ORIGINAL

NO. 21-

21-5313

IN THE

SUPREME COURT OF THE UNITED STATES

IN re JUAN LUIS LEONOR, Petitioner

PETITION FOR A WRIT OF HABEAS CORPUS

Juan Luis Leonor DOC# 54664

Pro Se Petitioner

Nebraska Correctional Youth Facility

2610 N. 20th Street East

Omaha, Nebraska 68110

QUESTIONS PRESENTED

In 2011, nine years after Petitioner's convictions for second degree murder became final, the Nebraska Supreme Court decided *State v. Ronald-Smith*, 282 Neb. 720 (Neb. 2011). In *Ronald-Smith*, it was held that Nebraska's offense of manslaughter, when committed upon a sudden quarrel provocation, is an intentional offense same as second degree murder; thus when there is evidence of a sudden quarrel provocation, in order to obtain a conviction for second degree murder, the State, by evidence beyond a reasonable doubt, must prove the lack of a sudden quarrel provocation, an essential element of second degree murder. Petitioner's case squarely fits within *Ronald-Smith*'s definition of the law because the State's own evidence provides that the killing, although intentional, was the result of a sudden quarrel provocation, and the State has not proven beyond a reasonable doubt that he committed the intentional offense without a sudden quarrel.

Nebraska's collateral review proceeding is only available if a decision of the Nebraska Supreme Court is held to be a new rule of constitutional law and retroactive to cases on collateral review. Neb. Rev. Stat. 29-3001(4)(d). Applying the Federal Retroactivity Test, the Nebraska Supreme held that *Ronald-Smith* provides a new procedural rule not retroactive to cases on collateral review. *State v. Glass*, 298 Neb. 598 (Neb. 2018). The retroactivity of *Ronald-Smith* is not at issue in Petitioner's case, because the rule of law in *Ronald-Smith* was the correct statement of the law when petitioner's conviction became final. *Fiore v. White*, 531 U.S. 225 (2001). Even so, the decision not hold *Ronald-Smith* retroactive to cases on collateral review is in conflict with Federal law and it is thus reviewable by this Court, because it confines petitioner to a lesser remedy than what the U.S. Constitution and *Teague* command. See *Danforth v. Minnesota*, 552 U.S. 264, 287 (2008).

Petitioner respectfully asks the Court to grant review on the following questions:

1. Whether, the Nebraska Supreme Court's decision not to hold *Ronald-Smith* retroactive to cases on collateral review confines Petitioner to a lesser remedy than what the U.S. Constitution and *Teague v. Lane* demand, where, as here, that Court employed the Federal Retroactivity Test?

2. Whether the Federal Constitution requires that Petitioner's convictions and sentences be set aside in light of State v. Ronald-Smith?

PARTIES TO THE PROCEEDINGS BELOW

Juan Luis Leonor, Petitioner, and the State of Nebraska have been the parties in the proceedings in the Nebraska Courts.

Juan Luis Leonor, Petitioner, and Scott Frakes (Director of Nebraska Department of Correctional Services) *were* the parties before the Eight Circuit Court of Appeals.

Juan Luis Leonor, Petitioner, and Scott Frakes (Director of Nebraska Department of Correctional Services), are the parties to the current habeas corpus proceeding. Scott Frakes is the person detaining Mr. Leonor.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner, Juan Luis Leonor, respectfully requests that this Court grant habeas corpus relief, or transfer for hearing and determination his application for habeas corpus to the district court in accordance with its authority under 28 U.S.C. § 2241(b).

OPINION BELOW

The opinion of the United States Court of Appeals for the Eight Circuit appears at **Appendix A** to the Petition and is unpublished.

STATEMENT OF JURISDICTION

As discussed throughout this petition, this Court has jurisdiction under 28 U.S.C. § 2241, § 1651(a); U.S. Const. Art. I, Sec. 9, Cl. 2; U.S. Const. Art. III; and 28 U.S.C. § 2243. The order of the united States Court of Appeals for the Eight Circuit denying authorization to file a successive petition for habeas corpus, was entered on February 21, 2020. **Appendix A.** No petition for rehearing or for a writ of certiorari was sought because it is prohibited by 28 U.S.C. § 2244(b)(3)(E).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. U.S. Const. Art. I, § 9, Cl. 2: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety require it."

2. U.S. Const. Amend. XIV, § 1, states, in relevant part: "No

state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, not shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

3. U.S. Const. Art. VI, Cl. 2: in relevant part states: The Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all treaties ... the Supreme Law of the Land."

4. 28 U.S.C. §2241, in relevant part states: "(c) The writ of habeas corpus shall not extent to a prisoner unless-(1) He is in custody in violation of the Constitution or laws of the United States ... (d) the application is made by a person in custody under the judgment and sentence of a state...."

5. 28 U.S.C. §2242: APPENDIX Q

6. 28 U.S.C. §2243: APPENDIX R

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8. 28 U.S.C. §2254: APPENDIX T

9. Neb. Rev. Stat. §28-304(Reissues 1995 & 2016): "(1) A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation. (2) Murder in the second degree is a Class IB Felony."

10. Neb. Rev. Stat. §28-305 (Reissue 2016): "(1) A person commits manslaughter if he or she kills another without malice upon a sudden quarrel or causes the death of another unintentionally while in the commission of a unlawful act. (2) Manslaughter is a Class IIA Felony.

11. Neb. Rev. Stat. § 28-206 (Reissue 1995): "A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender."

12. Neb. Rev. Stat. § 28-105 (Reissue 2016), states in relevant part, that Class IB Felony is punishable by imprisonment of a minimum term of 20 years, maximum life. Class IIA Felony is punishable by a minimum of a $ 25,000 fine, or a maximum of 20 years' imprisonment.

13. Neb. Rev. Stat. § 29-3001(4)(d), states, in relevant part, that a motion for postconviction relief must be filed within 1-year after: "The date on which a constitutional claim asserted was initially recognized by the Supreme Court of the United States or the Nebraska Supreme Court, if the newly recognized right has been made applicable retroactively to cases on postconviction collateral review...."

STATEMENT OF THE CASE

Petitioner was denied Due Process because (1) Nebraska failed to prove beyond a reasonable doubt that he committed intentional killing of another "without a sudden quarrel provocation," an **essential element** of the crime charged. Thus, he remains convicted, sentenced, and incarcerated for a crime he did not commit. No other court, but this Court, through the exercise of its original jurisdiction can correct this miscarriage of justice.[1]

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[1] This is an original proceeding that requires not only a showing of exhaustion, but also a showing that no other remedy (state or federal) is available. Thus, to avoid repetition any other relevant facts not addressed within the "Statement of the Case" will be addressed within their respective sections.

Relevant here, On August 22, 2000, Mr. Leonor was convicted by a jury in Nebraska of two counts of second degree murder in violation of Neb. Rev. Stat. § 28-304 (Reissue 1995), and sentenced to 20 years to life imprisonment for each murder count. See *State v. Leonor*, 263 Neb.86, 92 (Neb. 2002). The convictions and sentences became final on April 2002. *Id.*[2]

The crux of this proceeding centers mostly in *State v. Ronald-Smith*, 282 Neb. 720 (Neb. 2011), which was decided 9 years after Mr. Leonor's convictions became final. In *Ronald-Smith*, the Nebraska Supreme Court modified Nebraska law pertaining to the criminal statutory offenses of second-degree murder (the offense Mr. Leonor was convicted of), and manslaughter upon a sudden quarrel a statutory criminal offense codified in Neb. Rev. Stat. § 28-305 (Reissue 2016).[3] In *Ronald-Smith*, the Nebraska Supreme Court held that manslaughter upon a sudden quarrel constitutes an ***intentional*** offense. See *State v. Glass*, 298 Neb. 598, 609 (Neb. 2018) (In *Ronald-Smith*, it was "clarified ... that sudden quarrel manslaughter is an intentional crime....").

Since the enactment of Neb. Rev. Stat. § 28-305, but prior to 1994, the offense of manslaughter upon a sudden quarrel was considered an

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[2] Mr. Leonor was also convicted of two counts of use of a weapon to commit a felony in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1995), related to the murder charges, and was sentenced to 5 to 10 years for each count. *State v. Leonor*, 263 Neb. at 92.

[3] The Offense of manslaughter under Neb. Rev. Stat. § 28-305 (Reissue 2016), can be committed in two different ways: one way is "upon a sudden quarrel," and the other way is "unintentionally while in the commission of an unlawful act." Id.

intentional offense. See *State v. Pettit*, 233 Neb. 436, 460 (Neb. 1989). In 1994, however, the Nebraska Supreme Court changed that course in *State v. Jones*, 245 Neb. 825 (Neb. 1994). In *Jones*, it was held that manslaughter upon a sudden quarrel was **not** an intentional offense. *Id.* at 830, n. 6 (overruling *State v. Pettit*). In reaching that conclusion, the *Jones* Court reasoned that change was needed in order to distinguish second degree murder from manslaughter upon a sudden quarrel, which both were intentional offenses. *Ronald-Smith*, 282 Neb. at 732.

In 2011, the Nebraska Supreme overruled *State v. Jones*, and re-affirmed *State v. Pettit*. See *Ronald-Smith*, 282 Neb. at 734. The overruling of *Jones*, the Nebraska Supreme Court has held, brought a new rule of law in *Ronald-Smith* that does not apply retroactively to cases on collateral review. See *State v. William-Smith*, 284 Neb. 636, 654-655 (Neb. 2012)(citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)); *State v. Glass*, 298 Neb. 598, 607-610 (Neb. 2018)(*Ronald-Smith*'s new rule is not substantive)(citing *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016); *Schriro v. Summerlin*, 542 U.S. 348 (2004); and *Teague v. Lane*, 489 U.S. 288 (1989)).

After *Ronald-Smith* was decided, Mr. Leonor sought collateral relief in the Nebraska courts arguing that based on *Ronald-Smith* his convictions violated federal due process because the State failed to prove beyond a reasonable doubt that he committed second-degree murder. After a long waiting period of about 7 years, his case is still pending in the state collateral court without a final ruling, as will be fully addressed further below. During this course, is when the *Glass* Court

held that *Ronald-Smith* does not apply retroactively to cases on collateral review, as will also be addressed further below. With that in mind, if Mr. Leonor is to continue waiting for a ruling on his claim in the state courts, it is likely that when the state collateral court rules on it, it will be disposing of his claim based on *Glass*. Not only that, but forcing Mr. Leonor to wait for a ruling in the state courts not knowing how many more years he will have to wait, implicates his Liberty interest constitutional right.

Even so, it is Mr. Leonor's position that no retroactivity is at issue concerning the applicability of *Ronald-Smith* to his case. Mr. Leonor's contention is structured on the fact that *Ronald-Smith* did not *effect* any change in the law to his case. That is, notwithstanding that *State v. Jones* held that manslaughter was **not** an intentional offense in either of its capacities, intentional manslaughter was one of the options the State provided Mr. Leonor's jury with to convict him besides intentional second degree murder, as will be addressed next.

Mr. Leonor was tried and convicted as an aider and abettor to second degree murder. In Nebraska, "[a] person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender." See Neb. Rev. Stat. § 28-206 (Reissue 1995). Under the theory of aiding and abetting (Jury Instruction No. 6), Mr. Leonor's jury was instructed as follows:

> The defendant can be guilty of murder in the second degree or manslaughter even though he personally did not commit every act involved in the crime so long as he aided and abetted someone else to commit it. The Defendant aided someone else if:

(1) the defendant ***intentionally*** helped or encouraged another person to commit murder in the second degree or ***manslaughter;*** and

(2) the defendant knew that the other person ***intended*** to commit murder in the second degree or ***manslaughter;***

(3) the murder in the second degree of manslaughter in fact was committed by that other person.

Appendix B, 43 (emphasis added).

On its face, Jury Instruction No. 6 did not provide Mr. Leonor's jury with the statement of the law in line with *State v. Jones*; instead, his jury was instructed with what now in *Ronald-Smith* was held to be the correct statement of the law: i.e., that manslaughter is an **intentional** offense, when committed upon a sudden quarrel. Id. 282 Neb. at 732, 734.

Now, that *Ronald-Smith* held that manslaughter upon a sudden quarrel is an intentional offense, which resembles the language within Jury Instruction No. 6, no retroactivity is at issue and thus Mr. Leonor should not be stopped from relying on *Ronald-Smith*. See e.g., *Fiore v. White*, 531 U.S. 225 (2001)(no retroactivity is at issue if a state highest court's change in the law was the correct statement of the law when petitioner's conviction became final); *Bunkley v. Florida*, 538 U.S. 835 (2003)(same).

Also, it should be noted that in holding that *Ronald-Smith* it is not a new *substantive* rule of law, the *Glass* Court employed the Federal retroactivity analysis to reach that conclusion, a conclusion Mr. Leonor asserts was wrong because it is in conflict with Federal law, and thus it is subject to review by this Court, as will be addressed further below.

For the reasons that follow, review and relief should be granted.

REASONS FOR GRANTING THE WRIT

This Court has jurisdiction to entertain this original habeas petition. In *Felker v. Turpin*, 518 U.S. 651, 658 (1996), the Court left "open the question whether and to what extent the Antiterrorism and Effective Death Act of 196 (AEDPA) applies to original petitions." See *In re Davis*, 557 U.S. 952 (2009)(Stevens, J., Concurring). And whatever the answer to that question is, the Court did establish that the "restrictions on repetitive and new claims imposed by §§ 2244(b)(1) and (2)[,]" although not bound by them, "they certainly inform [the Court's] consideration of original habeas petitions." *Felker, 518 U.S. at 662*.

The power of this Court to consider Mr. Leonor's habeas corpus petition lies at the plain language of 28 U.S.C. § 2241. That statute allows the Court to grant a writ of habeas corpus when a prisoner "is in custody in violation of the Constitution or laws or treaties of the United States." See § 2241(c)(3). And this Court's jurisdictional power to consider writs of habeas corpus from prisoners unconstitutionally sentenced in state court proceedings, like Mr. Leonor, is specifically granted in 28 U.S.C. 2254(a): "The Supreme Court ... shall entertain an application for a writ of habeas corpus in behalf of a person in custody in violation of the Constitution or laws or treaties of the United States." Id.

Further, the Supreme Court Rule 20.4(a) requires that "[i]f the relief sought is from the judgment of a state court, the petition shall set out specifically how and where the petitioner has exhausted available remedies in the state courts or otherwise comes within the provi-

sions of 28 U.S.C. 2254(b)," and "[t]o justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form of from any other court." Id.

As will be addressed below, Mr. Leonor meets each one of the requirements to obtain review of this original habeas petition.

I. ADEQUATE RELIEF CANNOT BE OBTAINED IN ANY FORM FROM LOWER FEDERAL AND STATE COURTS

A. ADEQUATE RELIEF CANNOT BE OBTAINED IN FEDERAL COURTS

This is Mr. Leonor's second time seeking federal habeas corpus relief. In 2005, Mr. Leonor brought his first federal habeas petition and relief was denied in its entirety. See *Leonor v. Houston*, 2007 WL 2003413, * 1 (Dist. Neb. 2007). With that in mind, if Mr. Leonor wishes to bring the instant habeas petition in the lower federal courts, he then must meet the requirements for second or successive habeas petitions enumerated within § 2244(b)(1) & (2).

To begin with, Mr. Leonor must first seek permission from the Federal Court of Appeals to file a second habeas petition. § 2244(b)(3)(A). Second, Mr. Leonor must show either that his claim involves a "new rule of constitutional law, made retroactive to cases on collateral review by th[is] Supreme Court, that was previously unavailable, see § 2244(b)(2)(A), or that the "factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and ... the facts underlying the claim, if proven and viewed in light of

the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense." See § 2244(b)(2)(B)(i) & (ii).

First, Mr. Leonor's claims are based on *Ronald-Smith*, a decision the Nebraska Supreme Court has already held does not apply retroactively to cases on collateral review. See *State v. William-Smith*, 284 Neb. 636, 654-655 (Neb. 2012); *State v. Glass*, 298 Neb. 598, 607-610 (Neb. 2018). Even if the Nebraska Supreme Court would have held that *Ronald-Smith* applies retroactively to cases on collateral review, Section 2244(b)(2)(A) only operates if the new rule announced is made retroactively by this Court, not the Nebraska Supreme Court. Id. The alternative will be if Mr. Leonor has a viable claim that the U.S. Constitution commands states to apply new substantive rules applicable to cases on collateral review. Of course, Mr. Leonor must first exhaust that question to the Nebraska courts, and then take it to this Court through the writ of certiorari route. Mr. Leonor has already presented that question to the Nebraska courts, however, as he will fully address it further below, there is not corrective process available to him in the Nebraska Courts to vindicate his *Ronald-Smith* claims.

Second, the option that could be the most appropriate is if Mr. Leonor's argument that the change in the law in *Ronald-Smith* was the correct statement of the law at the time of his trial, could constitute the "factual predicate" under § 2244(b)(2)(B)(i). Even if this condition could be available, Mr. Leonor is held to a higher standard of "actual

innocence[,]" § 2244(b)(2)(B)(ii), which he believes is unfair because if *Ronald-Smith* applies retroactively in collateral review, that higher actual innocence standard disappears, particularly, where, as here, no retroactivity is at issue.

Mr. Leonor did seek permission from the Eight Circuit Court of Appeals to file a second habeas petition. In that proceeding, Mr. Leonor first alleged that his *Ronald-Smith* claims fit the criteria of § 2244(b)(2)(A), based on the principles outlined in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), *Schriro v. Summerlin*, 542 U.S. 348 (2003), and *Welch v. United States*, 136 S.Ct. 1257 (2016). **Appendix C, 7-12 & 23-24.**

Second, Mr. Leonor argued that the essence of *Ronald-Smith* constitutes a factual predicate for his claim under § 2244(b)(2)(B)(i) & (ii), and that his claim provided actual innocence because the State cannot prove that he committed second degree murder. **Appendix C, 6-22.**

The Court of Appeals denied Mr. Leonor's application with no explanation. **Appendix A.** And pursuant to § 2244(b)(3)(E), Mr. Leonor could not have taken an appeal to this Court from the Court of Appeals judgment denying permission to file a second habeas petition.

Therefore, for the reasons explained above, adequate relief cannot be obtained in any form from the lower federal courts.

B. ADEQUATE RELIEF CANNOT BE OBTAINED IN ANY FORM FROM NEBRASKA COURTS

1. EXHAUSTION

Since the decision in *Ronald-Smith* was released, Mr. Leonor has brought his *Ronald-Smith* based claim twice in the Nebraska Courts.

(a). Postconviction Proceeding, May 30, 2012:

On May 30, 2012, in a timely manner, Mr. Leonor sought collateral relief under the Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 (Reissue 2008).[4] In that proceeding, among other claims, Mr. Leonor argued that his convictions were obtained in violation of Due Process because under *Ronald-Smith* the State failed to prove beyond a reasonable doubt "the absence of sudden quarrel provocation" an element of second degree murder, see **Appendix D, 3 & 79-81.**[5]

On April 6, 2012, the Nebraska postconviction Court denied relief reasoning generally that "[e]ach of [Mr. Leonor's] claims were clearly "knowable" to him at the time of his direct appeal or two prior post-conviction motions." **Appendix E, 1-2.**[6] As far as Mr. Leonor's *Ronald-Smith* based claims is concerned, the state postconviction court was wrong in its April 6, 2012-ruling because *Ronald-Smith* was not available until after November 2011.

On April 11, 2012, Mr. Leonor filed a timely motion to alter or amend judgment asking the postconviction court to reconsider its order

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[4] *State v. Ronald-Smith*, was decided on November 2011. Under Neb. Rev.Stat. 29-3001(4), Mr. Leonor had 1-year to bring a postconviction motion following the *Ronald-Smith* decision. On May 12, 2012, within 6-months after the *Ronald-Smith* decision was released, Mr. Leonor filed his postconviction motion. **Appendix D.**

[5] Only the relevant true copies of the pages of the original motion or petition referred to are provided.

[6] The "prior two postconviction motions" referred to by the postconviction court in its April 6, 2012-Order, were postconviction motions filed by Mr. Leonor in 2003 & 2008, prior to *Ronald-Smith*, and thus they are not relevant here.

concerning his *Ronald-Smith* based claims. **Appendix F, 3-4** (Issues 1 through 5). At the same time, Mr. Leonor had also filed a notice to appeal the April 11, 2012 Order. Shortly thereafter, the appeal was dismissed because upon the filing of Mr. Leonor's motion to alter or amend the April 11, 2012-judgment, the Nebraska Supreme Court was left without appellate jurisdiction. **Appendix G.**[7]

Upon learning that the appeal was dismissed, Mr. Leonor decided to withdraw his motion to alter or amend judgment and rather to continue with his appeal, **Appendix H, 1-2**, which is a permitted process within Nebraska law. *State v. Bao*, 269 Neb. 127, 133-134 (Neb. 2005) (in this case the defendant filed a motion to alter or amend the judgment denying him postconviction relief, which had terminated the time to file an appeal. Later, that defendant sought to withdraw the motion to alter or amend judgment. The Nebraska Supreme Court held that upon the ruling on the motion to withdraw defendant's 30-days to appeal commenced again). Thus, Mr. Leonor had 30-days to commence an appeal from the ruling of his motion to withdraw.

On October 2, 2012, the motion to withdraw was granted. **Appendix I.** Pursuant to Neb. Rev. Stat. § 25-1301.01 (Reissue 2008), a clerk of the

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[7] The Nebraska Supreme Court cited *State v. Bellamy*, 264 Neb. 784 (Neb. 2002). In *State v. Bellamy*, it was held that "[w]hen a motion terminating the 30-day appeal period is filed, a notice of appeal filed before the court announces its decision upon the terminating motion has not effect and appellate court acquires no jurisdiction." *Id.* at 787; see also *State v. Bao*, 269 Neb. 127, 132 (Neb. 2005) (the running of the time for filing a notice of appeal shall be terminated as to all parties by a timely motion to alter or amend a judgment).

state court is required "within 3 working days after the entry of any civil judgment, to send postcard or notice by mail to each party or the party's attorney, advising that a judgment has been entered and the date of entry." See *State v. Haynes*, 2014 WL 309411, * 3 (Neb. App. 2014). This process under Neb. Rev. Stat. § 25-1301.01, was not followed by the clerk of the state court.

To be exact, Mr. Leonor did not receive notification that the Court had entered an order granting his motion to withdraw. Then, after a year or so had passed, Mr. Leonor felt compelled to call the clerk of the court to inquire about the status of the motion to withdraw. In that telephonic conversation, Mr. Leonor was told that the motion to withdraw had already been granted in October 2, 2012. Thinking that it may have been a misunderstanding from the clerk, Mr. Leonor was prompted to write the clerk of the court asking for a copy of the said October 2, 2012-ruling, which he later received it on December 1, 2013. **Appendixes I & J.**

Because the ruling on the motion to withdraw was entered on October 2, 2012, and Mr. Leonor did not know about that ruling until after a year had passed, he was not able to commence an appeal related to the April 6, 2012 Order denying postconviction relief, because he was already outside the 30-days period to commence an appeal.

On May 8, 2014, Mr. Leonor sought to rectify the violation to Neb. Rev. Stat. § 25-1301.01 (related to the motion to withdraw), through a motion to vacate or modify the judgment a proper procedure in Nebraska. *State v. Haynes*, 2014 WL 309411 (Neb. App. 2014) (motion to vacate or modify judgment proper remedy to reopen appeal if "the clerk's failure to

send [defendant] notice of the judgment deprived him of his right to appeal of his postconviction motion.").

In support of the motion to vacate or modify the October 2, 2012--judgment, Mr. Leonor offered evidence showing that he never received notification of that judgment from the postconviction court or the clerk of that court within the 30 days he had to commence an appeal related to the April 6, 2012--ruling denying postconviction relief. **Appendix K, 1-5; 41-43; Exhibit 5.**[8]

As of today, since May 8, 2014, Mr. Leonor has not received a ruling on his motion to vacate or modify judgment.

(b). Postconviction Proceeding, March 2, 2016:

On March 2, 2016, Mr. Leonor filed a successive state postconviction motion in Nebraska arguing that based on *Ronald-Smith* his Federal Due process rights were violated because the State failed to prove beyond a reasonable doubt that he committed second-degree murder, **Appendix L**[9], **9-11**; and **Id. 7-8.** This time, the main basis for bringing that postconviction motion was this Court's decision in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) (holding that "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule").

Under that circumstance, Mr. Leonor argued that through the lens of

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[8] See, ante, Note 5.

[9] See, ante, Note 5.

Montgomery v. Louisiana, the decision in *Ronald-Smith* is a substantive rule of law that the U.S. Constitution commands it must apply retroactively to cases on collateral review. **Appendix L, 2.** On September 6, 2017, postconviction relief was denied. **Appendix M.** In denying relief, that postconviction court reasoned that the Nebraska Supreme Court in *State v. William-Smith*, 284 Neb. 636 (Neb. 2012), held that *Ronald-Smith* was not a constitutional rule of law; thus, Mr. Leonor could not have met the requirement under Neb. Rev. Stat. § 29-3001(4)(d), which requires that in order to bring a successive postconviction a new rule of law must be of constitutional character and must be retroactive to cases on collateral review.[10] **Appendix M, 5.**

Moreover, the postconviction court also reasoned that even if *Ronald- Smith* was a rule applicable on collateral review, Mr. Leonor's claim failed because he did not file his motion within the 1-year period of limitations under Neb. Rev. Stat. § 29-3001(4), after *Ronald-Smith* was decided; that *Ronald-Smith* was decided on November 11, 2011, and his postconviction motion was filed on March 2, 2016. **Appendix M, 5-6.**

On September 13, 2017, in a timely fashion, Mr. Leonor sought to alter or amend the judgment entered on September 6, 2017, denying postconviction relief. **Appendix N.** In that motion to alter or amend, Mr.

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10 Neb. Rev. Stat. 29-3001(4)(d), states that a motion for postconviction relief must be filed within 1-year after: "The date on which a constitutional claim asserted was initially recognized by the Supreme Court of the United States or the Nebraska Supreme Court, if the newly recognized right has been made applicable retroactively to cases on postconviction collateral review...."

Leonor insisted that *Ronald-Smith* is a substantive rule of law that the U.S. Constitution commands Nebraska must apply it retroactively to cases on collateral review. **Appendix N, 2-4.** In addition, Mr. Leonor advanced that the postconviction court erred in finding that Mr. Leonor did not bring a postconviction motion within the 1-year period of limitations after *Ronald-Smith* was decided, because he did bring a motion on May 30, 2012. **Appendix N, 4-7;** see also, ante, pp. 12-15 (the motion filed on May 30, 2012).

As of today, no ruling has been entered on this motion to alter or amend judgment filed on September 13, 2017.

2. ADEQUATE RELIEF CANNOT BE OBTAINED FROM NEBRASKA COURTS

As Mr. Leonor explained above in the "Exhaustion" section, since *Ronald-Smith* was decided he has sought collateral review in Nebraska pressing that he stands convicted in violation of Federal Due Process, to no avail. The main reason for not obtaining review, at least in the Nebraska courts, is based on the impression that *Ronald-Smith* does not apply retroactively to cases on collateral review. Thus, unless this Court will hold that the U.S. Constitution commands Nebraska to apply *Ronald-Smith* retroactively to Mr. Leonor's case, he is without recourse in the Nebraska Courts.

First, as shown above, for postconviction to be available for Mr. Leonor, the postconviction statute requires that a new rule must be of constitutional nature and retroactively applicable to cases on collateral review. See Neb. Rev. Stat. § 29-3001(4)(d). The holdings of *State v. William-Smith*, 284 Neb. 636, 654-655 (holding *Ronald-Smith* is not a

constitutional rule), and *State v. Glass*, 298 Neb. 598, 607-610 (holding *Ronald-Smith* is not a substantive rule of law), do not assist Mr. Leonor in obtaining collateral review in Nebraska courts.

Second, there is no reasonable explanation why the state postconviction court has yet not ruled upon Mr. Leonor's motion to modify or vacate the judgment related to the postconviction motion filed on May 30, 2012, see ante pp. 15-18, and there is no reasonable explanation for the delay in entering a ruling on Mr. Leonor's motion to alter or amend judgment related to the postconviction motion filed on March 2, 2016. See ante pp. 18-20.

In fact, it is the rule in Nebraska that a state district court presented with a collateral proceeding, such as "Post judgment motions—modification & postconvictions," are required to dispose of the matters within "180 days to a year." See Neb. Ct. R. § 6-101(A)(Neb. Rev. 2013); see also *State v. Hill*, 308 Neb. 511, 523 (Neb. 2021)(Explaining Neb. Ct. R. § 6-101(A)).

The only reason, Mr. Leonor carefully believes, his state postconviction proceedings have been delayed for more than 7 years, is because his case has been treated merely as residual. How many more years Mr. Leonor has to wait for a ruling? Particularly when he has an interest of liberty because he is innocent of the convictions against him. See e.g., *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment--from government custody, detention, or other forms of physical restrain--lies at the heart of the liberty Clause protects."); *District Attorney's Office for Third Judicial Dist. V. Osborn*, 557 U.S. 52, 68 (2006)(a state

prisoner has "a liberty interest in demonstrating his innocence with new evidence under state law."); *Id.* at 67 ("No state shall ... deprive any person of life, ... without due process of law.")(citing U.S. Const. Amend. 14th, 1st and 5th). The fact that a decision--making process involves discretion, does not prevent Mr. Leonor from having a protect-table liberty interest. Cf. e.g., *Young v. Herper*, 520 U.S. 143, 150 (1977).

Mr. Leonor is 43 years old. By Mr. Leonor proving that his convictions are in violation of Federal Due Process because the State failed to prove beyond a reasonable doubt that he committed second-degree murder, he will be able to enjoy "not merely freedom from bodily res-traint but also the right ... to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, ... generally to enjoy those privileges long recog-nized ... as essential to the orderly pursuit of happiness by free man." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)(citations omitted).

This is not the case in which petitioner has not even attempted to give the state courts any chance to address his federal claim. So by compelling Mr. Leonor to keep waiting for a ruling in the state courts and thus to complete exhaustion of his Due Process claim, deprives him of his liberty interest federal right, especially when it is evident that no remedy is available to him in the Nebraska courts. See e.g., *Welch v. Lund*, 616 F. 3d 756, 760 (7th Cir. 2010)("These provisions [2254(b)(i) & (ii)] excuse the need for exhaustion of state remedies when, for example, an inordinate and unjustifiable delay renders the state's process

ineffective to protect the petitioner's rights.")(citation omitted); *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981)(excusing exhaustion is proper "if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief.").

Therefore, under the circumstances outlined above there exists no adequate relief that can be obtained in any form from the lower federal courts and the Nebraska courts, because "there is an absence of available state corrective process; or ... circumstances exits that render such process ineffective to protect the rights of" of Mr. Leonor. 28 U.S.C. § 2254(b)(1)(B)(i) & (ii); see also *Henderson v. Lockhart*, 864 F. 2d 1447, 1450 (8th Cir. 1989)(exhaustion not required where "prospect for a meaningful appeal is a matter of conjecture."); *Castille v. Peoples*, 489 U.S. 346, 350 (1989)(""It would be inconsistent with the ... underlying principles of comity, to mandate recourse to state collateral review whose results have effectively been predetermined, or permanently to bar from federal habeas prisoners in States whose postconviction procedures are technically inexhaustible."").

The requirements of S.Ct. Rule 20.4(a) and 28 U.S.C. § 2242 ("reasons for not making application to the district court in which the applicant is held"), are therefore met.

II. EXCEPTIONAL CIRCUMSTANCES

This Court's power to grant an extraordinary writ is very broad but reserved for exceptional cases in which "appeal is a clearly inadequate remedy." *Ex parte Fahey*, 332 U.S. 258, 260 (1947). Mr. Leonor stands

convicted for a crime that the law as modified in *State v. Ronald-Smith*, can no longer lawfully hold him convicted for. That is, the evidence is legally insufficient because the State has not yet proven and cannot prove that Mr. Leonor did not commit the intentional killing upon a sudden quarrel; as a result he currently stands serving a sentence of 40 years to life that Nebraska lacked the power to prescribe. No other court, but only this Court can provide review to redress this miscarriage of justice. In the past, this Court has found exceptional circumstances in cases that raised similar questions that Mr. Leonor raises in this petition. Thus, Mr. Leonor's case should not be the exception now. As this Court once said:

> On many occasions this Court has found it necessary to say that the requirements of Due Process of the Fourteenth Amendment must be respected no matter how heinous the crime in question and no matter how guilty an accused ultimately be found to be after guilt has been established in accordance with the procedure demanded by the Constitution. Evidently, it also needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist.

See *Chessman v. Teets*, 354 U.S. 156, 165 (1957).

A.

An exceptional circumstance occurred in *Fiore v. White*, 531 U.S. 225 (2001) and *Bunkley v. Florida*, 538 U.S. 835 (2003), where this Court granted certiorari to resolve whether a state's change in the law after petitioners' conviction became final had effected a retroactivity issue. Moreover, if retroactivity was at issue, "when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review."

Fiore, 531 U.S. at 226. The same exceptional question exists in Mr. Leonor's case as it occurred in *Fiore*, because no retroactivity is at issue concerning the rule announced in *State v. Ronald-Smith*. Specifically, because *Ronald-Smith*'s interpretation of the law was the correct statement of the law at the time Mr. Leonor was convicted, thus, it did not effect any change in the law in Mr. Leonor's case.

Even if *Ronald-Smith* would have effected a change in the law, Mr. Leonor insists that *Ronald-Smith* is a substantive rule of law. In holding that *Ronald-Smith* is not a substantive rule, the *Glass* Court employed the Federal retroactivity analysis to have reached its conclusion. See *State v. Glass*, 298 Neb. 598, 607-610 (Relying on *Montgomery v. Louisiana*, supra, *Schriro v. Summerlin*, supra, and *Teague v. Lane*, *supra*). Thus, under that condition, whether the *Glass* Court was correct in holding that *Ronald-Smith* is not a substantive rule is "reviewable by this Court." *Montgomery v. Louisiana*, 136 S.Ct. at 727. Because Mr. Leonor insists the decision in *Glass* is in conflict with federal law, it is an exceptional circumstance.[11]

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[11] See *Bowen v. Johnston*, 306 U.S. 19, 27 (1939) ("an exceptional circumstance "where the need for the remedy afforded by the writ of habeas corpus is apparent[,] ... are those indicating a conflict between state and federal authorities on a question of law involving concerns of large importance affecting their respective jurisdictions.""") (citations omitted). See also, *Michigan v. Long*, 463 U.S. 1032, 1040 (1983) (jurisdiction of this Court would be allowed when "a state court decision fairly appears to rest primarily on federal law or to be interwoven with federal law."); *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 100 (1993) (The Supremacy Clause does not allow States to deny remedies for federal rights "by the invocation of a contrary approach to retroactivity under state law."); *Id.* at 102 ("State law may provide relief beyond the demands of federal due process, but under no circumstances may it confine petitioners to a lesser remedy[.]") (citations omitted).

1. Ronald-Smith DID NOT EFFECT ANY CHANGE IN THE LAW IN MR. LEONOR'S CASE; THUS NO RETROACTIVITY IS AT ISSUE

Mr. Leonor's jury was instructed that Mr. Leonor could have been convicted of either intentional second degree murder or intentional Manslaughter. **Appendix B, 43** (Jury Instruction No. 6):

> The defendant can be guilty of murder in the second degree or manslaughter even though he personally did not commit every act involved in the crime so long as he aided and abetted someone else to commit it. The Defendant aided someone else if:
>
> (1) the defendant ***intentionally*** helped or encouraged another person to commit murder in the second degree or ***manslaughter;*** and
>
> (2) the defendant knew that the other person ***intended*** to commit murder in the second degree or ***manslaughter***
>
> (3) the murder in the second degree of manslaughter in fact was committed by that other person.

Id. (emphasis added).

That manslaughter is an intentional offense, is the exact statement of the law announced in *Ronald-Smith*. See *State v. Ronald-Smith*, 282 Neb. at 732 & 734. It is true that at the time of Mr. Leonor's convictions became final the law was that manslaughter was not an intentional offense. See *State v. Jones*, 245 Neb. 821, 830, n. 6 (Neb. 1994). However, it was Nebraska's decision to instruct Mr. Leonor's jury with the option to convict him for intentional manslaughter. Hence, no change in the law was effected in Mr. Leonor's case from the decision in *Ronald-Smith*. Accordingly, judicial or collateral estoppel prevents Nebraska from changing its initial position. See *Zedner v. U.S.*, 547 U.S. 489, 504 (2006) ("Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position,

especially if it be to the prejudice of the party who had acquiesced in the position formerly taken by him.")(citation and original quotations omitted). The judicial estoppel applies to a state. *Normandy Apartments, Ltd. V. U.S.*, 100 Fed. Cl. 247 (2011)(citing *New Hampshire v. Main*, 532 U.S. 742, 755 (2001)). "Several factors typically inform the decision whether to apply the doctrine in a particular case[.]" *Id*. First, "a party's later position must be clearly inconsistent with its earlier position." *Id*. As stated above, it was Nebraska's choice to instruct Mr. Leonor's jury with the incorrect statement of the law at the time of his trial when the law said that manslaughter was ***not*** an intentional offense. *State v. Jones*, supra.[12]

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[12] Although, the Nebraska Supreme Court has held that a jury instruction of that nature only places a heavier burden on the State to prove the element of intent, *State v. Jackson*, 259 Neb. 24, 37-38 (Neb. 1998), that is not all correct at least in Mr. Leonor's case.

To be exact, the *Jackson* Court's reasoning is based on the presumption that a jury will be properly instructed that a state has the burden to prove **intent** beyond a reasonable doubt under the aiding and abetting theory. See e.g., the aiding and abetting jury instructions in *State v. Mantich*, 249 Neb. 311, 324-325(Neb. 1996); *State v. Ryan*, 233 Neb. 74, 113 (Neb. 1989); *State v. Tucker*, 257 Neb. 496, 508 (Neb. 1999); *State v. Johnson*, 236 Neb. 831, 840-841(Neb.1991).

In Mr. Leonor's case, his jury was not instructed, under the aiding and abetting theory, that the State had the duty to prove **beyond a reasonable doubt** that Mr. Leonor committed the intentional killing. **Appendix B.**

Moreover, under the circumstances, Jury Instruction No. 6 did convey to Mr. Leonor's jury that he had the duty to prove the **difference** between intentional second-degree murder and intentional manslaughter, whatever that was. And because Mr. Leonor did not testify, his jury may have thought that he failed to prove his burden, a factor that had influenced them to find him guilty of intentional second degree murder. Thus, Nebraska's decision to instruct Mr. Leonor's jury on intentional manslaughter did not place any heavier burden on the State whatsoever, but it did have effect in the jury in reaching their verdict.

Now, *Ronald-Smith* held that manslaughter is an intentional offense when committed upon a sudden quarrel provocation, and requires the State, not Mr. Leonor, to prove beyond a reasonable doubt that he did not commit the intentional killing upon a sudden quarrel. Thus, that manslaughter is an intentional offense now under *Ronald-Smith*, was clearly inconsistent with the State's position at Mr. Leonor's trial.

Second, "whether the party has succeeded in persuading a court to accept the party's earlier position...." *Zedner*, 547 U.S. at 504 (citation omitted). On direct appeal of Mr. Leonor's convictions, the State pressed to the Nebraska Supreme Court that it had proven **beyond a reasonable doubt** all elements to convict him for second degree murder under the aiding and abetting theory. Mr. Leonor's convictions for second-degree murder were affirmed as legally sufficient even when his jury had found him guilty under the incorrect statement of the law. *State v. Leonor*, 263 Neb. at 97.

Third, "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Zedner*, 547 U.S. at 504 (citation omitted). It will be an unfair advantage on Mr. Leonor, to say that because Nebraska has instructed his jury with the statement of the law as given now in *Ronald-Smith*, his jury had the capacity to find him guilty of intentional manslaughter.

As stated above, not only it is doubtful whether the State was held to its heavy burden of proving beyond a reasonable doubt that Mr. Leonor committed the intentional killing when the aiding and abetting jury

instruction did not convey his jury to hold the State to that burden. **Appendix B.** But also, it is likely that Mr. Leonor's jury held him to a burden of proving the *presence* of the fact that distinguished intentional second degree murder from intentional manslaughter, whatever the fact was, and because Mr. Leonor did not testify his jury thought he failed to prove that burden, a burden he was not required to prove. Additionally, Mr. Leonor's jury did not know that pursuant to *Ronald-Smith*, it is the State's burden to prove beyond a reasonable doubt the fact that distinguishes second-degree murder from intentional manslaughter.

Therefore, no retroactivity is at issue here from the decision in *Ronald-Smith*, and judicial and collateral estoppel prevents Nebraska from changing its initial position.

2. Ronald-Smith WAS DICTATED BY PRECEDENT; THUS IT IS NOT A NEW RULE

"A new rule is new unless it was "*dictated* by precedent existing at the time the defendant's conviction became final."" *Edwards v. Vanney*,--S.Ct.--, 2021 WL1951781, * 5 (May 17, 2021)(citing *Teague*, 489 U.S. at 301 (plurality opinion)).

In *Fiore v. White*, and *Bunkley v. Florida*, this Court held that "retroactivity is not at issue" if a state court's interpretation of a criminal law is a correct statement of the law when a petitioner's conviction became final. *Fiore*, 531 U.S. at 226; *Bunkley*, 538 U.S. at 840. The proper question is not whether the law changed, but whether in light of the new law, as interpreted later by the State's highest court, made clear that petitioner's conduct did not violate an element of the statute. If not, his conviction "does not satisfy the structures of the

Due Process Clause," and "retroactivity is not at issue." *Id* (citing *Fiore*).

Ronald-Smith did not state a new theory of law. The offense of manslaughter, as defined in Section 28-305(1) has "remained unchanged since 1977." *Ronald-Smith*, 282 Neb. at 725. Thus, since 1977, Section 28-305(1) states that "A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act." Id.

The offense of Manslaughter upon a sudden quarrel has been treated as an intentional offense for more than a century. *Ronald-Smith*, 282 Neb. at 733 (citing *Boche v. State*, 84 Neb. 845 (Neb. 1909)). In *State v. Pettit*, 233 Neb. 436 (Neb. 1989), the Nebraska Supreme Court affirmed that manslaughter upon a sudden quarrel, under Section 28-305(1), was still an intentional offense. See *Ronald-Smith*, 282 Neb. at 729 (citing *Pettit*). By doing so, *Ronald-Smith* Court **reaffirmed** *Pettit* and *Boche*. See *Ronald-Smith*, 282 Neb. at 734.

So what reason is given to treat *Ronald-Smith* as a new rule? The fact that *State v. Jones*, 245 Neb. 821 (Neb. 1994) had overruled *Pettit* to the extent that manslaughter upon a sudden quarrel was an intentional offense. See *Ronald-Smith*, 282 Neb. at 730. That, alone, cannot be a foundation to treat *Ronald-Smith* as a new rule. The Due Process Clause demands that the inquiry must be not one of form but of substance in determining the inquiry. In other words, it is not about whether the law changed in Nebraska, but "[r]ather when the law changed." See *Bunkley*, 538 U.S. at 841-842. Better put, whether the law was the **true** "correct

statement of the law" at the time Mr. Leonor's convictions became final. See *Fiore*, 531 U.S. at 226.

For instance, it was not disputed in *Bunkley* that the Florida law in question had changed after the petitioner's conviction became final. **Bunkley**, 538 U.S. at 836-838. However, that did not settle the inquiry, as this Court observed, because what had led to the change in the law question was the result of "an evolutionary refinement of the law." *Id*. Unclear was, however, at "what stage in the evolutionary process" "over the course of these many years," "the law law had reached at the time Bunkley was convicted." *Id* at 841. As this Court reasoned, "[b]ecause Florida law was in a state of evolution over the course of these many years, we do not know what stage in the evolutionary process the law had reached at the time Bunkley was convicted." *Id*.

Nebraska law, concerning Section 28-305(1), has also been in a state of evolutionary refinement. It went from *Pettit* in 1989, to *Jones* in 1995. Then, it went from *Jones* to *Ronald-Smith* in 2011. This refinement concluded in *Ronald-Smith* by holding that manslaughter upon a sudden quarrel has been an intentional offense since *Pettit* and *Boche*.

In other words, the holding of *Ronald-Smith* was dictated by the precedents of *Pettit* and *Boche*, which not only both stated the correct statement of the law, see *Ronald-Smith*, 282 Neb. at 732 ("the language used by the Legislature to define the crime of manslaughter" has always been "plain and unambiguous," and thus the "holding of *Jones* that an intentional crime cannot constitute sudden quarrel manslaughter is inconsistent with the language of 29-305(1)...."); *Id*. at 734 ("the

analysis and holding in *Pettit* was correct and the holding in *Jones* that "[t]he distinction between second degree murder and manslaughter upon a sudden quarrel is the presence or absence of an intention to kill," was error), but also the Nebraska Supreme Court clearly held that the case of *State v. Jones* had been an unconstitutional judicial legislation because it had "essentially rewrote § 28-305 (1)." *Ronald-Smith*, 282 Neb. at 732.

If *State v. Jones* was unconstitutional law, it means it was void and as no law at all.[13] To that extent, it is fair to say that *Pettit* on the other hand had legitimately construed the language used by the Nebraska Legislature to define the offense of manslaughter, which it was as much as "plain and unambiguous" then, as it is now when interpreted again by *Ronald-Smith*. See *Ronald-Smith*, 282 Neb. at 733.

Therefore, because the statement of the law announced in *Ronald-Smith* was dictated by precedent (i.e., *Pettit* which was decided in 1989), it is the same statement of the law at the time Mr. Leonor's convictions became final in 2002. As such, Due Process commands that no retroactivity is at issue here.

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[13] See e.g. *United States v. Davis*, 139 S.Ct. 2319 (2019) ("When Congress passes a law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again."); *Viereck v. United States*, 318 U.S. 236, 243 (1943) ("the unambiguous words of a statute which imposes penalties are not to be altered by judicial construction ...."); *Montgomery v. Louisiana*, 136 S.Ct. at 731 ("[a]n unconstitutional law is void, and is an no law.") (original quotations) (citing *Ex parte Siebold*, 100 U.S. 371 (1880)).

3. THE RULE ANNOUNCED IN RONALD-SMITH IS SUBSTANTIVE

"States are free to make new procedural rules retroactive on state collateral review." *Montgomery v. Louisiana*, 136 S.Ct. at 729. And if a state makes a new procedural rule retroactive, that state court is not prevented "from providing greater relief in their own collateral review courts." *Id.* As concerning substantive rules, states are required to make a substantive rule retroactive:

> The Court now holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. *Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises.

Id.

Mr. Leonor reads *Montgomery* as to command that the U.S. Constitution is at play in the States not only when a new substantive rule is announced by this Court, but also when a particular state announces a new substantive rule. Mr. Leonor bases that contention on this Court's statement, "[t]hat Constitutional command is, like all federal law, binding on State courts." *Id.* Even so, that it is now a constitutional command, still "*Teague* does not preclude [states] from giving retroactive effect to a broader set ... than *Teague* itself require[s]." *Id.* at 728. Of course, the caution remains that under no circumstances may a state court confine petitioners to a lesser remedy than what the U.S. Constitution and *Teague* command. See *Danforth v. Minnesota*, 552 U.S. 264, 287 (2008) (citations omitted); *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 100, 102 (1993).

On the other hand, if Mr. Leonor misapprehends *Montgomery v. Loui-*

siana, nevertheless he has some play in it. That is so, because "Nebraska has adopted the *Teague*/*Schriro* retroactivity test[,]" *Glass*, 298 Neb. at 607, and that retroactivity test was employed in deciding whether *Ronald-Smith* provided a new substantive rule of law. *Id.* at 607-610. Thus, under that circumstance, the question will be whether the federal retroactivity analysis employed by the *Glass* Court confines Mr. Leonor to a lesser remedy than what federal law demands.

The Nebraska Supreme Court has already established that its decision in *Ronald-Smith* is a "new rule." See *State v. Glass*, 298 Neb. at 609. Yet, the Nebraska Supreme Court has held that its new rule is not a "constitutional rule." *State v. William-Smith*, 284 Neb. 636, 654-655 (Neb. 2012); *Glass*, 298 Neb. at 609. However, it is well established that the "source of a "new rule" is the Constitution itself, not any judicial power to create new rules of law." *Danforth*, 532 U.S. at 271. Even if *Ronald-Smith* were not a constitutional rule, it is of no consequence here because that did not affect the *Glass* Court's analysis in deciding whether *Ronald-Smith* was a substantive rule, and as Stated above, Nebraska is not precluded from giving retroactive effect to a broader set than *Teague* itself requires. *Montgomery*, 136 S.Ct. at 728.

With that in mind, next the focus is on whether Ronald-Smith is a substantive rule. After applying the *Teague*/*Schriro* test, the *Glass* Court held that the rule announced in *Ronald-Smith* was a "procedural rule" because *Ronald-Smith* simply held "that it was improper for a jury to consider second degree murder without simultaneously considering sudden quarrel manslaughter [which it resulted in] a change in the

acceptable method for the jury to deliberate ... "regulat[ing] only the manner of determining the defendant's culpability."" See *Glass*, 298 Neb. at 610 (citing *Schriro*, 542 U.S. at 353). Based on the aforementioned, the *Glass* Court determined *Ronald-Smith* was not a substantive rule but a procedural rule; thus it did not apply retroactively to cases on collateral review.

Mr. Leonor does not debate that by *Ronald-Smith* concluding that it was improper for a jury to consider second-degree murder without simultaneously considering sudden quarrel manslaughter, fits as a procedural feature. However, Mr. Leonor does debate that the *Glass* Court failed to inquire whether that procedural feature was simply a required component in order for a substantive change to operate. As this Court held, "[t]here are instances in which a substantive change in the law must be attended by a procedure that enables the prisoner to show that he falls within the category of persons the law may no longer punish." *Montgomery*, 136 S.Ct. at 735. And "[t]hose procedural requirements do not, of course, transform substantive rules into procedural ones." *Id.* at 734.

As this Court held in *Montgomery*, "when an element of a criminal offense is deemed unconstitutional, a prisoner convicted under that offense receives a new trial where the government must prove the prisoner's conduct still fits within the modified definition of the crime. In a similar vein, when the Constitution prohibits a particular form of punishment for a class of persons, an affected prisoner receives a procedure through which he can show that he belongs to the protected class." *Id* (citation omitted). The rule in *Ronald-Smith* fits squarely

within this framework.

First, the Nebraska Supreme Court found in *Ronald-Smith* that the element "unintentional" of Neb. Rev. Stat. 28-305(1)'s manslaughter upon a sudden quarrel, as held in *State v. Jones*, 245 Neb. 821, 830 (Neb. 1994), was unconstitutional because it was an element created by **judicial** legislation. See *Ronald-Smith*, 282 Neb. at 730 (quoting *Jones*); and *Id* at 732 (In *State v. Jones*, "this Court essentially rewrote 28-305(1) ... we now conclude that this was error. It is the province of the legislative branch, not the judiciary to define criminal offenses within constitutional boundaries."). Thus, the element "unintentional" was deemed unconstitutional.

As a result, the *Ronald-Smith* Court held, "intent' is an element of 28-305(1)'s manslaughter upon a sudden quarrel section. See *Ronald-Smith*, 282 Neb. at 734. And in order for the State to obtain a conviction for manslaughter upon a sudden quarrel, the State must prove beyond a reasonable doubt that the killing was **intentional**. *Id.* at 729 (quoting *State v. Pettit*, 233 Neb. 436, 460 (Neb. 1989), reaffirmed by *Ronald-Smith*, at 734).

Second, in *Ronald-Smith* was held that the difference between second degree murder and manslaughter upon a sudden quarrel is the presence or absence of the sudden quarrel. *Id.* at 732. And if the State wants a conviction for second degree murder under Neb. Rev. Stat. 28-304(1), it must now prove ***beyond a reasonable doubt*** that a defendant did not commit the intentional killing, upon a sudden quarrel. See *State v. Abdulkadir*, 286 Neb. 417 (Neb. 2013); *State v. Hinrichsen*, 292 Neb. 611 (Neb. 2016);

and *State v. Gonzales*, 294 Neb. 627 (Neb. 2016). **APPENDIX O.**

As shown above, the elements of Neb. Rev. Stat. § 28-305(1) and Neb. Rev. Stat. § 28-304(1), were modified in *Ronald-Smith*. Now, Section 28-305(1) has intent as an element of manslaughter upon a sudden quarrel, and Section 28-304(1) has "absence of sudden quarrel" as an element. "A decision that modifies the elements of an offense is normally substantive rather than procedural[,]" because "[n]ew elements alter the range of conduct the statute punishes, rendering some formerly unlawful conduct lawful or viceversa." *Schriro v. Summerlin*, 542 U.S. at 354. Under those circumstances, a new trial must be granted for a defendant convicted of second-degree murder, "where the government must prove the prisoner's conduct still fits within the modified definition of the crime." *Montgomery*, 136 S.Ct. at 734. In other words, The U.S. Constitution prohibits the punishment of 20 years to life imprisonment imposed upon Mr. Leonor who was charged with second degree murder, unless the State proves beyond a reasonable doubt that he did not commit the intentional killing, upon a sudden quarrel. **APPENDIX O.**

Thus, for the reasons given above, *Ronald-Smith* fits within the framework of a substantive rule. And that substantive rule must be "attended by a procedure that enables the prisoner to show that he falls within the category of persons the law may no longer punish." *Montgomery*, 136 S.Ct. at 735. In *State v. William-Smith*, 284 Neb. 636 (Neb. 2012), the Nebraska Supreme Court created that procedure:

> Where there is evidence that (1) a killing occurred intentionally without premeditation and (2) the defendant was acting under the provocation of a sudden quarrel, a jury must be given the option of convicting of second degree murder or voluntary

manslaughter upon its resolution of the fact issue regarding provocation.

Id. at 656.

That procedure is where the State must prove beyond a reasonable doubt that the killing, although intentional, was not upon a sudden quarrel provocation. See *State v. Abdulkadir*, 286 Neb. at 426-428.[14] Which the Nebraska Supreme Court held "satisfie[s] the requirements set out in [*William-]Smith*...." *Abdulkadir*, 286 Neb. at 427-428.

That procedure adopted in *William-Smith*, is similar to the one discussed by this Court in *Montgomery v. Louisiana* when analyzing *Miller v. Alabama*'s procedure. In that respect, this Court held that *Miller v. Alabama* had "a procedural component[,]" that "require[d] a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence." *Montgomery*, 136 S.Ct. at 734. The State of Louisiana, "contend[ed] that because *Miller* require[d] this process, it must have set forth a procedural rule." This Court rejected Louisiana's position stating that "[t]his argument, however, conflates a procedural requirement necessary to implement a substantive guarantee with a rule that "regulate[s] only the manner of determining the defendant's culpability." *Id.* at 734-735 (citation omitted).

Because *Ronald-Smith* is a substantive rule of law, the Nebraska Supreme Court's decision not to apply it retroactively to cases on

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[14] In *Abdulkadir*, the Nebraska Supreme Court held as correct that **"the second degree murder instruction required the State to disprove beyond a reasonable doubt that Abdulkadir killed [the victim] during a sudden quarrel**[.]" *Id.* 286 Neb. at 427-429 (emphasis added).

collateral review is in conflict with federal law, and thus is reviewable by this Court. For the reasons stated above, an exceptional circumstance exists because the *Glass* Court has confined Mr. Leonor to a lesser remedy than what the U.S. Constitution and Federal law command.

B.

Another exceptional circumstance that requires the granting of the Court's original jurisdiction, is that Mr. Leonor is actually innocent of second degree murder. That is to say, Mr. Leonor remains convicted and sentenced for a crime the State has not yet proven, and cannot prove beyond a reasonable doubt. As this Court held, "serious constitutional concerns that would arise if AEDPA were interpreted to bar judicial review of certain actual innocence claims." *In re Davis*, 557 U.S. 952 (2009)(Stevens, J., concurring); see also *O'Neal v. McAninch*, 513 U.S. 432, 441 (1995)("... the basic purposes underlying the writ of habeas corpus [is to address] ... error of constitutional dimension--the sort that risks an unreliable trial outcome and the consequent conviction of an innocent man").

Also, in *Davis v. United States*, 417 U.S. 333 (1974), this Court held that if habeas petitioner's contentions were true that "his conviction and punishment [were] for an act the law [did] not make criminal, there could be no room or doubt that such a circumstance "inherently results in a complete miscarriage of justice" and "present[s] exceptional circumstances that justify collateral review under [the habeas statute]."" *Id.* at 346. Collateral review, this Court added, is necessary to correct a "fundamental defect in the sentencing

and incarceration of an innocent person." *Id.*

Further, in *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), this Court envisioned that:

> The prisoner may have a vital interest in having second chance to test the fundamental justice of his incarceration. Even where, as here, the many judges who had reviewed the prisoner's claims in several proceedings provided by the State and in his first petition for federal habeas corpus have determined that his trial was free from constitutional error, a prisoner maintains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated.

Id. at 452.

"[T]his Court explicitly tied the miscarriage of justice exception to the petitioner's innocence." See *Schulp v. Delo*, 513 U.S. 298, 321 (1995). Normally, for first time petitioners seeking federal habeas corpus review, the "miscarriage of justice exception ... applies to a severely confined category: cases in which new evidence shows it is more likely than not that no reasonable juror would have convicted [the petitioner]." See *McQuigging v. Perkins*, 569 U.S. 383, 395 (2013). However, "Congress ... required of second-or-successive habeas petitioners attempting to benefit from the miscarriage of justice exception to meet a higher level of proof ("clear and convincing evidence") and to satisfy a diligence requirement that did not exist prior to AEDPA's passage." *Id.* at 396. Because Mr. Leonor is seeking habeas corpus review invoking this Court's original jurisdiction, this Court is not bound by AEDPA's statutory "restrictions on repetitive and new claims imposed by 2244(b)(1) and (2)[,]" but "they certainly inform [the Court's] consideration of original habeas petition." See *Felker v. Turpin*, 518 U.S. 651, 662 (1996).

"[W]hether a court is assessing actual innocence under the *clear and convincing* evidence standard or the *less stringent evidence* standard, the "analysis must incorporate the understanding that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence." *Schlup*, 513 U.S. at 328. In other words, as Mr. Leonor interprets it, the actual innocence *clear and convincing standard* is equivalent to the insufficiency of evidence standard of *Jackson v. Virginia*, 443 U.S. 307 (1979), or crosses the legal boundary between guilt or innocence. While the *less stringent standard* "does not require absolute certainty about petitioner's guilt or innocence." *House v. Bell*, 547 U.S. 518, 538 (2006).

With those principles in mind, Mr. Leonor asserts that his convictions violate Due Process because the State has failed to prove, and cannot prove, beyond a reasonable doubt, that he committed second degree murder (as will be argued below in the next section), which firmly meets the *clear and convincing* innocence standard and surpasses the *less stringent* innocence standard. Under this condition, "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient[;] the only just remedy available ... is the direction of a judgment of acquittal." *Burks v. U.S.*, 437 U.S. 1, 18 (1978). And even if it is reasoned that the State should be given the opportunity to prove beyond a reasonable doubt before a jury that Mr. Leonor did not commit the intentional killing upon a sudden quarrel, Mr. Leonor is still innocent under the *less stringent* standard, and "a reversal is likely based on the "weight of the evidence" analysis which

would afford him "a second opportunity to seek a favorable judgment."" See *Tibbs v. Florida*, 457 U.S. 31, 46 (1982); see also *Bousley v. United States*, 523 U.S. 614 (1998)(this Court employed the *less stringent* miscarriage of justice standard that "it is likely than not that no reasonable juror would have convicted him," based on an intervening change in the law).

Mr. Leonor has complied with Supreme Court Rule 20.4(a), as shown above in subdivisions A & B of this section, by showing that exceptional circumstances exists in his case for this Court to grant review under its original jurisdiction. Moreover, as previously addressed, this Court is Mr. Leonor's last resort. See *Ex parte Hawk*, 321 U.S. 114, 118 (1944) ("where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, because in the particular cases the remedy afforded by state law proves in practice unavailable or serious inadequate, a federal court should entertain his petition for habeas corpus, else would be remediless."). It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired. See *Bowen v. Johnston*, 306 U.S. 19, 26 (1939)(citing *Ex parte Lange*, 18 Wall. 163 (1873)).

Therefore, Mr. Leonor urges this Court to grant review of his claims and thereafter habeas corpus relief, or transfer his case to the district court for an evidentiary hearing and/or further proceedings.

III. MR. LEONOR'S CONVICTIONS AND CONTINUED INCARCERATION VIOLATED DUE PROCESS

The Due process Clause requires the State to prove beyond a reasonable doubt every fact necessary to constitute the crime with which a defendant is charged. See *In re Winship*, 397 U.S. 358, 364 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

Evidence is not sufficient to support a conviction if, "after viewing the evidence in light most favorable to the prosecution, any rational trier of fact could [not] have found the essential elements of the crime beyond a reasonable doubt." See *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *In re Winship*, supra ("Lest there remain any doubt the constitutional statute of the reasonable-doubt standard, ... the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)("facts that increase the prescribed range of penalties to which a criminal is exposed" must be submitted to a jury and established by proof beyond a reasonable doubt").

In Nebraska, "an intentional killing committed upon "a sudden quarrel," ... constitutes the offense of manslaughter." *State v. Glass*, 298 Neb. 598, 609 (Neb. 2018). Also, "under *Ronald-Smith* "both second degree murder and voluntary manslaughter involve the intentional killing; they are differentiated only by the presence or absence of the sudden quarrel provocation." See *State v. William- Smith*, 284 Neb. 636, 656 (2012). "Thus, where there is evidence that (1) a killing occurred intentionally without premeditation and (2) the defendant was acting

under the provocation of a sudden quarrel, a jury must be given the option of convicting of second degree murder or voluntary manslaughter upon its resolution of the fact issue regarding provocation." *Id*. This procedure, under *William-Smith*, is meant to require that in a case where there is evidence of the sudden quarrel, a jury must be instructed that the State has the burden to prove **beyond a reasonable** doubt both that the killing was committed intentionally, and **without a sudden quarrel.**

APPENDIX O.

Moreover, it should be noted that that the element "absence of a sudden quarrel" is not written within Neb. Rev. Stat. § 28-304(1).[15] However, that is the law in Nebraska as interpreted by Nebraska's highest court, the Nebraska Supreme Court, to which this Court's owes deference. See *Jackson v. Virginia*, 443 U.S. at 324, Fn. 16 (where this Court provides that the sufficiency of evidence standard is to be applied "with explicitly deference to the substantive elements of the criminal offense as defined by state law."); *Johnson v. Fankell*, 520 U.S. 911, 916 (1997) ("neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state."); *Wainwright v. Goodge*, 464 U.S. 78, 84 (1983) (per curiam) ("[T]he views of the state's highest court with respect to state law are binding on federal courts."); *Garner v. Louisiana*, 368 U.S. 157, 166 (1961) ("We of course are bound by a state's

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[15] Neb. Rev. Stat. § 28-304 (Reissues 1995 & 2016): "(1) A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.

interpretation of its own statute and will not substitute our judgment for that of the state's when it becomes necessary to analyze the evidence for the purpose of determining whether the evidence supports the findings of the state court.").

With that in mind, then, the question is, is there evidence that the intentional Killing was committed upon a sudden quarrel in order for the procedure outline in *William-Smith* be employed in Mr. Leonor's case; and thus for the State's burden of proving beyond a reasonable doubt be at play as to whether Mr. Leonor committed the intentional killing without a sudden quarrel? As will be addressed below, there is evidence of a sudden quarrel provocation, and that evidence is the State's own evidence.

A. THE STATE'S OWN EVIDENCE, IN MR. LEONOR'S TRIAL, PROVIDED THAT THE KILLING ALTHOUGH INTENTIONAL, WAS THE RESULT OF A SUDDEN QUARREL PROVOCATION

Nebraska law "define[s] a sudden quarrel as a legally recognized and sufficient provocation that causes a reasonable person to lose normal self-control." *State v. Abdulkadir*, 286 Neb. 417, 425 (Neb. 2013). "[I]t does not necessarily mean an exchange of angry words or an altercation contemporaneous with an unlawful killing and does not require a physical struggle or other combative corporal contact between the defendant and the victim." *Id.* at 426. The question is, "whether there existed reasonable and adequate provocation to excite one's passion and obscure and disturb one's power of reasoning to the extent that one acted rashly and from passion, without deliberation and reflection rather than from judgment." *Id.*

Further, the Nebraska Supreme Court has held that "it is not the provocation alone that reduces the grade of the crime, it is also the sudden happening or occurrence of the provocation so as to render the mind incapable of reflection and obscure the reason so that the elements necessary to constitute murder are absent." *State v. Gonzales*, 291 Neb. 627, 654 (Neb. 2016). Thus, "if there was enough time between the provocation and the killing for a reasonable person to reflect on the intended course of action, then the mere presence of passion does not reduce the crime below murder." *Id.* "The inquiry is whether the suspension of reason reasonable continued from the time of provocation until the very instant of the act producing death took place." *Id at 652-653*. "[I]f, from any circumstances whatever shown in evidence, it appears that [defendant] reflected and deliberated, or if in legal presumption there was time or opportunity for cooling, the provocation [cannot] be considered by the jury in arriving at [its] verdict." *Id.* at 653 (original quotations).

1. PROVOCATION

The State's evidence adduced at trial that, "[s]ince about the middle of 1998, there was a marked increase in violence ... involving Lomas [the victims' gang] and Surenos [Mr. Leonor's gang]. ... It escalated significantly in 1999." **APPENDIX P, 44-45.**[16] In describing what a gang member is capable of doing, the State emphasized that gang members are involved

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[16] See ante, Note 5.

in "violent crimes such as homicides or drive-by shootings. **APPENDIX P, 42.** To further establish that there was an ongoing warfare between Mr. Leonor's gang and the victims' gang, and the magnitude of violence involved, the State offered testimony that the mother of one of the members of Mr. Leonor's gang had been shot by Lomas gang members a few days prior to the shooting at hand. **APPENDIX P, 113-114.**

The State's theory further advanced that Mr. Leonor and the victims were gang members. That a vehicle encounter occurred at a street intersection between the victims and Mr. Leonor and his companion. In that encounter, the victims had provoked Mr. Leonor and his companion by throwing rival gang signs at them. This provocation from the victims led to a car chase where Mr. Leonor was driving and his companion shooting at the victims' car. See *State v. Leonor*, 263 Neb. at 97 (Testimony of State Witness Gerardo Ortiz)("Leonor told Ortiz that he and Gonzales had shot someone who had thrown a Lomas gang sign at them...."); see also *Id* (Testimony of State Witness Jose Hernandez)(the "four way stop sign," is where Mr. Leonor and his companion "saw a bald headed man in a black car who got paranoid when they looked at each other," at that time "Leonor got in front of the bald man's car to block his way ... [w]hen the bald man tried to reverse and got right beside him, Gonzales then shot his gun at the man ... [and] Leonor next raced the bald man's car down the street ...."); see also *Id* (Testimony of State Witness Arthur Carter) ("Leonor's friend began shooting at the other car while at an intersection. They chased the car South, shooting at it, until the car hit the pole.").

The State's evidence made clear that the victim's provocation was the only reason Mr. Leonor and his companion were involved in the car chase and shooting at the victims' car. **APPENDIX P, 181** (Testimony of Gerardo Ortiz)(because Mr. Leonor and his companion were provoked by the victims throwing of rival gang signs, that is why Mr. Leonor and his companion "did what they did.")(Mr. Leonor is referred to as "Malo" and his companion is referred to as "Creeper."). And that evidence is what mainly formed the basis for the Nebraska Supreme Court to affirm Mr. Leonor's convictions for second degree murder:

> We determine that the evidence was sufficient to support the guilty verdicts. The evidence showed that Leonor told Ortiz that he and Gonzales had shot someone who had thrown a Lomas gang sign at them: ... Therefore, Leonor is guilty as an aider and abettor."

State v. Leonor, 263 Neb. at 97.

The State's evidence clearly showed that the Surenos gang and the Lomas gang were shooting at and each other. In fact, as shown above, the State offered evidence showing that the Lomas gang members were capable of shooting at the Surenos, or anyone involved with the Surenos, including a mother, just for being the mother of one of the Surenos members.

In the real world, the throwing of rival gang signs, as applicable to the circumstances in this case, constitute that the victims wanted war and their intent was to harm Mr. Leonor or his companion. The Nebraska Supreme Court has recognized that "it is common knowledge that gang members have guns, that gang members use guns." *State v. Foster*, 286 Neb. 826, 850 (Neb. 2013). Thus, based on the State's evidence, considering the ongoing warfare between the victims' gang and Mr. Leonor's

gang that involved extreme violence, a reasonable trier of fact can conclude that the throwing of rival gang signs by the victims implicated nothing friendly but a provocation. A provocation that Mr. Leonor and his companion reacted upon after being disturbed by anger and fear impulsed by the harm that the victims could have caused to Mr. Leonor or his companion (i.e., Mr. Leonor or his companion could have got shot or killed).

It should be noted that, at trial, State witness, Jose Hernandez, testified that witness Ortiz had been with him when Mr. Leonor told them about the shooting. See, collectively (Trial Bill of Exceptions, 275:9 - 278:23; 284:23 - 285:18).[17] However, Witness Hernandez never testified that the victims had *provoked* Mr. Leonor and his companion by throwing rival gang signs at them. But because the jury heard that Ortiz and Hernandez were together, it is thus fair to conclude that the jury considered their accounts as one, and when put together their accounts state that Mr. Leonor and his companion caused the car chase and the shooting upon the victims' car, only because of the victims' provocation, just as the Nebraska Supreme Court concluded it. State v. Leonor, 263 Neb. at 97 (Leonor told Ortiz that he and Gonzales had shot someone who had thrown a Lomas gang sign at them.")

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[17] Mr. Leonor does not have possession of the trial bill of exceptions, or the document cited to. But he states under penalty of perjury that those citations are accurate and the testimony referred to is what those transcripts say those witnesses testified to or what was said in those documents.

2. THERE WAS A SUDDEN HAPPENING OR OCCURRENCE OF THE PROVOCATION

In *State v. Gonzales*, 291 Neb. 627, 654 (Neb. 2016), the Nebraska Supreme Court cited to *State v. Freeman*, 201 Neb. 382 (Neb. 1978) and *State v. Lyle*, 245 Neb. 345 (Neb. 1994), cases that show an example when the evidence shows that there was enough time to have cooled off between the provocation and the killing, and this, the sudden quarrel provocation was absent. In that respect, the *Gonzales* Court held:

> In cases where there was a much shorter cooling-off period, but the defendant left the scene of the provocation and returned later with a weapon, we have held that the evidence did not support an instruction on manslaughter. For instance, in *State v. Lyle*, we held that the 20-minute time period between the provocation and the killing, in which the defendant left, obtained a gun, and returned to the vicinity of the fight, was inconsistent with sudden quarrel manslaughter. Similarly, in *State v. Freeman*, we held that there was no evidence from which the jury could infer that the murder was upon a sudden quarrel when the victim was stabbed 14 times after the defendant had gone to the kitchen to procure the knife and return to the victim's bedroom.

Id. at 653-654.

In Mr. Leonor's case, the evidence presented by the State shows that there was not time for cooling-off between the provocation until the very instant of the act producing death took place. For instance, when the victims provoked Mr. Leonor and his companion, the reaction of Mr. Leonor and his companion was only to beat to the punch or else they could have been killed or harmed by the victims who were capable of. The State's evidence showed that the victims had left the house of State witness, Antoinette Gomez, a friend of theirs, in the direction of Q street [one of the streets that connect the intersection where the encounter occurred] at "1:30 a.m." See *State v. Leonor*, 263 Neb. at 90.

The evidence at trial also showed that witness Gomez's home was located on 20th Street [the other street that connects to the intersection], not too far from Q Street. (Trial Bill of Exceptions, 264-267).[18]

Also, the evidence showed that Omaha police Officer Woolery "received a call at 1:32 concerning shots fired in the area of 20th Street." *State v. Leonor*, 263 Neb. at 91. That means, from the time the victims left Ms. Gomez's house to the time the police call took place, no more than ***two minutes*** had elapsed. Within those two minutes, it is reasonable to draw an inference that if the victims left Ms. Gomez's house at 1:30 a.m., it must have taken them about a minute or so to arrive at the intersection of 20th and Q Streets where the encounter occurred. This reasonable inference leaves one minute left before the police call was received at 1:32 a.m., between the provocation and the shooting and car chase. And this estimation is made without taking into account the time the 911 caller took to have placed the police call (i.e., the dialing and the ringing), which it can be fairly inferred that it took the caller about ten seconds. Thus, leaving about fifty seconds left between the provocation and the shooting and car chase.

From the above evidence, and considering that no evidence was presented by the State showing that there had been an interval or a pause upon which Mr. Leonor and his companion could have had an opportunity for cooling and reflection between the provocation and the car chase and

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[18] See ante, Note 17.

shooting, it was established that the suspension of reason of about **one minute** reasonably continued from the time of provocation until the very act producing death took place. In other words, the State's evidence shows that from the time the provocation until the car chase and shooting took place, all consisted of one continuous act.

Therefore, the evidence in Mr. Leonor's case shows that the killing was committed upon a sudden quarrel provocation.

3. NEBRASKA HAS NOT AND CANNOT PROVE THAT MR. LEONOR COMMITTED INTENTIONAL KILLING WITHOUT A SUDDEN QUARREL PROVOCATION

In assessing challenges to the sufficiency of evidence, the question for habeas courts is not whether there was any evidence to support the conviction, but "whether, after reviewing the evidence in light most favorable to the prosecution, any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt." *Wright v. West*, 505 U.S. 277, 284 (1992)(quoting *Jackson v. Virginia*, 443 U.S. at 319). Under *Jackson*, "Federal habeas courts must look to state law for the substantive elements of the criminal offense, but the minimum of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law." See *Coleman v. Johnson*, 566 U.S. 650, 655 (2012)(per curiam)(internal quotations and citation omitted). "A reviewing court may set aside the jury's verdict on the ground of insufficiency of evidence only if not rational trier of fact could have agreed with the jury." *Id.* at 651.

As previously addressed, the evidence in Mr. Leonor's case shows that the intentional killing was committed upon a sudden quarrel provo-

cation, a provocation that neither Mr. Leonor nor his companion initiated, but the victims. *State v. Leonor*, 263 Neb. at 97 ("Leonor told Ortiz that he and Gonzales had shot someone who had thrown a Lomas gang sign at them."). And that evidence was the State's own evidence.

If the State wanted Mr. Leonor to be convicted for second degree murder, *Ronald-Smith* then requires the State to prove beyond a reasonable doubt not only that the killing was intentional, but also that it was ***not*** committed upon a sudden quarrel. **Appendix O.** The State only pursued its theory that the killing was intentional, but did not prove beyond a reasonable doubt that the intentional killing was not committed upon a sudden quarrel. For that reason, Mr. Leonor's convictions for second-degree murder, and the accompanying charges of use of a weapon to commit the second-degree murder, cannot stand because these convictions and sentences are in violation of the Due Process Clause of the 14th Amendment.

Moreover, it is Mr. Leonor's contention that the State cannot prove that Mr. Leonor committed second-degree murder because its own evidence produces that the killing was committed upon a sudden quarrel provocation. Mr. Leonor asserts that if *Ronald-Smith* had been around at the time he had his direct appeal, the Nebraska Supreme Court would have determined that the State failed to prove beyond a reasonable doubt that the intentional killing was *not* committed upon a sudden quarrel provocation.

On direct appeal, Mr. Leonor pressed to the Nebraska Supreme Court that the evidence in favor of the State failed to support for a charge of

second degree murder, that at the most, the State's evidence could have proved manslaughter upon a sudden quarrel. (State v. Leonor, S-00-1318, Appellant's Brief, p. 17) ("the theory of the State was that gang signs were exchanged and then Leonor chased after the other vehicle with Gonzales hanging out of the window firing shots ... that the State pushed the theory that Medrano was a gang member of a rival gang, Gonzales intended to kill them.").[19]

Based on the State's theory, Mr. Leonor further advanced that "the facts of this case suggest that the crime of manslaughter was committed.... The obvious difference as it relates to the facts of the present case is the lack of intent required in the commission of manslaughter. The State failed to prove, beyond a reasonable doubt, that the appellant knew that Mr. Gonzales possessed the requisite intent to kill both victims and that the appellant, himself, had the requisite to kill both victims." (Id. at p. 18).

In affirming Mr. Leonor's convictions, the Nebraska Supreme Court found that the State had proved that the killing was intentional, and for that reason Mr. Leonor was guilty of aiding and abetting second degree murder. *State v. Leonor*, 263 Neb. at 97. In doing so, the Nebraska Supreme Court clearly was mindful that the killing had been committed upon a sudden quarrel provocation. *Id* ("Leonor told Ortiz that he and Gonzales had shot someone who had thrown a Lomas gang sign at them.").

Had *Ronald-Smith* been existent when the Nebraska Supreme Court

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[19] See ante, Note 17.

decided Mr. Leonor's case, his convictions and sentences for second degree murder and the accompanying convictions of use of a weapon, would have been found insufficient and set aside. For this other reason, Mr. Leonor asserts that the State cannot prove that he committed the intentional killing without a sudden quarrel.

Therefore, Mr. Leonor is a person in custody pursuant to the judgment of a state court and his custody for his convictions and sentences for second-degree murder and the accompanying convictions and sentences for the use of a weapon are all in violation of the Due Process Clause of the 14th Amendment to the U.S. Constitution. See 28 U.S.C. § 2254 (a).

As previously stated, this Court is Mr. Leonor's last resort to address and correct the miscarriage of justice because no other court, state or federal, can. *Ex Parte Hawk*, 321 U.S. 114, 118 (1944)("where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, because in particular cases the remedy afforded by state law proves in practice unavailable or serious inadequate, a federal court should entertain his petition for habeas corpus, else he would be remediless.").

The application of AEDPA to Mr. Leonor's case, will be a suspension of the writ of habeas corpus in violation of Art. I, § 9, Clause 2 of the Constitution. As such, he implores this Court, or if the cause is transferred to the district court, to find that "the statute's text is satisfied because decisions of this Court clearly support the proposition that it would be an atrocious violation of the Constitution and the principles upon which is based," to keep the rest of his life in prison an innocent

man. See *In re Davis*, 557 U.S. 952 (2009)(Stevens J., concurring).

Moreover, Mr. Leonor asks the Court that, if a hearing is necessary, and if his case is transfer to the district court, to entitle him to an evidentiary because he has presented the factual basis for his claim in the State courts, but unsuccessfully obtained one. In *Williams v. Taylor*, 529 U.S. 420, 435 (2000), this Court held that a petitioner who did not receive an evidentiary in state court may receive an evidentiary hearing in federal court "unless there is lack of diligence, or some greater fault, attributable to the prisoner, or the prisoner's counsel." *Id*. The Court further held, "[d]iligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law."

Mr. Leonor has been diligent in seeking an evidentiary hearing in the state courts, to no avail. **Appendix D, 81; Appendix L, 9-11; Appendix M, 6.**

CONCLUSION

Therefore, Mr. Leonor respectfully asks the Court to grant the petition for habeas corpus and find that:

* *Ronald-Smith* applies to his case; and

* to set aside and dismiss his convictions and sentences for second degree murder and remand that he be discharged from custody on those charges and the weapon charges related to the murders; or

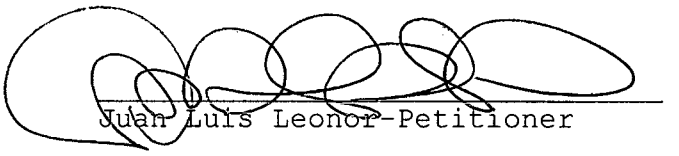
* to set aside and dismiss his convictions and sentences for second degree murder with remand to the State courts for a new trial;

* to transfer the cause to the district court for further

proceedings and grant an evidentiary hearing or with directions to set aside and dismiss the charges for second degree murder, and that Mr. Leonor be discharged from custody on those charges and the weapon charges related to the murders; or

* To transfer the cause to the district court for further proceedings and grant of an evidentiary hearing or with directions to set aside and dismiss the charges for second degree murder and related charges, and remand to the State courts for a new trial.

Respectfully submitted on this 23 day of June, 2021.

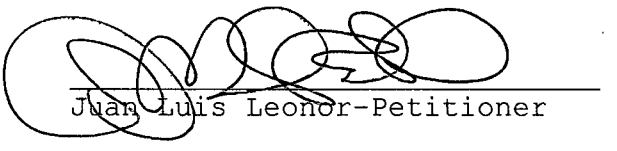


Juan Luis Leonor-Petitioner

VERIFICATION

STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

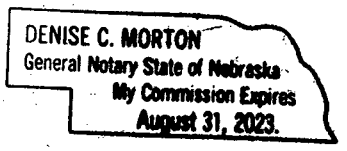
COMES NOW, Juan Luis Leonor, the Petitioner, pro se, pursuant to 28 U.S.C. § 2242, and being first duly sworn upon oath hereby deposes and states that he is the undersigned petitioner in the above and foregoing Petition for a Writ of Habeas Corpus; that he knows the contents therein, and states and avers that to the best of his knowledge and understanding of the facts, the statements contained therein are true and accurate to the best of his knowledge and belief.



Juan Luis Leonor-Petitioner

SUBSCRIBED AND SWORN TO before me and in my presence on this 23rd day of JUNE, 2021.

SEAL:



Notary Public