1-a) and Rule 40(a-2), a Petition For Rehearing for Panel thereto, and for Suggestion of Rehearing En Banc to the Entire Court Judges, with a further F.R.A.P., R. 41(d-1 & 2) Request to Stay Mandate.

(Restricted Content by F.R.A.P., R. 40(b) 15
page Limitation)

I-A. F.R.A.P., Rule 35 (b-1-A) C.O.A. Law.

The Panel's Wrongful 1-28-19 Decisions—CONFLICT with relevant Decisions of the United States Supreme Court and this Court of Appeals presented and addressed in support of the Habeas and C.O.A. filings, wherein consideration by the full Court is necessary to secure and maintain uniformity of these Court's precedential Controlling Decisions as cited below as follows, unquote.

I-B. 28 U.S.C. § 2253(c-2&3) C.O.A. Law.

Also OVERLOOKED and MISAPPREHENDED by the Panel set forth per 28 U.S.C. § 2253(c-2 & 3), (2) A Certificate of Appealability may issue under paragraph (1), only if Appellant has made a Substantial showing of the denial of a Constitutional Right; (3) and Shall indicate which Specific Issue or Issues satisfy the showing by paragraph (2), unquote.

I-C. Panel's Wrongful 1-28-19 Decision.

The Panel's Overlooked, Misapprehended, and simply Conflicting 1-28-19 obscured Decision, to wit:

The Court has carefully reviewed the ORIGINAL (?) file of the District Court, and the Application for Certificate of Appeal ability is denied.

[...]

Under the Court's Restricted 15 page Limitation herein, (F.R.A.P., R. 40(b)), Appellant has Overwhelming showed here and upon his prior Habeas Filings

with the Courts, (*see*, Aplnt's 7-28-18 Fed. R. App. P., R. 10(a-1) Specific Request for Records on Appeal), Multiple Specific Uncontroverted, under VERIFIED* Oath as True of Record, Manifest Miscarriages of Justice fully supported Favorably upon Controlling Law, constituting Fundamental and Structural Constitutional Prejudicial Violations of Appellant's 1st, 5th, 6th, and 14th Amendment Substantial Guaranteed Trial Rights in this most extraordinary No-Crime case of Actual Innocence. (Emphasis Added). (*See* again, Aplnt's § 2241 Pet. at its Appendix (Appx) 'A', pp. 9-20 (10-11), & pp. 21-22, with its attached Auxiliary (Aux.) therein, pp. 1-3; plus Aplnt's 9-20-18 C.O.A., Incorporation of same at p. 7 therein—with all the presented therefore relative Supporting U.S. Supreme Court and this Court's Controlling Precedents thereto.).

I-D. Misapprehended C.O.A. Correct Appellate Review Law.

The Panel Overlooked here a Conflicting C.O.A. Appellate Review Law found in its *Johnson v. U.S.*, 720 F.2d 720, 720 (8th Cir. 2013) Controlling Precedent, wherein the Panel's wrongful "FULL THROATED" review, especially without any required by Law EVIDENTIARY HEARINGS accorded, necessitated only a PRIMA FACIE determination showing on the C.O.A. face of Appellant's Constitutional Claims and relevant Issues at this preliminary stage of C.O.A. review, sufficiently only for further exploration in the District Court.

See: Johnson, per curiam, adopting said *Prima Facie* showing from the, 7th, 10th, 3rd, 4th, 2nd, 5th, 9th, 6th, and 1st Circuit Courts' of Appeals. (Emphasis Added).

Without able to glean here any "... ORIGINATING ..." clarity of exactly what the Panel actually reviewed, Appellant now attempts to Address below with particularity in his pro se Layman terms, what the Panel's 1-28-19 Conflicting-Overlooked-Misapprehended 1-28-19 Decision supposedly stems from upon Appellant's actual § 2241(c-3), Verified* '17' requested Habeas Filings and all its therein U.S. Supreme Court and this Court of Appeals Favorable Controlling precedents upon each and every specific Claim.

II. Overlooked Required by Law Evidentiary Hearings.

The Panel's untenable 1-28-19 wrongful Decision, utterly suffers in direct Conflict with, or egregiously Overlooked Appellant's VERIFIED* upon Oath, uncontroverted, Constitutional Claims and Supporting Factual Issues of Record, all upon controlling supportive law/precedents, wherein required FULL-THROATED sufficient EVIDENTIARY HEARINGS were never accorded in order to satisfy rendering any preliminary Judicial Decision, including the 1991, 4:91CV-3364 Habeas Court on Direct Estoppel Issue Preclusion, and the current § 2241(c3) (4:18CV-3057 Court), along with this Panel's 1-28-19 wrongful Decision therefrom, as well as all Courts in between, to wit:

(NOTE: A pertinent Habeas Controlling example precedent here for this particular EVIDENTIARY HEARING for Ineffectiveness Claims of procedural Due Process, *Compare, Nelson v. U.S.*, 909 F3d 964, 969, 981 (8th Cir-2018) (Judge Colloton at 969, granting Rehearing, Evidentiary Hearing; and at 981

granting further Modification of C.O.A. on Ineffectiveness Constitutional Claims.).

Panel Further Overlooked Evidentiary Hearing Controlling Conflicts of Precedent.

Fuentes v. Shewin, 407 U.S. 68, 80 (1977) (Whenever Burden of Proof is placed, on the movant, [Appellant herein], Due Process accords an Evidentiary Hearing). § 2241 Pet., Appx, 'A', p. 13; &C.O.A. at p. 7.

Williams v. Taylor, 529 U.S. 420, 437 (2000) (Evidentiary Hearing Standard accorded for Habeas Corpus cases; adopted in *Wright v. Bowersox*, 720 F.3d 979, 987 (8th Cir. 2013)). § 2241 Appx. 'A', p. 21.

McQuiggins v. Perkins, 569 U.S. 383, 396 (2013) and *Griffin v. Delo*, 33 F.3d 895, 906-08 (8th Cir. 1994) (Evidentiary Hearing required upon Claims of Actual Innocence). § 2241 Pet. pp1&6; and pp. 6-7 at C.O.A.

Hefferman v. Lockhart, 834 F.2d 1431, 1436 (8th Cir. 1987) and *Crawford v. Minnesota*, 698 F.3d 1086, 1087-88 (8th Cir. 2012) (Evidentiary Hearing required upon diligent *Brady* violations). § 2241 Pet, Appx 'A' pp. 13 & 20; and C.O.A. p. 8.

Freeman v. Glass, 95 F.3d 639, 644 (8th Cir. 1996) (Evidentiary Hearing accorded on *Miranda v. Arizona* and *Doyle v. Ohio*, prejudicial violations by prosecutorial misconduct upon Right to Remain Silent and not be used against Appellant at Trial as Guilt.). § 2241 Pet, Appx 'A' p. 21; and,

Evidentiary Hearings accorded on Appellant's several other presented Substantial Constitutional Predicate Ineffectiveness Claims. § 2241 Pet, Appx. 'A' pp. 9-20 & 21-22, plus Attached Aux. filing thereto at pp. 1-3.

III. Overlooked Direct Estoppel No-Probative-Evidence Issue Preclusion Acquittals.

This Court of Appeals and its 1-28-19 Panel are both mandated by Federal Controlling Precedent, (*Migra v. Warren*, 465 U.S. 75, 77 (fn,#1), 81 (1984)), to have used upon its Decisions, the same Nebraska Controlling “No-Probative-Evidence” Directed Verdict of Acquittal Standard, (*State v. Johnson*, 602 N.W.2d 258 (Neb. 1999 and precedents), used by the 1986 Trial Judge when rendering in Favor of Appellant, the below multiple Acquittals of the alternative Felony Murder Charge § 28-401 (1975), upon all its following Underlying “ATTEMPTED” Sexual Assault Charged Offenses! (Emphasis Added).

III-A. Trial Court’s Directed Verdicts of Acquittals.

NO PROBATIVE EVIDENCE EXISTS APPELLANT ENGAGED IN ANY INTENTIONAL CONDUCT OR ACTS OF FORCE, COERCION, OR DECEPTION, EITHER EXPRESSED OR IMPLIED THROUGH WORDS OR BODILY MOVEMENTS, WHEREIN THE ATTENDED CIRCUMSTANCES SUCH AS APPELLANT BELIEVED THEM TO BE WOULD HAVE CONSTITUTED A COURSE OF CONDUCT INTENDED TO CULMINATE IN THE COMMISSION OF SEXUAL PENETRATION, OR WHERE SUCH A COURSE OF CONDUCT OR ACTS WOULD HAVE BEEN KNOWN TO CAUSE SUCH A RESULT, OR THAT APPELLANT KNEW OR SHOULD HAVE KNOWN THAT MARY HARMER WAS MENTALLY OR PHYSICALLY INCAPABLE OF RESISTING OR APPRAISING THE NATURE OF SUCH ACTS OR CONDUCT. (Again Emphasis Added).

(N.R.S. § 28-401/28-303(b), 28-319, 28-201 & 28-105 (1&5)) (See S00-751 Br. pp. 11-12). (1975 Laws include: Felony Murder-§ 28-401, with underlying 1st Degree Sexual Assault § 28-408.03, and 28-201 an Attempt Charge.) See: The 9-20-18 C.O.A. at pp. 5-6; the 4-16-18 § 2241 Pet. at p. 7, its Appx. 'A' at pp. 1, 5-6, 10-11, plus Aux filing at pp. 1-3.

ALL NO LONGER ANY PART OF APPELLANT'S CASE! (Emphasis Added).

After a 9 year Law Enforcement Investigation into the tragic death of the deceased, Mary Harmer, the actual Probative Testimonial Evidence of Record established, she died from an accidental Drug Overdose at a party, alone in the bathroom of Appellant's domicile in 1975, UNCONTROVERTED BY ANYONE.

III-B. Conflicting Direct Estoppel Issue Preclusion-Acquittal-Prohibitions.

The Panel's erroneous Decision not only Overlooked the forestated No-Probative Acquitted Factual Issues resolved favorably to Appellant, but is also in Direct Conflict with the below Controlling Federal Direct Estoppel Issue Preclusion Directed Verdict Jeopardy Prohibition Precedents, presented in Appellant's 9-20-19 C.O.A., and throughout the "ORIGINATING" District Court Records therein.

The Panel's wrongful Decision resulted in further Manifest Miscarriage of Justice in this most extraordinary No-Crime case of Actual Innocence, requiring as Justice requires (§ 2253), A REHEARING BY Panel and/or REHEARING EN BANC, with a Reversal of the Panel's 1-28-19 Decision and a remand to the Dis-

strict Court for further Exploratory Evidentiary Hearings on Appellant's several Constitutional violated Claims.

III-C. Overlooked Direct Estoppel Issue Preclusion Controlling Acquittal Precedent.

See and specifically review the following favorable Direct Estoppel Acquitted Issue Preclusion corresponding cases, repeatedly set forth but ignored throughout Appellant's entire case and Habeas filings, to wit:

(i) *Bobby v. Bies*, 556 U.S. 825, 829 (fn.#1), 835 (2009) (Reiterating Issue Preclusion Estoppel Prohibitions, adopted from-Charles A Wright, 18 Fed. Prac. & Proc. § 4418 (3rd Ed.)-Issue Preclusion (Direct Estoppel) within a Single Claim.);

(ii) *U.S. v. McBride*, 862 F.2d 1316, 1319 (8th Cir. 1988) (Applying corresponding Direct Estoppel Issue Preclusion upon Directed Verdict Favorable Acquittal resolutions within a single Claim);

(iii) *Peru (Bird) v. U.S.*, 4 F.2d 881, 884 (8CA 1925) (Also applying corresponding Direct Estoppel Issue Preclusion analogy upon Directed Verdict Favorable Acquittal resolutions.); and,

(iv) plus review Favorable Controlling Directed Verdict Issue Preclusion analogous case of Direct Estoppel resolutions, *Smalis v. Pennsylvania*, 476 U.S. 140, 145-46 (1986) (" . . . Acquittals, unlike convictions, terminate the initial Jeopardy, not only when it might result in a second trial, . . . but also if it would translate into further proceedings of some sort, devoted to the resolution of the Factual Issues going to the elements of the offense charged."

This includes, “... from being relitigated even in an Appellate Court....” *Kepner v. U.S.*, 195 U.S. 100, 103 (1904), that has repeatedly recurred throughout this extraordinary case and Appellate processes, in direct violations of the Constitution. (Emphasis Added).

–(NOT DOUBLE JEOPARDY–
‘NOR COLLATERAL ESTOPPEL’–ISSUES)–

(Again review on Rehearing: Appellant’s 9-20-18 C.O.A. filing at pp. 5-6; and, Appellant’s § 2241 Pet., at its Appendix ‘A’ filing, pp. 1, 5-6 & 10-11, plus at its Auxiliary filing thereto, pp. 1-3; all from the “... Originating...” Records of the District Court Requested (F.R.A.P., R. 10(a-1) 7-28-18 filing) on this appeal process for this Court’s Panel review therefrom.).

IV. F.R.A.P., R. 35(b1A&B) Conflicting Decision of Exceptional Importance Lacking Constitutionally Required Probative Evidence of Guilt.

As additional relevant matters of Exceptional Importance (F.R.A.P., R. 35(b-1-A&B) Supporting paragraphs III-A-C foreclosed Issue Preclusion Constitutional Acquittal Prohibition Violations, the Panel egregiously Overlooked or ignored, its further Conflicting Decision of the U.S. Supreme Court and this Court’s controlling, precedents of, *Jackson v. Virginia*, 443 U.S. 307 (1969), and *U.S. v. Beck*, 659 F.2d 875 (8th Cir. 1981). (See § 2241 Pet., Appx. ‘A’ at p. 22, Claim vii; and the C.O.A. at p.7.).

The Panel’s utter failure to also find from the “... ORIGINAL...” District Court requested Records, or anywhere else, Constitutionally guaranteed Sworn

upon Oath-BEYOND A REASONABLE DOUBT-probative evidence (let alone that of Probable Cause, Substantial, Preponderance, and/or Clear & Convincing), that would controvert the below unequivocal Sworn upon Oath State evidence of Actual Innocence of Record in this No-Crime case.

This Exceptional Conflicting Importance of totally lacking Sufficient Evidence, warrants here, as Justice requires (§ 2253), the reversal again of the Panel's 1-28-19 Decision upon a REHEARING and/or Suggestion for a Rehearing En Banc, with a further substantive remand to the District Court for an Evidentiary Hearing, and a new and Fair Trial to satisfy in any manner, all of these Lacking Elements of the remaining charge of 1st Degree Intentional Murder; (*i.e.* Corpus Delicti-Def. Physically Kills Another, Purposely, Deliberately, and Premeditatedly, with Malice, in Nebraska,); to wit:

- (a) No Violence Exists-testified to by State Law Enforcement;
- (b) No Foul Play-Nor any Criminal Corpus Delicti Determination of Death, exists,—testified to by State's Forensic Experts; plus,
- (c) The Prosecutor himself twice told the Jury, in opening, and closing, the State could not prove a Murder occurred—Nor that Defendant-Appellant committed such an egregious act! (Emphasis Added). 2241 Pet, Appx. 'A' pp. 10-11; and C.O.A. at p. 7.

What then, pray tell, Probative Constitutional Evidence Exists in this No-Crime case of Actual Innocence establishes any 1st Degree Murder Occurred????

**V. F.R.A.P., R. 35(b-1-A) Conflicting
A.E.D.P.A. (1996) Decisions.**

Without any Clarity again, the 1-28-19 Panel Decision Denying a C.O.A. also Directly Conflicts therein with Appellant's prior presented A.E.D.P.A. (1996) U.S. Supreme Court and this Court's Controlling precedents of *Lindh v. Murphy*, 521 U.S. 320 (1997), and *Slack v. Daniels*, 529 U.S. 473 (2000), plus this Court's *Barrett v. Acevedo*, 169 F.3d 720 (8th Cir. 2001), and *Crouch v. Norris*, 251 F.3d 720 (8th Cir. 2001) A.E.D. P.A. precedents, that would have readily accorded Appellant's § 2254 Habeas relief upon a warranted C.O.A., as Justice required. (§ 2253). 2241 PET, Appx 'A' pp. 1-5; and C.O.A. at pp. 3-4.

The Panel's 1-28-19 Decision denying a C.O.A., Conflicts here with the Constitutional relief provided by 28 U.S.C. § 2241(c-3) in Appellant's § 2241 Pet. at pp. 3-6, upon the U.S. Supreme Court's precedents below, preventing both District Courts wrongly creating these ongoing Miscarriages of Justice, of: "TROUBLESOME RESULTS", "PROCEDURAL ANOMALIES", "CLOSING COURTROOM DOORS", in this most extraordinary No-Crime case of Actual Innocence. The Panel's 1-28-19 Conflicting Decision now requires Rehearing herein, or Suggestion for Rehearing En Banc as again Justice requires. (§ 2253): *See: Castro v. U.S.*, 540 U.S. 375, 380 (2002), and its adopted *Panetti v. Quarterman*, 551 U.S. 930, 946 (2007), in *Nooner v. Norris*, 499 F.3d 832 (8th Cir. 2007).

Both these *Castro* and *Panetti*, A.E.D.P.A. controlling procedural cases similar in kind of procedural substance to Appellant's case at Bar, granted C.O.A.'s and EVIDENTIARY HEARINGS, whereas, Appellant's

meritorious case is summarily and arbitrarily denied by this Eighth Circuit. Why???

In addition, the 1-28-19 Decision Directly Conflicts with the A.E.D.P.A. "ACTUAL INNOCENCE" GATEWAY EXCEPTION controlling precedents of *McQuiggin v. Perkins*, 569 U.S. 383, 385, 391-394 (2013), where a C.O.A. was readily issued upon an EVIDENTIARY HEARING, and remanded to the District Court for further Exploration. (§ 2241 Pet, Appx. 'A' at pp. 6-8; & C.O.A. filing at pp. 6-7.).

VI. Panel's Conflicting Decision Upon Appellant's Numerous *Brady v. Maryland* Specific Controlling Constitutional Supporting Precedent and Factual Violated Claims Denying Fair Trial.

The 1-28-19 Panel Decision utterly Conflicts with the following specifically presented *Brady v. Maryland*, 373 U.S. 83 (1963) supporting precedent upon the below relevant specific FACTUAL Claims, also readily found in the § 2241 Pet. Appx 'A' at pages: (presented per Restricted F.R.A.P. R. 40(b) 15p limit).

Brady v. Maryland, 373 U.S. 83 (1963)-(p9);

Fuentes v. Shevin, 407 U.S. 67 (1972)-(p13);

Chambers v. Mississippi, 410 U.S. 284 (1973)-16);

Pointer v. Texas, 380 U.S. 400 (1965) (p.16);

Sanders v. Sullivan,
863 F.2d 218 (2nd Cir 1988)-(p.18);

Napue v. Illinois, 360 U.S. 264 (1979)-(p.18);

Weary v. Cain, 136 S. Ct. 1002 (2016)-(p.18 & 19);

Berger v. U.S., 295 U.S. 78 (1935) (p.18);

U.S. v. Beckman, 222 F.3d 512
(8th Cir. 2000) (p.18);
Pyle v. Kansas, 317 U.S. 213 (1942)-(p.18);
Davis v. Alaska, 415 U.S. 308 (1974)-(p.18);
Miller v. Page, 386 U.S. 1 (1972)-(p.19);
Gigilo v. U.S., 405 U.S. 150 (1972) (p.19);
Smith v. Cain, 565 U.S. 573 (2012) (p.19);
U.S. v. Beck, 659 F.2d 875 (8th Cir. 1981)-
(pp. 20 & 22); and,
Hefferman v. Lockhart, 834 F.2d 1431
(8th Cir. 1987) (p.13 & 20).

**VII-A. Panel's Further Overlooked-Conflicting Decision
of Controlling Supportive Precedents Going to
'Ineffectiveness' Constitutional Claims.**

The Panel's 1-28-19 Decision also egregiously Con-
licts with and Overlooked the below U.S. Supreme
Court and this Court's controlling supportive 'INEF-
FECTIVENESS' specific precedents going to VII-B
following, INFRA, INEFFECTIVENESS Constitution-
al FACTUAL predicate Claims, to wit:

Williams v. Taylor, 529 U.S. 362 (2000)-
(*Strickland v. Washington*);
(§ 2241 Pet. Appx 'A' p. 21)
Miranda v. Arizona, 384 U.S. 436 (1966);
Doyle v. Ohio, 426 U.S. 610 (1976);
Freeman v. Glass, 95 F.3d 639 (8th Cir. 1996);
U.S. v. Beckman, 222 F.3d 522 (8th 2000);
Berger v. U.S., 295 U.S. 78 (1933);

Regan v. Nooris, 365 F.3d 616 (8th Cir. 2004);
Treppish v. State, 252 N.W. 388 (Neb. 1934);
State v. Doyle, 287 N.W.2d 59 (Neb. 1980):
U.S. v. Roack, 924 F.2d 1426 (8th Cir. 1991);
Jackson v. Virginia, 443 U.S. 307 (1969); and,
U.S. v. Beck, 695 F.2d 875 (8th Cir. 1981).

**VII-B. Panel's Overlooked Conflicting Decision of
Controlling Supportive Precedent Upon Unfair
Specific Prejudicial Ineffectiveness Constitu-
tional Predicate Claims.**

All the following Prejudicial Ineffectiveness specific predicate Claims erroneously Overlooked by the Panel's Decision, Denied Appellant a Fair Trial and Appellate Review therefrom, resulting in a further continuous Manifest Miscarriage of Justice in this extraordinary No-Crime case of Actual Innocence, to wit:

- (i) *Freeman v. Glass*, 95 F3d 639 (8th Cir 1996)-
Miranda v. Arizona with *Doyle v. Ohio*, mul-
tiple unfair prejudicial guilty incrimination
infringements by prosecutorial misconduct
upon Appellant's repeated exercised rights
to Remain Silent, to an Attorney, and not to
be used at Trial against Appellant's Consti-
tutional guaranteed Due Process safeguards.
(52241 Pet Appx. 'A' at p. 21.);
- (ii) *Berger v. U.S.*, 295 U.S. 78 (1935) and *U.S.*
Beckman, 222 F.3d 522 (8th Cir 2000) Prose-
cutorial unfair closing Rebuttal substantial
Due Process misconduct violations, deliber-
ately misstating Lack of Evidence of essential

PREMEDITATION element to the Jury.
§ 2241 Pet. Appx. 'A' p. 21);

- (iii) *Regan v. Norris*, 365 F.3d 616 (8th Cir. 2004),
Treppish v. State, 252 N.W. 388 (Neb. 1934),
and *State v. Doyle*, 287 N.W.2d 59 (Neb. 1980)
–14th Amendment Due Process infringement
upon lack of Corpus Delicti Structural Jury
Instruction Element. (§ 2241 Pet. Appx. 'A' p.
21);
- (iv) *Berger v. U.S.*, 295 U.S. 78 (1935)-Prosecutori-
al unfair Closing Argument Prejudicial Mis-
conduct excluding CORPUS DELICTI struc-
tural element from Jury province. (§ 2241
Pet. Appx. 'A' p. 21);
- (v) *On Point-U.S. v. Roack*, 924 F.2d 1426 (8th
Cir. 1991)-Multiple unfair prosecutorial pre-
judicial misconduct violations of FREEDOM
of ASSOCIATION prohibited Constitutional
safeguards. (§ 2241 Pet 'A' p. 21);
- (vi) 28 U.S.C. F.R.E., Rule 501 (N.R.S. § 27-513
(3))-14th Amendment Due Process Violations
upon requested and denied No-Inference
ADMONISHMENT Jury Instructions, of:
Doyle v. Ohio, Issue Preclusion Acquittal's
Factual Issues, Freedom of Association, etc.
(§ 2241 Pet. Appx. Pp. 21-22); and
- (vi) *Jackson v. Virginia*, 443 U.S. 307 (1979) and
U.S. v. Beck, 659 F.2d 875 (8th Cir. 1981)-
14th Amendment Due Process violations of
Insufficient Probative Evidence upon each and
every Essential Structural Element of remain-
ing accusation charged of Intentional Murder

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(§ 28-401(1975). (*i.e.*, Kills Another by Physical Act of Defendant-Appellant, Purposely, Deliberately, and Premeditatedly, with Malice, in Nebraska. (§ 2241 Pet 'A' p. 22).

Stay of Mandate

Under F.R.A.P., Rule 41(d-1&2), Appellant also requests here that the Court or Panel Judges issue a Stay of Mandate in this meritorious No-Crime case of Actual Innocence.

Verified Conclusion

In Conclusion here, upon all Appellant's forestated particularly specific non-frivolous good-faith FUNDAMENTAL and STRUCTURAL Constitutionally infringed Substantial Habeas Claims of the pro se layperson Appellant presented, the Panel's 1-28-19 obscure Decision, arbitrarily Overlooked, Misapprehended, and is in direct Conflict with the U.S. Supreme Court's and this Court's several Controlling Supportive Precedents cited thereto, necessitating as Justice unequivocally requires (§ 2253), a REHEARING by the PANEL, and or a Suggestion of REHEARING EN BANC, reversing the 1-28-19 Decision in this most extraordinary No-Crime case of Actual Innocence, now enduring 33 Years of multiple Manifest Miscarriages of Justice.

Respectfully Submitted by:

Thomas Nesbitt

pro se Layperson Appellant

P.O. Box 11099

Omaha, NE 68111-0099

Dated: 2-24-2019

VERIFIED DECLARATION

I, Thomas Nesbitt, the pro se layperson appellant herein, declare under penalty of perjury, that all his for stated factual and legal statements herein, are both true and correct per 28 USC 1746(2). Executed this 21st day of February 2019.

/s/ Thomas Nesbitt

Robertson v. Hayit Police Dept., 241 F.3d 992, 994-95 (8th Cir. 2001) (holding, "...A plaintiff's VERIFIED ... [Pleading] ... Is the equivalent of an affidavit for the purpose of summary judgment. A ... [Pleading] ... Cited dated is true under penalty of perjury, satisfies the requirement of a verified ... [Pleading] ... 28 U.S.C. § 1746(2)."

CERTIFYING MAILING TO CLERK the undersigned certifies under 28 USC 1746(2), that the forecasted petition for rehearing and necessary copies thereto, all timely mailed out for the O.C.C. facility per F.R.A.P., R. 25A(a-2-c) on Feb. 24, 2019, by placing the same in the O.C.C. U.S. mail depository, to the clerk of the court, at Thomas F Eagleton U.S. Courthouse, 111 South 10th Street, Room 24.329, St. Louis, Missouri 63102.

/s/ Thomas Nesbitt

2-24-11
18-3015
(Habeas)

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Clerk of Court

Page one 2-22-11 Photo Enclosed

Be Informed and find the Enclosed

Please fee returned my already filed 2-6-11

Petition Supered Motion for an extension of

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(50% bond) 2000 recorded person facility

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Abbe to complete of Response

EXPRESS

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**C.O.A. RENEWAL REQUEST ON APPEAL
(AUGUST 1, 2018)**

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

IN RE, THOMAS NESBITT,

Appellant,

v.

SCOTT FRAKES,

Appellee.

Case No. 18-3015

To: Circuit Justices or Justice:

Comes Now the pro se Pauper prisoner Appellant in above-captioned 28 U.S.C. 2241(c-3) meritorious and justiciable Non-Frivolous Habeas case, and hereby moves in Good-Faith, for this Court Justices or Justice therein under 28 U.S.C. § 2253(c-2) & (c-3), and Fed. R. App. P., Rule 22(b)(1)&((2), for the readily warranted Certificate of Appealability (C.O.A.) Renewal in this most extraordinary No-crime case of ACTUAL INNOCENCE.

CONTENTS

- I. Appellants Nonfrivolous in Applicable §2244(B) Claim Upon Erroneous AEDPA's Excessiveness.

Castro v. U.S., 540 U.S. 375 (2002) and

Panetti v. Quarterman, 551 U.S. 930 (2007)

(Certificate of Appealability Granted in Both Castro and Panetti Controlling Cases)

II. Appellants Nonfrivolous “Actual Innocence” Substantive “Gateway” Exception Claim Through Any AEDPA Excessiveness Limitations.

McQuiggins v. Perkins, 569 U.S. 383 (2013)

(Certificate of Appealability Granted in McQuiggins Controlling Case)

III. Appellant’s Nonfrivolous Constitutional Brady v. Maryland, 373 U.S. 83 (1963) Newly Discovered Unlawfully Suppressed Material Exculpatory Evidence Gateway Exception Claim Through Any AEDPA Limitation. (§2244(b)(2)(B) and Rule 60(b)(2)).

Robertson v. Hayit Police Dept., 241 F.3d 992, 994-95 (8th Cir. 2001) (holding, “... A plaintiff’s VERIFIED ... [Pleading] ... Is the equivalent of an Affidavit for the purpose of summary judgment. A ... [Pleading] ... Cited dated is true under penalty of perjury, satisfies the requirement of a Verified ... [Pleading] ... 28 U.S.C. § 1746.”

INTRODUCTION

This Verified*. § 2253 Renewal for a C.O.A., unequivocally shows below from the requested Case

* *Robertson v. Hayit Police Dept.*, 241 F.3d 992, 994-95 (8th Cir 2001) (holds, “A plaintiff’s Verified ... [Pleading] ... is the equivalent of an Affidavit for the purpose of summary judgement. A ... [pleading] ... signed and dated as true under penalty of

Record, that it's based on Appellant's thoroughly exhausted and presented, but totally ignored, Non-Frivolous Substantial and Fundamental Constitutional and Procedural Detailed Claims, summarily denied erroneously by the lower biased Court on-5-30-18, 6-19-18, and again on 6-29-18. (Filings, #9, #12, & #15). (4:18CV-3057).

In direct contradiction, it also shows that JURISTS of Reason have already Debated and Found in Favor of Appellant as all Cited therein under issued these herein presented Good-Faith Justiciable Claims, that would have resulted, without these herein several Mis-carriages of Justice incurred, in an outright Acquittal of the Remaining Accusation, to wit:

(Note: Appellant's herein pro se C.O.A. Renewal Claims are drafted and presented below under *Haines v. Kerner*, 404 U.S. 519, 520-21(1972), and per *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)-Liberal Standard of Proof for Pro Se Prisoner Pleadings.)

MEMORANDUM BRIEF IN SUPPORT

I. Appellant's Non-Frivolous Inapplicable § 2244(b) Claim upon Erroneous AEDPA Successiveness.

Castro v. US, 540 U.S. 375 (2002) and
Panetti v. Quarterman, 551 U.S. 930 (2007)

(Certificates of Appealability Granted in Both *Castro* and *Panetti* Controlling Cases).

perjury, satisfies the requirement of a Verified . . . [Pleading] . . . 28
U.S.C. § 1746(2).

1). Foremost here, are the Lower Courts' (4:10CV-3099 and 8:13-75) erroneous § 2244(b) Inapplicable AEDPA wrongful Successiveness Findings, warranting by below law and ACTUAL Verified Facts of Case Record, a Renewed C.O.A. issued for Appeal and Reversal purposes in this Exceptional Non-Frivolous meritorious No-crime case of ACTUAL INNOCENCE. (See, Dist. Ct.-6-19-18 and 5-30-18 (Filings #9, #12, & #15,—Blanket biased Denials).

1(a). In 1991, Appellant filed, appropriately, in the District Court of Judge KOPF, a DECLARATORY 42 U.S.C. § 1983 Civil Rights action upon the Grounds of—“DIRECT ESTOPPEL ISSUE PRECLUSION” colorful Jeopardy Abstention Doctrine Exception, (Filing #1-4:91CV-3364).

(See: *Younger v. Harris*, 401 U.S. 37, 46 (1971), and *Abney v. U.S.*, 431 U.S. 651, 662-63 (1977) (Jeopardy Exception to Abstention Doctrine) (Aplnt's § 2241 Pet, Appendix 'A' at p.2)

However, thereafter in 1992, the District Court of Judge KOPF, had this 1991 Civil Rights Declaratory action, erroneously changed, wrongly, into a § 2254 Habeas action, over Objection under Habeas Rule 9. (Filing #26-4:91CV-3364). (See § .2241 Pet, Appendix 'A' at pp. 2 & 5-6).

1(b). This above pre-1996, 4:91CV-3364 Habeas, Created No Subsequent Success-ness in Judge Kopf's Court in the later 2010, 4:10CV-3099 case.

Nor under any Rule 9 Habeas Limitation.

In turn, the 1991 4:91CV-3364 case,—also Did Not Create, whether directly or indirectly, any bases for

the later wrongful subsequent. Successiveness finding, again incorrectly used erroneously in the 8:13CV-75 Habeas by the legally Biased (28 U.S.C. § 5144(a) and § 455(a) & (b-3)) Judge Smith-Camp. (*See* again, § 2241 Pet., Appendix 'A', at pp. 2-7).

Plain and Simple, No § 2244(b) Successiveness ever existed in these—above warranted Non-Frivolous Justiciable Habeas Litigation Cases for Relief.

See Controlling Cases: Lindh v. Murphy, 521 U.S. 320, 322-23, 336 (1997), and this Circuit Mandate in *Barrett v. Acevedo*, 169 F.3d 1155, 1161 (8th Cir 1999) (Both Cases holding, no pre 1996 Habeas filings Create No 1996. Subsequent AEDPA Successiveness, period!) (Emphasis Added).

1(c). In addition today in this particular § 2241 Habeas case at Bar, consistent with *Castro v. US* and *Panetti v. Quarterman* controlling mandates below, *Felker v. Turpin*, 518 U.S. 651, 662 (1996) holds: A § 2241 Habeas action for correction is not affected by AEDPA Successiveness provision. Id.

(*See* Aplnt's § 2241 filing #1, at pp. 2 & 5-6).

1(d). Moreover, these two above 4:10CV-3099 and the 8:13CV-75 Habeas cases, were both, erroneously, "DISMISSED WITHOUT PREJUDICE"—As Legal Nullities, with no adjudication on merits of the Claims therein presented, (*See, Aplnt's* § 2241 Pet. at pp. 3-4, and Appendix 'A' at pp. 3&5, respectively.) (Emphasis added).

See: Flores v. US, 124 F.3d 207, 207 (#1) (8th Cir 1997) (1997W1525596-1997); Plus, *In Re Gasery*, 116 F.3d 1051, 1052 (Fn2) (5th Cir

1997) (Same) (Dismissals Without Prejudice—
are Legal Nullities.)

1(e). These forestated erroneous AEDPA pre-1996 subsequent Successiveness allegations wrongly decided by these two Nebraska District Courts above in this most extraordinary Non-Frivolous No-Crime case of ACTUAL INNOCENCE, are almost identical in justiciable substance to those erroneous wrongful successiveness decisions, Reversed on Certiorari by the U.S. Supreme the Court Mandate-found in *Castro v. U.S.*, 540 U.S. 375, 380-81 (2002).

Note: A C.O.A. was Granted in this Controlling-Castro Case. (290 F.3d at 1272).

In *Castro*, the District Court wrongly changed a Fed. R. Crim. P., Rule 33 Motion for a New Trial, into an erroneous 28 U.S.C. § 2255 Habeas case, later claiming, wrongly, Successiveness, where none ever existed! *Id.* 540 U.S. at 380-81. *See*, paragraph #1(a), above, in Appellant's case.

1(f). Moreover, Appellant's further several substantial and fundamental Non-Frivolous Constitutional meritorious. "INEFFECTIVENESS" Claims presented in Good-Faith in this § 2241 case as listed herein in GROUND II, (Aplnt's § 2241 Pet. Appendix 'A' at pp. 21-22), were never recognized nor addressed on the merits, only ignored in passing, in both the 4:10CV-3099 and 8:13CV-75 Cases.

Prior to 5-5-10, these GROUND II INEFFECTIVENESS Claims, were also never ripe nor available for Federal Habeas review until having been completely State Exhausted, on 5-5-10. *See, State v. Nesbitt*, 777 N.W.2d 821 (Neb 2010); and, *See, Flores*

v. US, 1997 WL525596 (1997), 124 F.3d 207, 207(#1) (8th Cir 1997) (State Exhaustion Requirement).

Thereafter, on 5-25-10, Appellant's above "INEFFECTIVENESS" Constitutional Claims, were all properly submitted for Habeas Relief in these wrongly decided 4:10VC-3099 and 8:13CV-75 Nebraska Habeas cases, all readily available for justiciable adjudication, but ignored erroneously, and further DISMISSED WITHOUT PREJUDICE, as Legal Nullities Flores v. US, ante; and the § 2241 Pet. at pp. 1 & 3-4, plus, Appendix at pp. 6&8.

1(g). Consistent in part with *CASTRO, ante*, Non-Successiveness decision above, is *Panetti v. Quarterman*, 551 U.S. 390 (2007), further reversing on Certiorari, quoting directly from *Castro*, upon *Panetti's* lower Court's also wrongful AEDPA Successiveness findings where in legal affect, like Appellant's case at BAR, None Ever Existed In The First Instance. Id. 551 U.S. at 931-32.

Note: A C.O.A. was also Granted in this controlling Panetti case. (at 448 F.3d 816).).

In *Panetti*, similar in justiciable substance and Law to Appellant's case, *Panetti's* "FORD" claim during *Panetti's* first Habeas filing, was not yet ripe nor available for Habeas Adjudication.

Neither were Appellant's herein presented by way of Incorporation, GROUND II "INEFFECTIVENESS" meritorious Claims, ripe and available for Habeas Adjudication prior to 5-5-10. (*See* § 2241 Pet., Appendix 'A' at pp.21-22).

1(h). The *Panetti* case also holds, 'the term "SUCCESSIVENESS" is not Self-defining.

For it allows in certain instances, like here, a prior Habeas filing upon a Direct Estoppel Issue Preclusion Abstention Exception Claim, (*see*, § 2241 Pet., Appendix p.2)., before any Issue Preclusion Jeopardy exposure occurs. (NOT any DOUBLE JEOPARDY—NOR any COLLATERAL ESTOPPEL Claim.).

(Inherent Reconsideration Jurisdiction for Correction of Constitutional) Miscarriage of Justice Upon Acquittal Prohibitions (*Krimmel v. Hopkins*, 56 F.3d 873, 874 (8th Cir Neb. 1995) (*Holt v. Norris*, 351 F.3d Appx 160 (8th Cir 2009))

1(h)(i). Like *Panetti's* subsequent FORD claim was not ripe on *Panetti's* First Habeas filing upon his Ineffectiveness Claims therein, so too Appellant's Ineffectiveness Claims were also not ripe until 5-5-10, or until after the 1991 Habeas filing (4:19CV-3364) case Was Over.

Meanwhile, Appellant's DIRECT ESTOPPEL ISSUE PRECLUSION Jeopardy Claims and exposure thereto, were being Violated daily at Trial, Direct Appeal, and on Collateral. Relief, all prohibited by the U.S. Supreme Court's Constitutional Jeopardy Prohibitions, stemming directly from Appellant's NO-PROBATIVE EVIDENCE DIRECTED VERDICTS of ACQUITTALS. (*State. v. Johnson*, 602 N.W.2d 253, 258 (Neb. 1999)), under the Direct Estoppel Issue Preclusion protection.

(NOT DOUBLE JEOPARDY-NOR COLLATERAL ESTOPPEL)

See: Bobby v. Bies, 556 U.S. 825, 829(#1) (2009); *U.S. v. Balin*, 977 F.2d 270, 276 (7th Cir 1992); *Smalls v. Pennsylvania*, 476 U.S.

140, 145-46 (1986); plus, *U.S. v. McBride*, 862 F.2d 1316, 1319 (8th Cir 1988); and, *Peru (BIRD) v. U.S.*, 4 F.2d 881, 884 (CA8 1925);

all Directed Verdict of Acquittals Issue Preclusion Direct Estoppel application cases still requiring Correction here.

1(h)(ii). However, the 4:91CV-3364 habeas Court and this Court's Appeal therefrom, *Nesbitt v. Hopkins*, 86 F.3d 118, 121 (8th Cir 1996) (citing to *Smalis v. Penn*, above), utterly failed erroneously to provide Appellant therein, the forestated correct Constitutional Issue Preclusion Acquittal Protections, as a Manifest Miscarriage of Justice in this Non-Frivolous Good-Faith meritorious case.

(See: *Aplnt's* § 2241 Pet, Appendix 'A' at pp. 2, 5-6, & 8-9; and at Auxiliary Addendum at pp.2-3; plus, *Aplnt's* F. R. Civ. P. Rule 60(b) Motion at p.#9).

1(I). Finally applicable here for a C.O.A., *Panetti*, again quoting consistently from *Castro, ante*, predictably Resisted *Panetti's* lower District Court's from wrongly creating, as erroneously occurred twice in Appellant's case at BAR, to wit: "... TROUBLESOME RESULTS...", "... PROCEDURAL ANOMALIES...", "... CLOSING COURTROOM DOORS...", that was never-Congress Intent. (Emphasis Added). *Id.* 551 U.S. at 946, and 540 US at 380-81. See again, *Aplnt's* § 2241 Pet. at pp. 4-5, Appendix 'A' at p. #9; plus *Aplnt's* Rule 60(b) Motion at pp. 6-7 (Filing #11).

All of Claim I, herein, should warrant by above forestated Law and Verified Facts of Record, a C.O.A. issued with a justifiable Reversal of Case, as this Law and Justice readily requires. (§ 2243).

II. Appellant's "Actual Innocence" Substantive AEDPA "Gateway" Non-Frivolous Exception Claim *McQuiggins v. Perkins*, 569 U.S. 383 (2013)

(Certificate of Appealability Issued in Controlling *McQuiggins* Case)

2). Appellant's herein Non-Frivolous "ACTUAL INNOCENCE" Clear and Convincing Substantive "GATEWAY EXCEPTION" Claim, also warrants here by Law and Facts of Record, a Renewed C.O.A be issued for Appeal and Reversal purposes in this exceptional egregious Miscarriage of Justice No-Crime case.

2(a). Appellant's substantive *prima facie* "ACTUAL INNOCENCE" Claim in this Most extraordinary No-Crime case (Requiring by Law an Evidentiary Hearing), is also justiciable in substance presented in the U.S. Supreme Court under its Controlling mandate of *McQuiggins v. Perkins*, 569 U.S. 383, 386, *392-93, (2013), Remanding earlier to the Lower District Courts for Plenary Review upon a required EVIDENTIARY HEARING. *Id.* U.S. at 396.

Also Compare: Triestman v. U.S., 124 F.3d 361, 378-80 F.2d (2nd Cir 1999) (A § 2241 Habeas on Actual Innocence Case.).

Note: A C.O.A. was also Granted in this Controlling *McQuiggins* Case. (569 U.S. 383 & 392).

2(b). *McQuiggins* "GATEWAY EXCEPTION" mandate (569 US at 383, 386, & 392-93) to any AEDPA Limitation, was also ignored by these herein lower District Courts in this ongoing meritorious No-Crime case, resulting in a further egregious Manifest Miscarriage of Justice upon Appellants. Non-Frivolous

ACTUAL INNOCENCE. (See Aplnt's, § 2241 Pet, at pp. 1, & 6-7, with Appendix 'A', at pp. 1, 6, 10, 11, 16 & Auxiliary at pp. 1&3, (Filing #1); plus, Aplnt's F. R. Civ. P., Rule 60(b) at pp. 4-6 (Filing #11).

(Evidentiary Hearing Mandates)

2(c). In addition to McQuiggins above required Evidentiary Hearing mandate upon an INNOCENCE Claim, the Law further holds: 'Whenever the Burden of Proof is Placed on the Movant, (as is in this Case at BAR), Due Process of Law Requires an Evidentiary Hearing be Held.

Fuentes v. Shewin, 407 U.S. 67, 80 (1972).
(§ 2241 Pet., Appendix at p. #13).

2(d). Appellant's "ACTUAL INNOCENCE" substantive Claim throughout this exceptional No-Crime case, also encompasses Appellant's further, but also totally ignored, his several accompanying Substantial and Fundamental Constitutional pertinent Violated Claims, found succinctly presented upon Clear and Convincing Due Diligence in this actual case Record at.: GROUND I, and at GROUND II, in the § 2241 Pet., Appendix 'A', at pp. 9-20, and at pp. 21-22, respectively.

These several Claims are all fully Incorporated herein, and Intertwined, Supporting fully Appellant's substantive ACTUAL INNOCENCE justiciable claim, Where the outcome would have resulted in an. outright Acquittal of the remaining accusation. (*Also see*: Aplnt's 6-11-18 Denied Rule 60(b) Motion at pp. 4-6 & 7-8 (Filings #11 & #12); and at § 2241 Pet, pp. (i), 4, 6, 7, & 8; plus, Appendix 'A' p.1(4a), 10-11, 16, 20, 22, and Aux. at pp. 1-2-3. (filling #1).

III. Appellant's Non-Frivolous Constitutional *Brady v. Maryland*, 373 U.S. 83 1963 Newly Discovered Unlawfully Suppressed Material Exculpatory Evidence Gateway Exception Claim through any AEDPA Limitation, (§ 2244(b)(2)(B) and F. R. Civ. P., Rule 60(b)(2))

3. Appellant's-Non-Frivolous Constitutional *Brady v. Maryland*, 373 U.S. 83 (1963), Newly Discovered Materially Exculpatory Unlawfully Suppressed AEDPA Evidence Exception Claims, by way of Due Diligence, further warrants here by Law below, a. Renewed C.O.A. be issued for Appeal and Reversal in this.: extraordinary No-Crime case.

3(a). Appellant's thoroughly detailed ongoing Due Diligence of his meritorious Constitutional *Brady v. Maryland* Newly Discovered Material Exculpatory State Suppressed Evidence Claim by County Attorney and Agents, involves Appellant's further COMPULSORY-CONFRONTATION and DUE PROCESS 'Perjured' State and Federal Violation Claims therein, also requiring by Law, an EVIDENTIARY HEARING.

See: Hefferman v. Lockhart, 834 F.2d 1431, 1436 (8th Cir 1987), and *Compare, Crawford v. Minnesota*, 698 F.3d 1086, 1088-89 (8th Cir 2012) (Where *Brady* Materiality is not herein Lacking like *Crawford*).

3(b). These Newly uncovered State Suppressed Material Brady Exculpatory Evidence Claims by way of Constance Clear Due Diligence, as a § 2244(b)(2)(B), and F. R. Civ. P., Rule 60(b)(2) AEDPA Successiveness EXCEPTION, would have without doubt, Resulted at Appellant's 1986 Trial in an outright Acquittal of the remaining Falsified accusation, had this Requested

Discovery been enforced therein and fully complied with upon all the herein U.S. Supreme Court's pertinent and Controlling Reversal precedent cited in Support, found throughout GROUND I, of the § 2241 Pet., at Appendix 'A', pp. 9-20), (p. #12). *Also See*, Aplnt's 6-11-18 Erroneously Denied F. R. Civ. P., Rule 60(b) Motion at 7-8 (Filings # 11 & #12).

WHEREFORE, Appellant requests his forestated Non-Frivolous Good-Faith Renewal Motion for a warranted § 2253(2) & (3) Certificate of Appealability (C.O.A.) be Justifiably granted

Respectfully Submitted By:

Thomas Nesbitt
The Pro se pauper Appellant
P.O. Box 11099
Omaha, NE 68111

Verified Declaration

I, Thomas Nesbitt, the undersigned pro se Appellant-Declarant, Declares under penalty of perjury, that all these forestated C.O.A. Factual and Legal Statements of Record herein, are true and correct under 28 USC § 1746(2).

Executed this ____ day of August, 2018.

Thomas Nesbitt, Appellant-Declarant

Proof of Timely Mailing Declaration of Filings

Under the Federal Mail Box Rule, (Houston v Lack, 489 U.S. 266 (1988)), per a 28 USC § 1746(2) Affidavit, the undersigned pro se Appellant-Declarant, Thomas Nesbitt, hereby Declares as true and correct under penalty of perjury, that this herein C.O.A. Renewal request, along with the enclosed accompanying Renewal request for I.F.P. status on Appeal, and the Request for Appointed Representation on Appeal, Filings, were all timely Mailed out of the OCC Prison Facility with First Class Postage Per paid by way of the U.S. Mails on August _____ 2018, to the Clerk of the Thomas F. Eagleton U.S. Courthouse, at 111 South 10th Street; Suite 24.329, St. Louis, MO 63102. Further your Affiant Sayeth Not.

Thomas Nesbitt,
Appellant-Declarant

**REQUEST FOR APPOINTED
REPRESENTATION ON APPEAL
(AUGUST 1, 2018)**

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

IN RE, THOMAS NESBITT,

Appellant,

v.

SCOTT FRAKES,

Appellee.

Case No. 18-3015

Comes now the pro se layperson Pauper prisoner Appellant in the above captioned § 2241 Habeas case from the lower Courts 6-29-18 Summary Denial of Counsel (Filing #15), and hereby moves this Court of Appeals in this. Meritorious justiciable No-crime case of Actual Innocence, for the Renewal of learned appointed Representation under 28 USC § 1915(e-1), justifiably warranted upon these Good-Faith Non-Frivolous fundamental Constitutional and substantive procedural several Claims as the following law and Justice would require. (§ 2243).

Memorandum Brief

1). Under 28 U.S.C. § 1915(e-1), the pro se lay-person pauper Appellant-Requests here for the learned Appointment of Counsel on Appeal to adequately formulate and meaningfully litigate (*Bounds v. Smith*, 430 U.S. 817 (1977)) these meritorious justiciable ongoing several § 2241(c-3) Habeas Claims in this most extraordinary "Actual Innocence" No-Crime case.

(See: the Substantial and Fundamental Constitutional and Procedural Claims presented in the accompanying Motions of Renewal for a C.O.A. and I.F.P. status on Appeal.).

Appellant's herein pro se Liberal Pleadings in this exceptional Actual Innocence § 2241(c-3) Habeas case for Appointment of Counsel, is made and presented under the *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), and *Haines v. Kerner*, 404 U.S. 519, 520-21(1972) Liberal Standard of Proof for Prose Prisoner Pleadings.

2). Succinctly stated, Appellant was convicted upon Subornation of Perjury by the State District Attorney and its Agents, uncorrected, as this Case Record upon Newly Discovered Evidence set forth and incorporated here in the accompanying Renewal for a C.O.A. will now show by Clear and Convincing Evidence at the required Due Process of law EVIDENTIARY HEARING.

Appellant was wrongly and unlawfully convicted for exercising his State and Federal Constitutional Rights to Remain Silent upon a non-existing falsified Accusation and Interrogation.

See: *Weber v. US*, 254 F.2d 713, 714-15 (8th Cir. 1958) (Remanded for Appointment of

Counsel on Appeal challenging and alleged Bad-Faith erroneous Claim.).

3). This Verified* request for appointment of learned representation in this No-Crime exceptional case of outright Perjury, is justifiably necessary to prevent any further ongoing Manifest Miscarriages of Justice in this wrongfully languishing unfair case as the pertinent Cited Supporting law and Justice unequivocally requires to the contrary. (§ 2243)

Wherefore, Appellant Requests his Motion for Renewed Appointment of Representation on Appeal be Granted.

Respectfully Submitted by:

Thomas Nesbitt
Pro se pauper Appellant
P.O. Box 11099
Omaha, NE 68111

I, Thomas Nesbitt, Declares under penalty of perjury, that all forestated Factual and Legal Statements herein, are true and correct under 28 U.S.C. § 1746(2).

Executed this ____ day of August, 2018.

* *Robertson v. Hayit Police Dept.*, 241 F.3d 992, 994-95 (8th Cir 2001) (holds, "A plaintiff's Verified ... [Pleading] ... is the equivalent of an Affidavit for the purpose of summary judgement. A ... [pleading] ... signed and dated as true under penalty of perjury, satisfies the requirement of a Verified ... [Pleading] ... 28 U.S.C. § 1746(2).

Thomas Nesbitt, Appellant-Declarant

Proof of Mailing Declaration

See the enclosed accompanying nonfrivolous
C.O.A. renewal request filing, proof of mailing
declaration with the mailing date of August
_____, 2018

Robertson v. Hayit Police Dept., 241 F.3d 992, 994-95
(8th Cir. 2001) (holds, "... A plaintiff's VERIFIED ...
[Pleading] ... Is the equivalent of an affidavit for the
purpose of summary judgment. A ... [Pleading] ...
Cited dated is true under penalty of perjury, satisfies
the requirement of a verified ... [Pleading] ... 28
U.S.C. § 1746(2)."

**APPELLANT FRAP, RULE 10(A) REQUEST FOR
CERTIFIED RECORDS ON APPEAL
(JULY 23, 2018)**

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

IN RE, THOMAS NESBITT,

Petitioner-Appellant,

v.

SCOTT FRAKES,

Respondent-Appellee.

Case No. 4:18CV-3057

To: Clerks of the District and Appellate Courts.

COMES NOW the pro se pauper Petitioner-Appellant in the above-captioned 28 USC § 2241(c-3) Habeas case, and hereby Certifies under Fed. App. P. Rule 10(b)(1)(B), that no Transcript of the District Court proceedings will be Ordered, simply because no proceedings nor Transcript exists in this case due to the District Court's utter failures, to adhere and comply with the relevant applicable Controlling U.S. Supreme Court's mandates and the Law cited throughout this Manifest Miscarriage of Justice action.

Therefore, only the District Court Record of the actual Filings (#1 thru #17) per Rule 10(a)(1)) are being

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requested: here to be forwarded to the Clerk of the Court of Appeals for summary Review and Relief.

Dated: 7-23-18

Respectfully Submitted By:

THOMAS NESBITT,
pro se Petitioner-Appellant
P.O. Box 11099
Omaha, NE 68111

CERTIFICATE OF MAILING

The undersigned certifies that, the forestated Certificate of Transcript and Record on Appeal, was Mailed to the Clerk of the District Court by way of the U.S. Mails with First Class Postage Prepaid July 23, 2018, at the Roman-L. Hruska Federal Courthouse, 111 South 18 Plaza, Suite 1151, Omaha, NE 68102.

THOMAS NESBITT,
pro se Petitioner-Appellant

PROOF OF SERVICE

I, In Re, Thomas E. Nesbitt, do swear or declare that on this date, JUNE, 2019, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's

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counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Please this filing is an 'In Re' Habeas case on Appeal from them Circuit Court, there sexists at this time, no adversary Party, until Ordered by this Courts. Upon such Order/ Notice, Appellant shall promptly serve the Attorney General of Nebraska as required. (See List of Party-(iv), ante,). 28 U.S.C. § 1746(2).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JUNE, 2019

(Signature)

**CLARIFICATION LETTER OF CLERK'S ORDER
(OCTOBER 30, 2019)**

October 30, 2019

Mr. Scott S. Harris, Clerk
United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543-0001

Dear Mr. Scott S. Harris-Clerk of Court,

Sir, please be advised that on October 11, 2019, I received by U.S. Mail, your apparent October 7, 2019, Court Order issued by your Office in the above-entitled case, to wit:

“... leave to proceed in Forma Pauperis is Denied, and the Petition for a Writ of Certiorari is Dismissed. See Rule 39.8” Unquote.
Cf: IN RE AMENDMENT TO RULE 39, 500 US 13, 13-14(1991).

CLARIFICATION: Forma Pauperis status has continuously been appropriately granted me by all Federal Courts involved in this meritorious case, included by your prior U.S. Supreme Court, as matters of a Justiciable GOOD-FAITH filing in this extraordinary exceptional NO-CRIME case of ACTUAL INNOCENCE. McQUIGGINS v PERKINS, 569 US 383, 396 (2013) (Innocence Gateway Exception-Without Prejudice, under a “LOOK-THROUGH” essential Due Process Review. LYST v NUNNEMAKER, 501 U.S. 797, 803-05(1991).

Therefore, please Clarify herein for succeeding vital litigation purposes, this rather confusing 10-7-19 Order by your Office appearing contrary to my above

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meritorious Criminal Habeas (28 USC § 2241 (c3) Appeal upon its substantial meritorious Errors presented therein as Justice requires (§ 2243), that has never been adjudged anywhere by anyone as being "... Malicious ..." and/or "... Frivolous ..." determination required under Rule 39.8. IN RE AMENDMENT TO RULE 39.8, supra..

I'll look forward to your Order Clarification.

Thank you.

Respectfully Yours,

/s/ Thomas Nesbitt

Thomas Nesbitt, Petitioner-Appellant
P.O. Box 11099, Omaha, NE 68111

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