APPENDICES IN SUPPORT OF PETITION FOR A WRIT OF HABEAS CORPUS

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APPENDIX A

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
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February 21, 2020

Mr. Juan Luis Leonor
NEBRASKA CORRECTIONAL FACILITY
54664
4201 S. 14th Street
P.O. Box 22500
Lincoln, NE 68542-2500

RE: 19-3145 Juan Leonor v. Scott Frakes

Dear Mr. Leonor:

Enclosed is a dispositive order entered today at the direction of the court.

Pursuant to Section 106 of the Antiterrorism and Effective Death Penalty Act of 1996, the grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

Michael E. Gans
Clerk of Court

JPP

Enclosure(s)

cc: Ms. Denise M. Lucks
Ms. Erin Elizabeth Tangeman

District Court/Agency Case Number(s): 4:07-cv-03139-JFB

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-3145

Juan Luis Leonor

Petitioner

v.

Scott Frakes, Nebraska Department of Correctional Services

Respondent

Appeal from U.S. District Court for the District of Nebraska - Lincoln
(4:07-cv-03139-JFB)

JUDGMENT

Before LOKEN, BENTON, and KELLY, Circuit Judges.

The motion for authorization to file a successive habeas application in the district court is denied. Mandate shall issue forthwith.

February 21, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-3145

Juan Luis Leonor

Petitioner

v.

Scott Frakes, Nebraska Department of Correctional Services

Respondent

Appeal from U.S. District Court for the District of Nebraska - Lincoln
(4:07-cv-03139-JFB)

MANDATE

In accordance with the judgment of 02/21/2020, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

February 21, 2020

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

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 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; and

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

D.L

GIVEN
Harold C Moran

INSTRUCTION NO. 7

The statutes of the State of Nebraska in full force and effect at the time alleged in the Information provided in substance as follows:

"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."

GIVEN
Gerald E Moran

APPENDIX C

Eighth Circuit Court of Appeals

PRO SE Notice of Docket Activity

The following was filed on 10/21/2019

Case Name: Juan Leonor v. Scott Frakes
Case Number: 19-3145

Docket Text:
AMENDED MOTION for Permission to file a Successive Habeas Petition (Rec'd by MAIL), filed by Petitioner Mr. Juan Luis Leonor w/service 10/15/2019. [4844602] [19-3145]

The following document(s) are associated with this transaction:
Document Description: Amended SHC Petition

Notice will be mailed to:

Mr. Juan Luis Leonor
NEBRASKA CORRECTIONAL FACILITY
54664
4201 S. 14th Street
P.O. Box 22500
Lincoln, NE 68542-2500

Notice will be electronically mailed to:

Ms. Erin Elizabeth Tangeman: erin.tangeman@nebraska.gov

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

JUAN LUIS LEONOR, Petitioner, VS. SCOTT FRAKES, Director of Nebraska Department of Correctional Services, Respondent.	CASE NO: 19-3145 AMENDED APPLICATION FOR PERMISSION TO FILE A SECOND FEDERAL HABEAS CORPUS PETITION UNDER U.S.C. 28 § 2254

COMES NOW, Juan Luis Leonor (hereinafter "Leonor"), and as required by 28 U.S.C § 2244(b)(3)(A), he seeks permission from this Court to file a second or successive habeas corpus petition.

I.

INTRODUCTION

Mr. Leonor comes for the second time before this Court seeking permission to file a second § 2254 habeas petition. The basis he seeks relief for this time is straighforward:

* Montgomery v. Louisiana, 136 S.Ct. 718 (2016) decided two issues. One is that a state is now required to apply a new substantive rule of law retroactive on collateral review. Two, it dealt with a retroactive issue concerning juveniles. Mr. Leonor's sole invocation of Montgomery concerns its command that new substantive rules apply retroactively;
* The change in the law in Nebraska concerning murder in the second degree and sudden-quarrel manslaughter, as held in State v. Smith, 282 Neb. 720 (2011), is under the U.S. Constitution a substantive new rule of constitutional law that Montgomery commands it applies retroactively on collateral review to Mr. Leonor's case;

* Under the new change in the law in State v. Smith, Mr. Leonor's federal DUE PROCESS rights were violated;

* Mr. Leonor's DUE PROCESS claim under State v. Smith is a new claim never raised in a previous habeas petition, and 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 him guilty of the underlying offense.

II.

RELEVANT FACTS/HISTORY/EXHAUSTION/DILIGENCE

Among other charges, but only relevant here, Mr. Leonor was convicted by a jury in Nebraska of two counts of murder in the second degree in violation of Neb. Rev. Stat. § 28-304(1), and his convictions were affirmed in 2002. See State v. Leonor, 263 Neb. 86 (2002).

On July 12, 2005, Mr. Leonor filed a habeas corpus petition under § 2254. See Leonor v. Houston, 2007 WL 2003413 (Case No.: 4:05-cv-3162). Finding all but one claim defaulted, habeas corpus relief was denied. Id. at * 1. Certificate of Appealability ("COA") was not granted by this Court. Leonor v. Houston, 2007 WL 4233316.

When Mr. Leonor's convictions were affirmed in 2002, the law in Nebraska held that the difference between murder in the second degree and manslaughter was the presence or absence of intent. State v. Jones, 245 Neb. 821 (1994). Still Mr. Leonor's jury was instructed that they could have convicted him of either intentional murder in the second degree or intentional manslaughter, but without

instructing them on the fact that distinguished these two intentional offenses, which at the time none existed. See (Exhibit # 1). In 2011, however, the Nebraska Supreme Court in State v. Smith, 282 Neb. 720 (2011) modified its law and held that manslaughter upon a sudden quarrel is an intentional offense and the difference between murder in the second degree and sudden-quarrel manslaughter is the presence or absence of "the sudden quarrel." Id. at 734. Thus, State v. Jones, was overruled. Id.

Since State v. Smith was decided, Mr. Leonor has, with due diligence, but without success, tried to get his convictions for murder in the second degree overturned alleging that he is entitled to the new rule announced in State v. Smith (hereinafter "State-v.-Smith-Due-Process Claim").

Mr. Leonor's first attempt was in 2012 when he timely sought state postconviction relief. Relief was denied because, pertinent here, his State v. Smith Due-Process Claim could have been raised on direct appeal or in previous postconviction proceedings pre-State v. Smith. (State v. Smith did not exist in 2002--when Mr. Leonor's direct appeal was had, nor in 2003--when his first postconviction proceeding was had, nor in 2008--when his second postconviction proceeding was had). Mr. Leonor attempted to appeal the denial of postconviction but the appeal was dismissed as premature because Mr. Leonor had filed a motion to alter or amend the judgment that had suspended the appeal process. Shortly thereafter, Mr. Leonor decided to withdraw his motion to alter or amend judgment and proceed with the appeal. For this, he filed for withdrawal of that motion. Said motion was withdrawn, however, Mr. Leonor was not notified within the 30-days timeline to file for an appeal, which by Nebraska law, he was entitled to notification. (Mr. Leonor learned about said ruling after he wrote the clerk inquiring for the status of the motion to withdraw, which occurred about a year or so after the ruling).

After Mr. Leonor learned that there had been a ruling on the motion to withdraw and he was not notified about it, he sought modification of the judgment (which is permitted by Nebraska law), asking the postconviction court to reenter its judgment denying postconviction relief, claiming that the court's clerk had failed to notified him about the ruling in question. As of today, there has been no decision made by the state court on the modification of the judgment matter since 2014. (Although Mr. Leonor has no record available of all these proceedings mentioned above involving his State v. Smith Due-Process Claim, he asserts under penalty of perjury that it all is true). Further, perhaps these proceedings become moot due to the fact that in 2012, the Nebraska Supreme Court held that State v. Smith was not retroactive on collateral review. See State v. William-Smith, 284 Neb. 636, 654-655 (2012).

On January 25, 2016, the U.S. Supreme Court decided Montgomery v. Louisiana, 136 S.Ct. 718 (2016), holding that "[i]f ... the Constitution [not the State, not the courts] establishes a rule and requires that the rule have retroactive application, the a state court's refusal to give the rule retroactive effect is reviewable by this Court." Id. at 727.

In 2016, following the Montgomery v. Louisiana decision, Mr. Leonor timely moved for successive state postconviction. There, he argued that Montgomery v. Louisiana and other U.S. Supreme Court cases command that the new rule announced in State v. Smith was substantive in nature and thus applies retroactively to his case on collateral review. In 2017, the state court denied relief holding that Mr. Leonor could have raised his State v. Smith Due Process Claim when he filed his 2012 postconviction motion, thus it was procedurally barred. (As explained above, Mr. Leonor did raise that claim in his 2012-postconviction motion, so, in a timely fashion he asked the postconviction court to alter or amend its judgment explaining that he did raise his claim in his 2012 postconviction motion). As of

today, there has been no ruling entered on Mr. Leonor's motion to alter or amend judgment. (Although Mr. Leonor has no record available of all those proceedings he mentioned above, he asserts under penalty of perjury that all is true). However, on January 2018, the Nebraska Supreme Court considered whether its holding in State v. Smith was a substantive rule of law through the lens of federal law, and found that that holding was not a substantive rule of law. See State v. Glass, 298 Neb. 598, 610 (2018)(incidentally Montgomery v. Louisiana was acknowledged).

The decision in State v. Glass makes now futil any waiting on further consideration from the state courts concerning Mr. Leonor's State v. Smith Due Process Claim, and for this purpose the state postconviction proceedings are unavailable to him to complete exhaustion. See 28 U.S.C. § 2254(b)(1)(B)(i) and (ii). Also, since there has been no ruling made yet on his State v. Smith Due Process Claim, the statute of limitations under 28 U.S.C. § 2244(d) is satisfied.

Also, pertinent here, in 2016 or 2017, Mr. Leonor brought a state habeas petition directly to the Nebraska Supreme Court, arguing that the statue of his conviction was unconstitutionally vague under State v. Smith. Relief was denied. Then, in 2017, Mr. Leonor asked this Court for permission to file a second habeas petition under § 2254. In part, Mr. Leonor raised the challenge to the validity of the statute of his conviction. See Leonor v. Frakes, 17-1491 (Mr. Leonor's application). In that application, Mr. Leonor also informed this Court that his State v. Smith Due Process Claim was being exhausted in a state postconviction proceeding. Id (Mr. Leonor may have provided the record he is missing here in support of that application). His application was denied because Mr. Leonor did not argue actual innocence. Id (Judgment) & (State's response).

Also, in 2017, Mr. Leonor sought to reopen the judgment denying his original

federal habeas petition by invoking Fed. R. Civ. P. 60(b)(6). See Leonor v. Houston, WL 4325714. There Mr. Leonor sought consideration of his defaulted claims arguing that Martinez v. Ryan, 132 S.Ct. 1309 (2012) and Trevino v. Thaler, 133 S.Ct. 1911 (2013), provided cause to excuse the default. See Leonor v. Houston, WL 4325714, at * 1. In that same Rule 60(b)(6) proceeding, Mr. Leonor sought leave to amend a defaulted ineffective assistance of counsel claim--concerning confusing jury instructions, reasoning that the amendment related back to the original claim. As relevant here, the amendment concerned State v. Smith. Both Rule 60(b)(6) and leave to amend were denied. In reaching that conclusion, the district court reasoned that Mr. Leonor's allegations grounded on State v. Smith provided a new claim for relief that required authorization from this Court to raise it in a second habeas petition. See Leonor v. Houston, WL 4325714, at *2, Fn. 1 ("These allegations are based upon Nebraska law that did not exist at the time of Leonor's habeas petition."). COA was not granted by this Court. See Leonor v. Houston, 2018 WL 1989641.

That being said, Mr. Leonor has established that his State v. Smith Due-Process Claim is a new claim not available at the time of his § 2254 habeas petition in line with § 2244(b)(1). Mr. Leonor has also established that the postconviction court had been incorrect in its holdings that Mr. Leonor's State v. Smith Due-Process Claim could have been raised in postconviction proceedings pre-State v. Smith. Further, Mr. Leonor has shown that he has been diligently pursuing his State v. Smith Due Process Claim in the State courts.

III.

THE FACTUAL PREDICATE FOR THE CLAIM COULD NOT HAVE BEEN DISCOVERED PREVIOUSLY THROUGH THE EXERCISE OF DUE DILIGENCE

As previously argued, State v. Smith was decided in 2011, however, unless

State v. Smith is held to apply retroactive to cases on collateral review, Mr. Leonor's factual predicate cannot be discovered through the exercise of due diligence. As previously shown in Part II, following the decision in State v. Smith Mr. Leonor has diligently sought relief for his Due Process Claims based on State v. Smith, however, his efforts have been frustrated, in part, by State v. William-Smith, 284 Neb. 636 (2012), where the Nebraska Supreme Court held that State v. Smith did not apply retroactively to cases on collateral reivew. Id. at 654-655.

When Montgomery v. Louisiana is decided on 2016, however, it can be fairly said that Mr. Leonor's factual predicate grounded in State v. Smith could have been discovered through the exercise of due diligence, of course, only if Mr. Leonor is correct in his position that State v. Smith provides a new substantive rule of constitutional law, which in essence, would apply retroactively to cases on collateral review as required by Montgomery v. Louisiana.

STATE V. SMITH IS A NEW SUBSTANTIVE RULE THAT APPLIES RETROACTIVELY ON COLLATERAL REVIEW TO MR. LEONOR

At the time Mr. Leonor was convicted and his convictions were affirmed, in 2002, the law in Nebraska held that the distinction between intentional murder in the second degree and the offense of manslaughter was the presence or absence of intent because manslaughter was all an unintentional offense. See State v. Jones, 245 Neb. 821 (1994).

Murder in the second degree is defined as causing the death of another "intentionally, but without premeditation." Neb. Rev. Stat. § 28-304(1). This definition has been intact since 1977. State v. Smith, 282 Neb. 720, 725 (2011).

Manslaughter is defined as committing that offense in two ways: that is, if one causes the death of another without malice upon a sudden quarrel, or if one kills another unintentionally while in the commission of an unlawful act." Neb.

Rev. Stat. § 28-305(1). Up to the time State v. Smith was decided, the language in § 28-305(1) had remained intact since 1977. See State v. Smith, 282 Neb. at 725. Thus, any changes to Nebraska Statutes §§ 28-304(1) and 28-305(1) have been the product of judicial interpretation.

Before State v. Jones was decided, the law in Nebraska concerning murder in the second degree and manslaughter upon a sudden quarrel, was that sudden-quarrel was an intentional crime, as held in State v. Pettit, 233 Neb. 436 (1989). Pettit was overruled by State v. Jones.

In 2011, State v. Smith is decided and overrules State v. Jones and reaffirms State v. Pettit. See State v. Smith, 282 Neb. at 734. In Smith, the Nebraska Supreme Court interpreted the law and held again that manslaughter upon a sudden quarrel is an intentional crime and the distinction between murder in the second degree and sudden-quarrel manslaughter is the presence or absence of the sudden quarrel. Id.

The question now is: is the decision in State v. Smith retroactive to cases in collateral review? If Mr. Leonor convinces this Court that State v. Smith is a substantive new rule of constitutional law because the change in the law there was protected by the U.S. Constitution, then State v. Smith applies retroactively to Mr. Leonor's collateral case.

Two cases, as far as Mr. Leonor knows of, have entertained this question though in somewhat a different posture: Iromuanya v. Frakes, 866 F.3d 872 (2017) and State v. Glass, 298 Neb. 598 (2018). Iromuanya does not cite to Montgomery v. Lousiana, and although State v. Glass does, it is only incidental its mentioning. As will be shown below, even though these two cases do not control the outcome of Mr. Leonor's case it is pertinent to compare them to Montgomery v. Louisiana.

In Iromuanya, this Court held that the change in the law concerning State v. Smith was a "state law problem, not a federal due process problem." Id. at 881. Importantly, however, is that this Court's assessment of State v. Smith in Iromuanya was through the lens of the "deferential standard of 28 U.S.C. § 2254(d)." Iromuanya, 866 F.3d at 877. Yet, it appears that this Court left open the possibility that if Iromuanya's case involved evidence of a sudden quarrel retroactivity would have been in his favor. Id. Iromuanya did not meet that criteria. Id. at 882.

According to Montgomery v. Louisiana, the issue of retroactivity is not any more a state law problem pertaining to substantive rules of law. "If ... the Constitution [not the state, not a court] establishes a rule and requires that the rule have retroactive application, then a state court's refusal to give the rule retroactive effect is reviewable by this Court." Montgomery, 136 S.Ct. at 727 (language in brackets added). This means, it was not the Nebraska Supreme Court that created the new rule of law announced in State v. Smith, but the Federal Constitution. Id. at 727; see also, Danforth v. Minnesota, 552 U.S. 264, 271 (2008)(the "source of a "new rule" is the Constitution itself, not any judicial power to create new rules of law."). Thus, the creation of the new rule in State v. Smith was governed by the U.S. Constitution which in its essence it is a constitutional new rule and it is not a state problem whether it is or not retroactive to cases on collateral review. Nebraska, however, misapprehends this constitutional concept. See State v. Glass, 298 Neb. at 609 ("[a]lthough State v. [] Smith announced a new manslaughter rule ... it did not recognized a new constitutional rule.")(emphasis added).

Moreover, it is also up to the Federal Constitution to decide whether the rule is "substantial" to be retroactive on collateral review. Montgomery, 136

S.Ct. at 729 ("[W]hen 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.")(emphasis added).

The constitutional new rule announced in State v. Smith is a substantive rule. Substantive new rules include "decisions that narrow the scope of a criminal statute by interpreting its terms." Welch v. United States, 136 S.Ct. 1257, 1265 (2016). Also "a decision that modifies the elements of an offense is normally substantive rather than procedural." See Schriro v. Summerlin, 542 U.S. 348, 354 (2004).

The Nebraska Supreme Court admits that, in State v. Smith it "**interpreted** the language of the manslaughter statute [i.e., its terms] to **clarify** the intent requirement for sudden quarrel manslaughter and dispel the confusion between the statutory crimes of second degree murder and sudden quarrel manslaughter." State v. Glass, 298 Neb. at 610 (emphasis added): See also State v. Hinrichsen, 292 Neb. 611, 622 (2016)("Based on the **clarification** of the of the elements of the crimes of second degree murder and voluntary manslaughter, we conclude that the second degree to manslaughter step instruction given in Smith was incorrect.") (emphasis added). The clarification of the terms of the elements of the crimes of murder in the second degree and sudden quarrel, as done in State v. Smith, is what the U.S. Supreme Court in Welch v. United States defines as a substantive rule. Id. 136 S.Ct. at 1265.

These two statutes, however, were not only clarified by interpreting their terms in State v. Smith, but also by making sudden quarrel manslaughter an intentional offense, it means the element of "intent" was modified into § 28-305(1)--the manslaughter statute. Also, the "absence of sudden quarrel" is an additional element added into § 28-304(1)--the murder in the second degree statute. See

State v. Hinrichsen, 292 Neb. at 634 ("In Smith, the jury was prevented from considering the crucial issue--whether the killing, although intentional, was the result of a sudden quarrel. The existence of a sudden quarrel was an **additional element** the jury needed to consider, but the instruction prevented it from doing so.")(emphasis added). Thus, in line with Schriro v. Summerlin, the modification of the elements of murder in the second degree and sudden quarrel manslaughter, constitute a susbtantive rule. Schriro, 542 U.S. at 354.

Further, as previously mentioned, ante Part II, p. 4, the Nebraska Supreme Court in State v. Glass, held that its decision in State v. Smith was not a substantive rule of law. In reaching that conclusion, the Glass Court held:

> We conclude that the holding in State v. [] Smith that it is improper for a jury to consider second degree murder without simultaneously considering sudden quarrel manslaughter, is a change to the acceptable method for the jury to deliberate and is a procedural change "regulat[ing] only the **manner of determining** the defendant's culpability."

Id. at 610 (original emphasis).

The Nebraska Supreme Court in Glass completely ignored that it had clarified and modified the elements of murder in the second degree and sudden quarrel manslaughter. The procedural aspect that the Glass Court speaks about is simply the result of the substantive change. Which is obvious, after it did a substantive change it had to create a procedural change in order for the modified elements to operate constitutionally. In fact, a similar approach was considered by the Supreme Court in Montgomery v. Louisiana, which was referred to as " 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. 136 S.Ct. at 734 ("There are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within

the category of persons whom the law may no longer punish.")(original quotations and emphasis); see also, Wright v. United States, 902 F.3d 868, 871-872 (8th Cir. 2018)(acknowledging this procedural requirement to implement s substantive rule approach in Montgomery).

That being said, this Court or the federal district court is not bound by the decision in State v. Glass because there is no deferential owed to the Nebraska Supreme Court. In any event, this appeals court can review the State v. Glass decision through the Constitution lens since that case controlled Mr. Leonor's case during exhaustion of his State v. Smith Due Process Claims.

Therefore, the decision in State v. Smith is a new substantive rule of constitutional law that applies retroactively to Mr. Leonor's collateral proceeding. As such, the factual predicate founded in State v. Smith, has been discovered through the exercise of due diligence after the decision in Montgomery v. Louisiana, commanding that Nebraska shall apply retroactively a substantive rule of law.

IV.

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 HIM GUILTY OF THE UNDERLYING OFFENSE

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]." MCquigging v. Perkins, 569 U.S. 383, 395 (2013). However, 'Congress ... required second or successive habeas petitioners attmepting 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." Id. at 396. Being that the standard governing here is the miscarriage of justice, but to a higher degree, Mr. Leonor would make

reference to Bousley v. United States, 523 U.S. 614 (1998), which held that to establish the miscarriage of justice exception one must "show it is more likely than not that no reasonable juror would have convicted him." Bousley permits petitioners to collaterally attack a conviction on the basis of intervening decisions modifying the substantive criminal law defining the offense, despite procedural default, if the petitioner makes a showing of actual innocence--that the petitioner did not commit the offense as modified by a change in the law that descriminalizes the conduct. See United States v. Morgan, 230 F.3d 1067 (8th Cir. 2000)(citing Bousley).

Mr. Leonor's miscarriage of justice claim is premised in Bousley and Morgan, of course, but hold to a higher standard.

As previously argued above, ante Part III, pp. 7-12, Mr. Leonor has made a showing that there was an intervening decision modifying controlling precedent between the time of Mr. Leonor's convictions and collateral proceedings. That is, at the time of Mr. Leonor's convictions in 2000 and when his convictions were affirmed in 2002, the controlling law was State v. Jones which held that the distinction between murder in the second degree and sudden-quarrel manslaughter was the presence or absence of intent, being that murder in the second degree was an intentional crime and sudden-quarrel manslaughter was not.

In 2011, nine years after Mr. Leonor's convictions were final, State v. Smith was decided and intervened by overruling State v. Jones, and by modifying the elements of murder in the second degree and sudden-quarrel manslaughter. That is, State v. Smith held that sudden-quarrel manslaughter is an intentional crime same as murder in the second degree. Smith, 282 Neb. at 734.

As modified the law between the interplay of murder in the second degree and sudden quarrel manslaughter, State v. Smith descriminalized the conduct by

which Mr. Leonor was convicted of, which now constitutes that his actions do not constitute the crime of murder in the second degree, but intentional manslaughter due to the presence of a sudden quarrel.

The definition of a sudden quarrel is as follows:

> A sudden quarrel is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control. It 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. The question is whether there existed reasonable and adequate provocation to excite one's passion and obscure and disturn one's power of reasoning to the extent that one acted rashly and from passion, without due deliberation and reflection, rather than from judgment.

State v. Abdulkadir, 286 Neb. 417, 425-426 (2013).

The evidence presented against Mr. Leonor, alone, proves the presence of a sudden quarrel. This means it is evidence "clear and convincing" because it was presented not by Mr. Leonor, but by the State. That is, the State presented evidence that the victims-members of a rival gang known as "Lomas," sought to beef up with Mr. Leonor and his companion--who were members of the gang known as "Surenos." That is, the victims threw rival gang signs at Mr. Leonor and his companion meaning they wanted war, and Mr. Leonor's companion responded to the victims' provocation by throwing gang signs back, and consequently he started shooting at the victims' car while Mr. Leonor was driving his vehicle. See (Exhibit # 2)("Malo" is referring to Mr. Leonor, and "Creeper" is referring to Mr. Leonor's companion); see also State v. Leonor, 263 Neb. at 97 ("We determined 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[.]").

The provocation of the victims was the evidence upon which the Nebraska

Supreme Court had sustained Mr. Leonor's convictions for murder in the second degree. In other words, the Nebraska Supreme Court, under the law at the time, found the provocation of the victims and the reaction taken to that provocation (the shooting and the killing), had been intentional. Now that the law, as modified reduces the conduct of sudden quarrel-provocation to intentional manslaughter, the Nebraska Supreme Court's reliance on that evidence as sufficient to sustain Mr. Leonor's convictions as intentional, it is clear and convincing evidence that Mr. Leonor is innocent of murder in the second degree, but of the lesser crime of manslaughter, which is intentional too.

The State's evidence also showed that since the middle of 1998 there was a marked increase in violence in south Omaha involving Lomas and Surenos gang members, and that it escalated significantly in 1999, as to homicides and drive-by shootings. (Exhibit # 3). This shooting occurred in 1999. See State v. Leonor, 263 Neb. at 89 (November 22, 1999, Incident). The State also presented evidence that the mother of a Sureno member had been shot days before by a Lomas gang member. (Exhibit # 4). This evidence, together with the provocation evidence, clearly and convincing shows that following the provocation of the victims, Mr. Leonor's companion was not going to stand the chance of him or Mr. Leonor getting shot or killed by the Lomas gang members who had provoked them by calling for war initiated by the Lomas gang signs. Mr. Leonor's companion did not have to wait to see if the victims were capable of doing it or if they had a gun. At the time, any confrontation between members of these two gangs involved a shooting or a homicide. See e.g., State v. Foster, 286 Neb. 826, 850-853 (2013)("general statements that gang members have guns and use them ... was a fact that would have been known by the jury as a matter of common knowledge.").

Mr. Leonor's jury heard all this evidence mentioned above of the presence of a sudden quarrel provocation, but did not know that they could have considered it to find Mr. Leonor innocent of intentional murder in the second degree, because the law at the time did not allow them to do so. Had they knew that evidence presented by the State of the presence of a sudden quarrel provocation constituted also an intentional killing, i.e., manslaughter upon a sudden quarrel, no reasonable fact finder would have found him guilty of the underlying offense.

In Bousley v. United States, the Supreme Court allowed the petitioner to show that he was actual innocent by providing evidence that "demonstrate no more than that he did not "use" a firearm as that term is defined in Bailey." See Bousley, 523 U.S. at 624. As for the Government, it was not limited to rebut the petitioner's evidence of "any showing that [he] might [have] take[n]." Id. Under that approach, the miscarriage of justice standard that "it is more likely than not that no reasonable juror would have convicted him," Id. at 623, would have been met. That is, the district court was required to conduct an assessment of credibility by weighing both the petitioner's and the Government's evidence.

Here, Mr. Leonor surpasses the miscarriage standard in Bousley, and meets the miscarriage of justice standard in § 2244(b)(2)(B)(ii). That is, Mr. Leonor's "clear and convincing evidence" lies on the State's own evidence and the Nebraska Supreme Court's upholding of that evidence as sufficient. cf. Wadlington v. United States, 428 F.3d 779, 783 (8th Cir. 2005)("a party generally cannot demonstrate actual innocence where there is sufficient evidence to support a conviction.").

Mr. Leonor has met both standards of miscarriage of justice, the Bousley, which is permissible, see Davis v. Kelley, 854 F.3d 967 (2017)(petitioner sought

permission to file a successive petition, in part, argued that the miscarriage exception of justice entitled him to successive petition relief. This Court found that Davis did not assert he was actual innocent, thus the exception did not apply), and the "clear and convincing evidence" situated in § 2244(b)(2)(B)(ii).

V.

IN LIGHT OF THE CLEAR AND CONVINCING EVIDENCE, IT IS SUFFICIENT TO ESTABLISH THAT, BUT FOR CONSTITUTIONAL ERROR, NO REASONABLE FACT FINDER WOULD HAVE FOUND HIM GUILTY OF THE UNDERLYING OFFENSE

The Constitutional error that Mr. Leonor seeks to raise in a second habeas petition embraces, as required by § 2244(b)(2)(B)(i) and (ii), see Engesser v. Dooley, 686 F.3d 928, 936-937 (2012), the factual predicate in question, and the facts that show innocence. Also, the constitutional error, as previously said, ante Part II, p. 6, is a new claim. Leonor v. Houston, WL 4325714, at * 2, Fn. 1 ("These allegations are based upon Nebraska law that did not exist at the time of Leonor's habeas petition.").

The new claim that Mr. Leonor seeks to raise in a second habeas petitition is as follows:

> GROUND ONE, Claim A: Mr. Leonor's 14th Amendment Due Process Constitutional right was violated because his jury was not instructed on the element of "absence of sudden quarrel," the fact that distinguishes intentional-murder in the second degree from intentional manslaughter, which the State must have proven beyond a reasonable doubt. As a result, the burden was shifted on Mr. Leonor.

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

The absence of a sudden quarrel, when appropiate, is not an affirmative defense, but an element of murder in the second degree. This means, the presence

of a sudden quarrel is the fact that distinguishes intentional-murder in the second degree from intentional manslaughter. State v. Smith, 282 Neb. at 733-734. Mr. Leonor was charged with second degree murder-an intentional offense, and as shown above, ante Part IV, pp. 14-16, evidence of the presence of a sudden quarrel exists in his case (which is incorporated it here by the mentioning of it). As such, Mr. Leonor is entitled to have his jury consider whether the intentional offense was the result of a sudden quarrel, which carries a sentence of no more than 20 years imprisonment. Under the convictions for murder in the second degree he was sentenced to 20 years to life for each count, plus the sentences for the weapons charges linked to the murders. cf. U.S. v. Pirani, 406 F.3d 543, 554 (2005)("It is a miscarriage of justice [justifying remand] to givea person an illegal sentence that increases his punishment, just as it is to convict an innocent person.")(citation omitted).

For this to be accomplished, the trial court is required to submit to Mr. Leonor's jury, and the state is required to prove beyond a reasonable doubt, the absence of a sudden quarrel as an "additional element" of intentional murder in the second degree. State v. Hinrichsen, 292 Neb. at 634.

Mr. Leonor was tried as an aider and abettor. State v. Leonor, 263 Neb. at 97. Even though at the time of his convictions Nebraska law stated that sudden-quarrel manslaughter was an unintentional offense, see State v. Jones, 245 Neb. at 830., however, Mr. Leonor's jury was instructed that they could have convicted him of either "intentional" murder in the second degree, or "intentional" manslaughter. (Exhibit # 1)(Jury Instruction No. 6). The unfairness that Mr. Leonor faced with Jury Instruction No. 6, in conjuction with all the jury instructions is, that by law, the State did not have to prove any fact that

would have distinguished these two intentional offenses; worse, the State did not even have to prove intent because by the way the jury was instructed in Jury Instruction No. 6, the intent was already implied. And since the law at the time did not provide any fact that would have distinguished these two intentional crimes, Mr. Leonor could not have brought as a defense anything to seek a conviction for manslaughter. Mr. Leonor believes that he was found guilty of intentional murder in the second degree because the jury may have thought that he had to prove the difference between the two intentional crimes. Mr. Leonor was entitled to remain silent by the U.S. Constitution.

This violation of due process amounts to structural error. And even if it does not, the violation was prejudicial. That is, the State failed to prove beyond a reasonable doubt the absence of a sudden quarrel in all of its criteria, and as a result, the burden was shifted to Mr. Leonor. The trial court erred in no instructing Mr. Leonor's jury on the element of "absence of sudden quarrel." In finding Mr. Leonor guilty of murder in the second degree, his jury was influenced by thinking that he had failed to prove the fact that distinguished intentional murder in the second degree from intentional manslaughter. (Exhibit # 1). Thus, the error was prejudicial. Bretch v. Abrahamson, 507 U.S. 619, 638 (1993); State v. Trice, 286 Neb. 183, 192 (2013)("because there was evidence--although slight--upon which a jury could have convicted Trice for sudden quarrel manslaughter, that error was prejudicial."); Iromuanya v. Frakes, 866 F.3d at 881-882; Alarcon-Chavez v. Nebraska, 2018 WL 4701309, * 12 (Alarcon-Chavez's claim might have some merit if there were any evidentiary basis for finding that the salient issue was the distinction between second degree murder and manslaughter, as it was in Smith).

Therefore, had Mr. Leonor's jury been instructed that the presence of a sudden quarrel entitles him to manslaughter his jury would have found him no guilty

of murder in the second degree.

GROUND ONE, Claim B: NEBRASKA'S STATUTE FOR MURDER IN THE SECOND DEGREE AND THE DEFINITION OF SUDDEN QUARREL ARE UNCONSTITUTIONAL UNDER THE CONSTITUTION'S PROHIBITION OF VAGUE CRIMINAL LAWS

In no case, does Nebraska's statute, § 28-304(1)-for murder in the second degree place the burden of proving the one fact that distinguishes second degree murder from sudden quarrel manslaughter on the state. Nor does it give a fair warning of what a defendant's burden will be regarding a defense against murder in the second degree. This lack of warning causes the presumption of that fact from no evidence and permits the arbitrary enforcement of second degree murder rendering the criminal statute unconstitutional on its face.

Pursuant to State v. Smith, it is required that if enough evidence of a sudden quarrel is revealed at trial, the trial court must give the jury a murder in the second degree instruction to include that the state has the duty to prove the absence of a sudden quarrel. State v. Hinrichsen, 292 Neb. at 634. This practice does not save § 28-304(1) from vagueness.

First, the State is under no constitutional obligation to do anything in regards to "absence of the sudden quarrel" as an element because that element is not part of § 28-304(1). See Patterson v. New York, 432 U.S. 197, 210 (1977) (Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged).

The prosecution can arbitrarily choose to not present any evidence of a sudden quarrel in a murder in the second degree case even when it had evidence of it. Thus, in order for a defendant to be entitled to the State v. Smith promised instruction, he is forced to give up his right to remain silent and produce therefore evidence of the sudden quarrel even if that evidence is in the hands of the State. That leads to arbitrariness and discrimination.

Second, the police or prosecutors can arbitrarily choose to charge a defendant with second degree murder and ignore evidence of a sudden quarrel. Without an ascertainable standard not only police and prosecutors, but also courts can arbitrarily choose who or when a defendant quilifies for a conviction on manslaughter upon a sudden quarrel instead of murder in the second degree. i.e., to a sentence of a maximum to life in prison or to a maximum of 20 years in prison. That's too much discretion. Thus, § 28-304(1) permits a standarless sweep that allows policeman, prosecutors, and judges to pursue their predilections. Consider for example, this Court's assessment of whether there is evidence of a sudden quarrel in Mr. Leonor's case. How's this Court determining the assessment. Based on what? What is the State doing in that regard? See Johnson v. United States, 135 S.Ct. 2551, 2557 (2015)("How does one go about deciding what kind of conduct the ordinary cases" involves? A statistical analysis of the state reporter? a survey? Expert evidence? Google? Gut instinct?").

The definition of "sudden quarrel" is also vague. Its definition says that it applies only to a "reasonable person." State v. Dubray, 289 Neb. 208, 242 (2014)(The reasonable person test is a reference to a hypothetical ordinary person. The concept of manslaughter is a concession to the failty of human nature, but it was not intended to excuse a defendant's subjective personality flaws.). Who is an "ordinary" person in the eyes of police, jurors, courts, prosecutors? How it is determined whether a defendant has or not personality flaws? What type of personality flaws is a juror, a prosecutor, a police man, a judge looking for before determining whether a defendant is a reasonable person? Does a gang member has personality flaws? Is he a reasonable person? How about a person of color? or the status of a person? Perhaps being illegal in the country is not a reasonable person. This definition allows too much discretion and discrimination, as well

arbitrariness.

Both the definition of sudden quarrel and the functioning of § 28-304(1) based on State v. Smith, are judicial legislation and this violates the guarantee of separation of powers under the Nebraska Constitution and thus it is a violation of the 14th Amendment to the U.S. Constitution.

Therefore, the definition of sudden quarrel and § 28-304(1) violate the 14th Amendment, Due Process Clause prohibiting the enforcement of vague laws.

****

Through these Due Process Claims raised above based on State v. Smith, the standard under § 2244(b)(2)(B)(i), (ii), is met. That is, the factual predicate, the facts underlying the claims, and the Due Process Claims go hand to hand in harmony, as the language of that provisions reads. The constitutional error is there, and the facts that supported, by clear and convincing evidence, is sufficient to establish that no reasonable fact finder would have found Mr. Leonor of murder in the second degree.

For instance, if § 28-304(1) is declared vague in violation of Due Process, as well the definition of sudden quarrel, it means they are "no law at all." See United States v. Davis, 139 S.Ct. 2319, 2323 (2019). This means, without a statute no reasonable fact finder would find Mr. Leonor guilty of murder in the second degree. It should be noted that Mr. Leonor raised the challenge to the statute claim in his previous application for permission to file a second habeas petition. Leonor v. Frakes, 17-1491 (application). This claim, too, at the time was under exhaustion in the state courts. But since no second habeas petition was granted Mr. Leonor is no barred from raising it here. Magwood v. Patterson, 561 U.S. 320, 332-334 (2010). Therefore, this Due Process Claim is proper here too.

VI.

STATE V. SMITH IS A NEW SUBSTANTIVE RULE OF LAW RETROACTIVE ON COLLATERAL REVIEW

Mr. Leonor advances that his claim, see Part V, pp. 17-19, relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. See § 2244(b)(2)(A).

At least, in the context of this case where the new rule was created by the Nebraska Supreme Court and not the U.S. Supreme Court, the U.S. Supreme Court in Montgomery v. Lousiana was clear 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." Id. 136 S.Ct. at 729. Thus, if the new rule announced in State v. Smith is a substantive rule of constitutional law, Montgomery commands that that rule be retroactive to Mr. Leonor on collateral review.

The U.S. Constitution, here, commands that the rule announced in State v. Smith is a substantive rule of Constitutional law, which is required as stated in Welch v. United States and Schriro v. Summerlin, as Mr. Leonor argued above, see ante Part III, pp. 7-12, which is incorparated here by the mentioning of it. In fact, in Tyler v. Cain, 533 U.S. 656, 669 (2001)(Justice O.Connor concurring), Justice O.Connor "reasoned that the Court can make "a new rule retroactive through multiple holdings that logically dictate the retroactivity of the new rule." See Goodwin v. Steele, 814 F.3d 901, 904 (8th Cir. 2014). The holdings in Welch v. United States, Schriro v. Summerlin, and Montgomery v. Louisiana, logically dictate the retroactivity of State v. Smith to Mr. Leonor's collateral case.

Thus, State v. Smith is a new rule that applies retroactively on collateral

review, as held by the U.S. Supreme Court in Montgomery v. Louisiana.

VII.

MR. LEONOR IS ENTITLED TO AMENDMENT AND THE APPOINTMENT OF COUNSEL

This is an amended application seeking permission to file a second habeas corpus petition. There are facts that Mr. Leonor cannot substantiate at this time from the record, such as the facts in his argument that he had presented his Due Process claim diligently for exhaustion in the State courts, see ante Part II, pp. 3-5. It is Mr. Leonor's understanding that the "record is what a federal court reviews in a successive petition." Engesser v. Dooley, 686 F.3d at 937. A couple of years ago, the Nebraska State Penitentiary where Mr. Leonor is incarcerated implemented a regulation requiring prisoners to get rid of excessiveness of property that included legal papers that did not fit in the cell's locker, otherwise anything found outside the locker would be confiscated and disposed of. Mr. Leonor sent all his legal papers/documents to his family keeping in mind that if he needed them he would ask for them. Unfortunately, the prison regulations do not allow legal documents entering the facility through the mail room unless they come from an attorney or the courts. Mr. Leonor does not have an attorney. Thus, he cannot retrieve at the moment the documents to show that he is being pursuing his Due Process diligently in the State courts.

With the assistance of an attorney, Mr. Leonor will be able to retrieve the pertinent documents to be presented as a record before this Court to substantiate his allegations seeking to file a successive habeas petition. That, of course, would required a slight amendment to this Amended application for leave to file a successive habeas petition. Not having said record Mr. Leonor faces a disadvantage from the Respondent which is crucial to assessment of this Court in

granting or denying his application.

VIII.

MR. LEONOR HAS MET THE PRIMA FACIE SHOWING HE IS ENTITLED TO FILE A SECOND HABEAS PETITION

As argued at Part III, pp. 6-12, Mr. Leonor brings a new factual predicate for his Constitutional Due Process claim, in line with § 2244(b)(2)(B)(i). And as argued at Part IV, pp. 12-17, the facts underlying his Due Process claim show innocence. And as also argued in Part V, pp. 17-20, he would not have been convicted of murder in the second degree, but for the constitutional error.

In addition, Mr. Leonor has also met the requirement that his new claim is based on a new substantive rule that the U.S. Supreme Court makes retroactive to cases on collateral review, see ante Part VI, p. 20, which if granted, then it eliminates any assessment under § 2244(b)(2)(B)(i) and (ii). See § 2244(b)(2)(A) (the word "or," if used properly, is a disjunctive from § 2244(b)(2)(B)).

Therefore, under § 2244(b)(3)(C), this Court is authorized to grant Mr. Leonor's application for leave to file a second habeas petition under § 2254, because he has established a prima facie showing that he is entitled to that opportunity.

Respectfully submitted on this 15th day of October, 2019, by,

JUAN LUIS LEONOR-Petitioner

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

DATED: 10-15-19

JUAN LEONOR DOC# 54664
P.O. BOX 22500
LINCOLN, NE 68542-2500

APPENDIX D

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COURT OF DOUGLAS COUNTY, NEBRASKA

Doc. 149 No. 834

State of Nebraska,
Plaintiff,

V.

Juan Luis Leonor,
Defendant.

SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF

COMES NOW, Juan Luis Leonor, the defendant (hereinafter "Leonor"), pursuant to Neb.Rev.Stat. § 29-3001 through § 29-3004 et seq. (reissue 1995), and hereby moves this Court to vacate and set aside the judgments of conviction and sentence that were entered against him in the above entitled case.

ISSUE 1

LEONOR'S NEWLY DISCOVERED EVIDENCE SHOWS ACTUAL INNOCENCE, THEREFORE, HIS CONVICTION IS IN VIOLATION OF DUE PROCESS UNDER THE NEBRASKA CONSTITUTION AND IN VIOLATION OF THE U.S. CONSTITUTION, EIGHT AMENDMENT –under Herrera V. Collins.

ISSUE 2

LEONOR WAS DENIED HIS CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND ADEQUATE DEFENSE AND DUE PROCESS UNDER THE NEBRASKA AND U.S. CONSTITUTIONS BECAUSE DUE TO THE INCORRECT DECISION MADE IN *State V. Jones*, 245 Neb. 821 (1994), WHICH HELD THAT "[t]here is not requirement of an intention to kill in committing manslaughter. ... [that,] The distinction between second degree murder and manslaughter upon a sudden quarrel is the presence or absence of an intention to kill," WHICH HAD DEPRIVED LEONOR FROM BRINGING A DEFENSE ON INTENTIONAL SUDDEN QUARREL AND FAILED TO INFORM LEONOR OF HIS BURDEN OR THE STANDARD OF PROOF FOR A SUDDEN QUARREL.

ISSUE 7

LEONOR WAS DENIED HIS RIGHTS TO FAIR TRIAL, DUE PROCESS AND RIGHT TO EFFECTIVE COUNSEL UNDER THE U.S. AND NEBRASKA CONSTITUTIONS WHEN TRIAL COUNSEL FAILED TO OBJECT WHEN THE PROSECUTOR, in its case in chief, and through leading questions, INTRODUCED, IMPROPER, HEARSAY, FALSE, FABRICATED AND INADMISSIBLE substantial evidence THROUGH THE TESTIMONY OF ITS WITNESSES, Gerardo Ortiz, Jose Hernandez, Arthur Carter, Detective Strong, Daniel Bredow, Mr. Wysocky.

ISSUE 8

LEONOR WAS DENIED HIS RIGHT TO A FAIR TRIAL, HIS RIGHT TO A COMPLETE DEFENSE AND HIS RIGHT TO A DUE PROCESS UNDER THE U.S. AND NEBRASKA CONSTITUTIONS, BECAUSE THE STATE BROUGHT LEONOR TO TRIAL WITHOUT HAVING DAVID GONZALES AVAILABLE TO TESTIFY, when the prosecutor's theory of the case was that Leonor had aided and abetted David Gonzales.

ISSUE 9

LEONOR WAS DENIED HIS RIGHTS TO DUE PROCESS, FAIR TRIAL AND EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE U.S. AND NEBRASKA CONSTITUTIONS WHEN TRIAL COUNSEL FAILED TO INVESTIGATE EVIDENCE PRESENTED BY THE STATE AND TO OBTAIN INDEPENDENT EVIDENCE AND INDEPENDENT EXAMINATION OF THE BULLET REMOVED FROM the victim Medrano.(This also constituted plain error.)_

ISSUE 10

THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT LEONOR COMMITTED INTENTIONAL SECOND DEGREE MURDER, IN VIOLATION OF THE U.S. AND NEBRASKA CONSTITUTIONS.

ISSUE 11

CUMULATIVE ERROR

****

All this evidence above that trial counsel failed to investigate and obtain, was all Leonor needed to take an innocence defense in his trial, something that Leonor has contended since his arrest. Trial counsel knew that Ortiz drove a light brown car.

Leonor asserts that ineffective assistance of counsel exists under U.S. V. Cronic, but in the alternative, it constitutes ineffective assistance of counsel under Strickland V. Washington.

Leonor prays this Court would entitle Leonor to an evidentiary hearing and thereafter to grant him post-conviction relief. Leonor also asserts that plain error exists.

ARGUMENT 10

THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT LEONOR COMMITTED INTENTIONAL SECOND DEGREE MURDER, IN VIOLATION OF THE U.S. AND NEBRASKA CONSTITUTIONS.

Leonor appealed his conviction for second degree murder arguing on appeal that "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 because Medrano was a gang member of a rival gang, Gonzales intended to kill them." (Exhibit # 4: Appellant's brief at p. 17.) As such, Leonor argued that "the facts of this case suggest that the crime of manslaughter was committed .... Manslaughter is the killing of another, without malice, ***upon a sudden quarrel***, or causes the death of another unintentionally while in the commission of an unlawful act. 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.)

The argument made by Leonor on appeal was based on the premise that evidence existed at trial of adequate provocation (BOE 181: 13-22), and that based on the evidence presented establishing the violent warfare of killings and shootings among the Lomas and Surenos (*BOE* 44:15 – 45:12), Gonzales or Leonor had acted ***unintentionally*** upon a sudden quarrel, or while in the commission of an unlawful act, resulting in the killings of

Medrano and Valadez, because Gonzales or Leonor were acting in the heat of passion due to the fact that, ***had*** Gonzales or Leonor ignored the provocation, they could have been shot or killed. That their acts were not intended to kill the victims, but simply they were responding to the threatening provocation.

The Nebraska Supreme Court affirmed the second degree murder convictions finding that the state had proven beyond a reasonable doubt all the elements. State V. Leonor, 263 Neb. at 97. (The Court again emphasized that "***evidence showed that [Leonor] and Gonzales had shot someone who had thrown a Lomas gang sign at them***," and that Leonor and Gonzales "follow[ed] the victim's car, shooting at it, until the victim's car hit a pole.") i.e., that the crime that Leonor had been intentional.

Leonor did not win on direct appeal because manslaughter was an unintentional crime, even upon a sudden quarrel. However, in State V. Smith, the Nebraska Supreme Court now correctly finds that, "Provocation is that which incites another to do something." Id. 734. "[P]rovocation not only causes anger; it motivates the actor to want to kill the provoker. Proof, then, of adequate provocation does not negat[e] intent. It magnifies it." Id.

Leonor could not have argued that the crime, even though could have been *intentional,* the evidence however defined that a crime of intentional manslaughter –upon a sudden quarrel was committed. That is because State V. Jones prohibited Leonor from bringing that argument. Id. 245 Neb. 821, at 830, n.6 (1994) ("[T]here is not requirement of an intention to kill in committing manslaughter. The distinction between second degree murder and manslaughter upon a sudden quarrel is the presence or absence of an intention to kill.")

The Nebraska Supreme Court recently, in State V. Smith, 282 Neb. 720, 735 (2012), held that a step instruction that did not permit the jury to consider convicting Smith of intentionally killing Harris as a result of a sudden quarrel was an incorrect statement of the law. Id. 734., and that the determination in State V. Jones, was an error. Id. at 732-733. The Court further stated: "[W]ith respect to sudden quarrel manslaughter, the distinguishing factor is that the killing, even if intentional, was the result of a legally recognized provocation. ..." State V. Smith, 282 Neb. at 732. "In the absence of some provocation, a defendant's anger with the victim is not sufficient to establish the requisite

of heat of passion. Nor does evidence of a string of prior arguments and a continuing dispute without any indication of some sort of instant incitement constitute a sufficient showing to warrant a voluntary manslaughter instruction. *Id.* at 735.

"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." *Neb. Rev. Stat.* § 28-305(1). A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation. *Neb. Rev. Stat.* § 28-304(1).

The evidence at trial, and as the Nebraska Supreme Court found, establishes that Leonor at the most committed a crime of intentional manslaughter upon a sudden quarrel. The evidence adduced at trial showed that the causation of the killing of the victims was the result of a gang related provocation. At trial, Police Officer, Bruce Ferrell, testified that "since about the middle of 1998, there was a marked increase in violence in south Omaha involving Lomas and Surenos gang members, as well as other Hispanic gangs perpetrated by Surenos on other gangs. It escalated significantly in 1999. (*BOE* 44:15 – 45:12). Officer Ferrell defined that violent crimes were ***homicides*** or ***drive-by shootings***. (*BOE* 42:22-23) The State also offered evidence establishing that a mother of one of the Surenos gang member had been shot prior to this shooting by a Lomas gang member. (*BOE* 114:8-22)

The evidence available at trial clearly showed that the Surenos and Lomas were shooting at and killing each other. In fact, 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 gang members. Evidence further showed that the victims threw gang signs to Leonor and Gonzales, after which Gonzales threw Surenos gang signs back; then, the shooting ensued.

Leonor's respectfully prays that an evidentiary hearing be granted and thereafter, post-conviction relief.

Leonor seeks the appointment of counsel in this matter.

Dated this: March 9th, 2012

Juan Luis Leonor DOC # 54664

Verification

State of Nebraska)
) SS.
County of Lancaster)

COMES NOW Juan Luis Leonor, the defendant, pro se, being first duly sworn upon oath, hereby deposes and states he is the undersigned defendant in the above and foregoing cause of action (Successive Motion for Post-Conviction Relief); 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. This motion was filed by the defendant himself.

By,

Juan Luis Leonor DOC # 54664
P.O. Box 2500
Lincoln, NE 68542-2500

SUBSCRIBED AND SWORN to before me and in my presence on this 9th day of March 2012.

SEAL:

GENERAL NOTARY - State of Nebraska
BRADLEY S. EXSTROM
My Comm. Exp. March 2, 2014

Notary Public

APPENDIX E

JRT OF DOUGLAS COUNTY, NEBRASKA

THE STATE OF NEBRASKA,

Plaintiff,

vs.

JUAN LUIS LEONOR,

Defendant.

DOC. 149 PAGE 834
CR 10- 9042117

ORDER DENYING POSTCONVICTION RELIEF AND MOTION TO RECUSE

Defendant has filed several motions that are before the Court. Each is denied for the reasons stated below:

Factual and Procedural Background

Defendant was convicted after a jury trial of two counts of second degree murder and two counts of use of a deadly weapon to commit a felony. Defendant's convictions and sentences were affirmed by the Nebraska Supreme Court on February 1, 2002. *See State v. Leonor*, 263 Neb. 86, 638 N.W.2d 798 (2002). Defendant subsequently filed a motion for postconviction relief, which was denied by the Honorable Gerald Moran September 10, 2003. Defendant filed a successive motion for postconviction relief, which was again denied as being procedurally barred by the Honorable Gerald Moran October 2, 2008. Defendant has now filed a third motion for postconviction relief, along with motions for appointment of counsel and to recuse the postconviction judge.

Defendant's Motions

I. Successive motion for postconviction relief

Defendant's current motion makes several arguments based on ineffective assistance, due process violations, errors by the trial court and prosecutorial misconduct. The Nebraska

Supreme Court has explained the following with regard to successive motions for postconviction relief:

> The Nebraska Postconviction Act, Neb.Rev.Stat. § 29-3001 et seq. (Reissue 2008), is available to a defendant to show that his or her conviction was obtained in violation of his or her constitutional rights. *State v. Marshall, supra.* However, the need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity. *Id.* Therefore, an appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion. *Id.*
>
> In the instant case, the allegations in Sims' second motion for postconviction relief involve ineffective assistance of counsel claims against his trial and appellate counsel as well as Sims' claim that there was insufficient evidence to convict him. Sims previously raised, and this court rejected on direct appeal, Sims' claim that there was insufficient evidence to convict him. **Further, Sims' claims of ineffective assistance of counsel were known or knowable to Sims at the time of his direct appeal and his first motion for postconviction relief.**

State v. Sims, 277 Neb. 192, 761 N.W.2d 527 (2009) (emphasis added). Each of Defendant's claims were clearly "knowable" to him at the time of his direct appeal or two prior postconviction motions. Thus, these claims are procedurally barred.

The only claim worthy of separate discussion is Defendant's first claim, which alleges actual innocence based on newly discovered evidence. Defendant relies on *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009), to support his claim of actual innocence in an effort to avoid a procedural bar or the three year limitation imposed by § 29-2103 for presenting newly discovered evidence. *Lotter*, however, did not recognize "actual innocence" as a cognizable claim in Nebraska and this Court is unwilling to do so either. *Lotter*, 278 Neb. at 482, 771 N.W.2d at 564. Even if the Court were to acknowledge such a claim, it would fail because Defendant has not established an issue of actual evidence through the exhibits attached to his motion. *See Lotter, supra* (holding that even if actual innocence were a congnizable claim, the

defendant had failed to present anything to establish a claim of actual innocence and refute the evidence adduced at trial). Here, Defendant has offered an affidavit that solely relies on hearsay and another from an individual who did not testify at trial. Thus, the Court finds that even if actual innocence were a congnizable claim, Defendant has failed to establish actual innocence to refute the evidence adduced at trial, the same evidence which the Nebraska Supreme Court found sufficient to affirm Defendant's conviction on appeal.

II. Motion for appointment of postconviction counsel

Defendant has also requested postconviction counsel, which is denied. States are not obligated to provide postconviction relief procedures; therefore, when they do, the Due Process Clause of the United States Constitution does not require states to supply an attorney. *State v. Stewart*, 242 Neb. 712, 719, 496 N.W. 2d 524, 529 (1993). The Nebraska Supreme Court has stated that when "the assigned errors in the postconviction petition before the district court contain no justiciable issue of law or fact, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant. *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003). "When, however, the defendant's petition presents a justiciable issue to the district court for postconviction determination, an indigent defendant is entitled to counsel." *Id.*

III. Motion to Recuse

Defendant's motion to recuse requests recusal of the Honorable Gerald Moran, who presided over the trial and subsequent collateral attacks. Judge Moran has retired and therefore, this issue is moot and Defendant's request is overruled.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's successive motion for postconviction relief is denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's motion for postconviction counsel is denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's motion to recuse is denied.

DATED this 5th day of April, 2012.

BY THE COURT:

Marlon Polk
District Court Judge

APPENDIX F

000670097D01

T OF DOUGLAS COUNTY, NEBRASKA

State of Nebraska,) Doc. 149 No. 834

Plaintiff.) CR 10-9042117

Vs.) **MOTION TO ALTER OR**

Juan Luis Leonor,) **AMEND JUDGMENT**

Defendant.)

Comes Now, Juan Leonor, Pursuant to Neb. Rev. Stat. § 25-1329, and moves this Court to alter or amend its judgment entered on April 5, 2012.

Facts

Leonor filed his third motion for Post Conviction Relief, and this Court denied such motion finding that all of Leonor's arguments were procedurally barred because they "were clearly "knowable" to him at the time of his direct appeal or two prior postconviction motions." (Order Den. Post. Conv., p. 2)

Leonor now asserts through this motion that this Court erred in its conclusion that Leonor's claims are procedurally barred because they were "knowable" to Leonor in prior proceedings.

Argument

THE COURT WAS IN ERROR IN FINDING THAT LEONOR'S ISSUES WERE PROCEDURALLY BARRED BECAUSE THEY WERE "KNOWABLE" TO HIM

ISSUES 2, 3, 4, 5 & 10

First, Leonor's ISSUES 2, 3, 4, 5 and 10, are brought based on current decision made by the Nebraska Supreme Court in *State V. Smith*, 282 Neb. 720 (2011), which held that *State V. Jones*, 245 Neb. 821 (1994) was incorrect in holding that intent was a separation of second degree murder from manslaughter upon a sudden quarrel. *State V. Smith*, 282 Neb. at 732-733.

In considering whether Leonor was procedurally barred in his claims raised in his postconviction, this Court was bound to follow and apply the long standard given by the Nebraska Supreme Court; that is:

> "Once a motion for postconviction relief has been judicially determined, any subsequent motion for such relief from the same conviction and

sentence may be dismissed unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the prior motion was filed."

State V. Ryan, 257 Neb. 635, 647 (1999); State V. Sims, 277 Neb. 192 (2009)

This Court, citing State V. Sims, applied the incorrect standard. This Court used the language used by the Nebraska Supreme Court stating that "Sims' claims of ineffective assistance of counsel were known or knowable to sims at the time of his direct appeal and his first motion for postconviction relief," as being the standard for review or the standard applicable to Leonor, and denied Leonor's claims on this basis. i.e. That Leonor's claims were "knowable" to him at the time he filed his previous postconviction or his direct appeal. The Sims Court found that the defendant's claims were knowable to him after it found that the basis for relief asked was available to him. i.e. ***If the basis relied upon relief, on its face, were available to a defendant, the claims raised were then knowable to him.*** This is the question this Court was bound to ask itself. An example is State V. Boppre, 280 Neb 774 (2010):

> "Even assuming Boppre's due process claim can rest on the above allegation, his current motion is procedurally barred. The motion ***fails to allege when he discovered the alleged prosecutorial withholding of the aforementioned evidence.*** The motion for postconviction relief broadly states that it "is based in part upon information which has been recently received and is not requesting review of issues already litigated or decided." The motion also incorporates portions of M.M.'s "recently obtained sworn statement." Boppre fails ***to allege, however, that the information contained in this affidavit was unavailable before any of the numerous challenges already made to his convictions and sentences.***
>
> ...
>
> Further, the current petition for postconviction relief ***fails to specify which allegations, if any, were unavailable at the time Boppre filed his prior motions.***
>
> ...

Neither Boppre's current petition for postconviction relief nor his brief ***identifies any newly discovered evidence that Boppre was prevented from obtaining at the time of his previous motions and appeals"***

Id. 785-787. (Emphasis added.)

In Boppre, the Nebraska Supreme court *first* considered whether the evidence alleged to be newly discovered was "unavailable" to Boppre when he filed his previous proceedings for relief. The Court found that Boppre did not specify in his motion for postconviction whether his alleged newly discovered evidence was available and thus, that Boppre could not have shown that his allegations of ineffective assistance of counsel and prosecutorial misconduct "could not have [been] presented" before. *Id.* at 786-787.

Unlike State V. Boppre, Leonor did allege that the basis for relief in ISSUES 2, 3, 5 and 10, that intent was an element of sudden quarrel-manslaughter, were not available until the decision in State V. Smith. (Post. Conv., at pp. 4-5), and that "judicial and Equitable estoppel" applies to his case (Id. pp. 5-6.), and thus, he is entitled to the principles of this doctrines because the Nebraska Supreme Court decision in State V. Jones had made Leonor believed that that was the right law, that intent was not an element of manslaughter, which made inexistent the recent holding in State V. Smith, and thus, prevented Leonor from bringing his ISSUES 2, 3, 5, and 10, in his trial, direct appeal and first and second postconviction motions filed.

It seems that this Court overlooked this assertion of judicial and equitable estoppel which is the law and the law favors Leonor. This Court cannot ignore the law and as such this Court was in error. This Court was also in error because the current decision in *State V. Smith*, which is the basis for relief alleged in ISSUES 2, 3, 5, and 10, is newly discovered evidence that, on its face, was not available, muchless *knowable*, to Leonor when he had his trial, direct appeal, or any of his two prior postconviction motions.

In respect to ISSUE 4, Leonor argues ineffective assistance of counsel because his trial counsel did not object to the trial court given jury instructions which did not include that intent was an element of sudden quarrel-manslaughter, based on the recent decision in State V. Smith. This claim is not procedural barred for the same reasons stated above for ISSUES 2, 3, 5, and 10. This claim at the most can call for a conclusion that trial

counsel was not ineffective because trial counsel could not have objected to what the law on its face, was. i.e., that the law in State V. Jones was the only law available.

ISSUES 6,7, 8 & 9

Regarding ISSUE 6 & 7, they are not procedurally barred and the basis for relief was not available to Leonor. Leonor alleged that he discovered newly discovered evidence asserting that the evidence presented by the state was false and known to the prosecutor to be false, which is the basis for relief, and thus, that evidence discovered amounted to an allegation of due process.

It is true that Leonor knew that the state's witnesses (Hernandez, Ortiz and Carter) that testified that Leonor was involved in this shooting, was false because Leonor has always maintained that he was not involved in any way in this shooting. Leonor indeed brought an allegation in his first motion for postconviction relief arguing that their testimony was false. But the problem was that Leonor could not have proven that their testimony was false. Specifically their testimony about the gun used in this shooting being a 9mm. Leonor did not know what type of gun was used in this shooting. The only way to prove that their testimony was false was if these witnesses recanted their testimony and brought the truth out. That just recently happened with witness Arthur Carter, whom through his brother Victor Carter states that he testified falsely at trial and that his testimony was fabricated by police officers. (Post. Conv., at pp. 43-45.) Which is similar to what happened in *State V. Ryan*, 257 Neb. 635 (1999), in that the defendant brought an allegation on direct appeal that "Judge Finn had an improper communication with the Timm Family." *Id.* at 649. The Nebraska Supreme Court found that "there was not evidence in that record supporting such an allegation." *Id.* The defendant later brought his first motion for postconviction raising the same issue to no avail. *Id* at 649-650. Finally, the defendant brought a second postconviction motion alleging that newly discovered evidence –the basis for relief, showed that Judge Finn had an improper meeting with the Thimm Family, and thus that his Ex Parte allegation was not procedurally barred. The Nebraska Supreme court found that "the basis Ryan relie[d] upon for relief in [his] second postconviction proceeding was not available at the time his first postconviction motion was filed." Then, the Ryan Court said:

"If we were to determine that the Heppner ltter was available to Ryan during his prior postconviction proceeding, we would be requiring Creager to continue the investigation beyond Judge Finn's affidavit. This we are not prepared to do. Once Creager obtained the signed affidavit form Judge Finn swearing that no such meeting occurred, Creager was entitled to rely upon that information and end his investigation. Accordingly, we find that the Heppner letter falls into the second circumstance we have recognized as a new ground for relief. The letter is newly discovered evidence which was not available in the prior proceeding."

Id.

Leonor asserts that *State V. Ryan* is a great example exhibiting that just because it was knowable to Ryan that Judge Finn had an improper meeting with the victim's family, but Ryan could not have proven that fact, did not procedurally barred him later after he obtained newly discovered evidence that such meeting occurred, and as shown above, Ryan was able to re-raise his claim in a second posconviction motion. This case shows that the standard is not whether a claim was knowable to a defendant, but instead, it shows that the question always is whether the evidence in support of the claim was available when a defendant filed his previous proceedings for relief of the same conviction.

In an evidentiary hearing, Leonor is going to prove that Arthur Carter –through his own testimony, had testified falsely and that the state knew that his testimony was false, and thus that his due process right was violated.

As for the affidavit of David Gonzales, (Post. Conv., pp. 41-43), Leonor asserts that David Gonzales was not available to testify at trial, and the state did not make him available. This is not a situation in that Gonzales was available and he just did not want to testify. Rather, Gonzales was on the run and his whereabouts were unknown to Leonor. After Gonzales was arrested and convicted, in 2011, Gonzales reveals to Leonor *what had really happened* in the said shooting and asserts that he is willing to testify. In his affidavit Gonzales asserts that the evidence introduced by the prosecutor is false. And Leonor in an evidentiary hearing is going to prove that.

Leonor admits that in ISSUES 6 and 7, in part claims that the evidence was inadmissible and hearsay. This can be say that it is procedurally barred if viewed the claim like that. However, Leonor also alleges in these issues that the prosecutor's evidence was false. Viewing this claim, as that the prosecutor knew that the evidence was *false*, is not procedurally barred, because Leonor did not learn about this falsity until David Gonzales and Victor Carter came forth with this evidence, which happened years after Leonor filed his previous postconviction motions. This Court can view the allegations made as inadmissible and hearsay evidence just to aid the Court that the evidence was presented by the prosecutor was fallible.

Again, the law in State V. Boppre, and State V. Ryan, favors Leonor, and therefore, this Court was in error in holding otherwise because his ISSUES 6, 7, 8, and 9, are not procedurally barred.

Conclusion

Leonor respectfully prays that this court amend or alter its judgment denying Leonor's postconviction motion and grant an evidentiary hearing and the appointment of counsels to represent him.

Dated this 9th day of April, 2012., By,

Juan Luis Leonor

Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing was served to the state's attorney, hall of justice, 17th and farnam, Omaha, NE 68183, through U.S. Mail service, postage prepaid, this 9th day of April, 2012.

Juan Luis Leonor DOC# 54664
P.O Box 2500
Lincoln, NE 68542-2500

APPENDIX G

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910
2413 STATE CAPITOL
LINCOLN, NE 68509
(402) 471-3731

September 13, 2012

Juan Luis Leonor #54664
Penitentiary
P.O. Box 2500
Lincoln, NE 68542 2500

IN CASE OF: S-12-000394, State v. Juan L. Leonor

The following internal procedural submission or filing by a party:

Misc. Submission to Court - Jurisdiction **submitted or filed** 08/29/12

has been reviewed by the court and the following order entered:

Appeal dismissed. No final order or ruling on appellant's motion to alter or amend the judgment. See, Neb. Ct. R. App. P. § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(3); State v. Bellamy, 264 Neb. 784 (2002).

Respectfully,

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

IMPORTANT NOTICE

Please take note of the Supreme Court Rule Amendments regarding Neb. Ct. R. §§ 2-102, 2-106, 2-107, 2-109, 2-113, 2-115 and 2-116 regarding the elimination of the requirement for the filing of multiple copies of various pleadings.

APPENDIX H

000741768D01

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

STATE OF NEBRASKA,
Plaintiff,
VS.
JUAN L. LEONOR
DEFENDANT

) DOC. 149 NO. 834
) MOTION TO WITHDRAW
) LEONOR'S MOTION TO ALTER OR
) AMEND JUDGMENT

COMES NOW, Juan Luis Leonor, the defendant, and hereby moves the Court to enter an order dismissing Leonor's Motion to alter or Amend Judgment that Leonor submitted on April 9, 2012, and filed on April 11, 2012.

Leonor asserts that this Court has not entered an order in respect to said motion, and as such, Leonor would like to proceed to appeal this court's denial of his successive motion for postconviction relief, filed on May 30, 2012.

Leonor also asks the Court to file its order in the office of the Clerk so that Leonor can have record to appeal with.

Respectfully submitted ~~by~~ on this 25th day of September, 2012, by,

#15 FILED
IN DISTRICT COURT
DOUGLAS COUNTY NEBRASKA
OCT 01 2012
JOHN M. FRIEND
CLERK DISTRICT COURT

Juan Luis Leonor DOC# 54664
P.O. BOX 2500
Lincoln, NE 68542-2500

Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing Motion to withdraw Leonor's Motion to alter or Amend Judgment, was served to the state's attorney, Ms. Katie Benson, Hall of Justice, 17th and Farnam st., Omaha, Nebraska, 68183, via U.S. Mail service, postage prepaid, on this 25th day of September, 2012.

Juan Leonor DOC#54664
P.O. BOX 2500
Lincoln, NE 68542-2500

APPENDIX I

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASA

STATE OF NEBRASKA

Plaintiff,

Vs.

JUAN L. LEONOR,

Defendants.

Doc. 149 No. 834

CR10 9042117

ORDER TO DISMISS

FILED
JOURNAL CLERK
2012 OCT -3 PM 12: 17
CLERK DISTRICT COURT

THIS MATTER came before the Court on October 2, 2012, on Defendant/Appellant's Motion to Withdraw his Motion to Amend or Alter Judgment filed April 11, 2012. The Defendant/Appellant appeared Pro se. Being duly advised of the premises the Court finds the Motion should be granted and this matter dismissed.

IT IS SO ORDERED

DATED this 2nd day of October 2012.

BY THE COURT:

MARLON A. POLK
DISTRICT COURT JUDGE

J00112004D01

APPENDIX J

November 12, 2013

Juan Leonor DOC # 54664
P.O. Box 2500
Lincoln, NE 68542-2500

Mr. John Friend
Clerk of the District Court
Hall of Justice, Room 300
Omaha, NE 68183

Dear Mr. Friend:

Last week I contacted your office by phone to inquire about a "Motion to Withdraw" that I filed in respect to my postconviction Motion and Motion to Alter or Amend Judgment, both filed on 2012.

The Motion to Withdraw was to withdraw the Motion to Alter the Judgment entered on April 11, 2012. My Motion to Withdraw was submitted to the Court on September 25, 2012.

The person I have spoken on the phone regarding my Motion to Withdrawn said that the Motion was granted last year and decided last year, which I think is impossible because I was never notified of the Courts disposition. Can you please, verify this for me, and if it is true that the matter has been decided can you please explain to me was in charge of notifying me; the judge or this office?

Also, please, can you provide me with a disposition of

the Court on the Motion to Withdrawn, and if I have to pay, please let me know how much.

Thank you for your time in this matter; God bless you.

Respectfully,

Juan Leonor

APPENDIX K

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

STATE OF NEBRASKA,

Plaintiff,

VS.

JUAN L. LEONOR,

Defendant.

DOC. 149 No. 834

CR 10-9042117

MOTION TO VACATE OR MODIFY JUDGMENT

COMES NOW, Juan Luis Leonor, pro se, and hereby prays that this Court exercises its discretion to grant this motion to vacate under Neb.Rev.Stat. § 25-2001 and State V. Manning, 18 Neb. App. 545 (2010); State V. Haynes, 2014 Neb. App. LEXIS 29.

Leonor seeks to vacate and modify the Court's judgments entered on April 5, 2012, denying his successive postconviction motion and, on October 2, 2012, granting Leonor's motion to withdraw.

POWER TO VACATE

In State V. Manning, the Court of Appeals held that a district court has "unlimited" discretion to modify or vacate a judgment at any time. Id. 18 Neb. App., at 549.:

> in civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgments at any time during the term at which they are rendered. Postconviction relief is not part of a criminal proceeding and is considered civil in nature. The district court's ability to modify a judgment is virtually unlimited.

Id.; see also, Neb.Rev.Stat. § 25-2001 (2). (The power of the district court under its equity jurisdiction to set aside a

judgment or an order as an equitable remedy is not limited by this section.)

The defendant in Manning sought leave to amend his post-conviction motion through his motion to vacate. Id. 18 Neb. App. at 551. The Court of Appeals, however, found that the defendant failed to cite "legal authority" that permitted the court to conclude that the defendant was entitled to an opportunity to amend his postconviction. Id. at 551.:

> Postconviction relief statutes simply do not accord the opportunity to amend a pleading after the court determines that it is insufficient to necessitate an evidentiary hearing. Manning has cited no legal authority which requires us to conclude otherwise.

Id.

Even though the defendant failed to cite legal authority in support of his contention, the appellate court, however, went ahead and assessed the defendant's claim, thereby finding that the defendant did not prevail. Id.:

> Finally, in assessing whether the trial court abused its discretion in denying the motion to vacate which sought to amend the postconviction motion after a final order had been entered dismissing the motion, it is not innappropiate to look at the nature of the proposed amendment. Having done that, we fail to understand, and Manning does not explain, how the allegedly withheld information is in any way exculpatory, and would have made any difference on the fundamental question of whether he attempted to murder a mother and her daughter-as he admitted he did via his plea. For several reasons, there was no abuse of discretion in denying the motion to vacate.

Id.

Also, in State V. Haynes, 2014 NEb. App. LEXIS 29 *., the Court applied

the same reasoning that it applied in Manning, that is, that the District Court has "broad inherent power to vacate or modify its own judgment during the term at which it is rendered." Id. at *7-8. Haynes claimed that "he did not receive notice of the judgment and was therefore unable to file a timely appeal from the denial of his postconviction motion." Id. The Court of Appeals found that Haynes did not prevail because the Court did not have affirmative evidence that the clerk did not send notice of judgment." Id. at 12.

FACTS

On March 9, 2012, Leonor submitted a successive motion for postconviction, arguing inter alia, that his U.S. and Nebraska Constitutional rights to Due Process and fair trial, with respect to the 2011' decision in State V. Smith, 282 Neb. 720 (2012), where the Nebraska Supreme Court held that a step instruction that did not permit the jury to consider convicting Smith of intentionally killing Harris as a result of a sudden quarrel was an incorrrect statement of the law. Id. at 734.

On his Claims II & III, Leonor argued that the decision in State V. Jones, 245 Neb. 821 (1994), did not allow him to argue that he was entitled to intentional manslaughter, (See Court Records, Succ. Post. Conv., Claim II, at Pp. 1 & 22-27), and that the trial court committed error in not instructing Leonor's jury on the distinction in manslaughter and murder in the second degree. (Id. pp. 2 & 38-41). As part of Claim II Leonor also argued that he was not informed of the standard of proof for sudden quarrel. (Id. at p. 1) And with respect to Claim III, he also alleged that the

trial court failed to instruct the jury that the state had the burden of proving the lack of sudden quarrel to convict Loenor of second degree murder ... and because the state failed to include in the amended Information that intent was also an element of manslaughter upon a sudden quarrel. See (Id. at pp. 2).

As for Claim V, Leonor argued that "2nd Degree murder is facially unconstitutional under Nebraska and U.S. Constitutions." (Id. at p. 2).

And pertaining to Claim X, Leonor argued that the evidence was insufficient beyond a reasonable doubt, that Leonor committed intentional second degree murder. (Id. at pp. 3 & 79-81)

The district court denied postconviction relief holding that "[e]ach of Defendant's claims were clearly "Knowable" to him at the time of his direct appeal or two prior postconviction motions. THus these claims [were] procedurally barred." (Court Records, Order Denying Succ. Post. Conv., at p. 2).

Following, Leonor filed a timely motion to alter or amend the Court's judgment, on April 11, 2012) (Court Records, Mot. To Alt. Or Amend. Judg., at pp. 1-6) Due to a misunderstanding with the Clerk of the Court, Leonor was under the impression that his Motion to Alter or Amend the Judgment had not been timely filed; in consequence, Leonor filed a notice of appeal in the Supreme Court.

Shortly after the notice of appeal was filed, the Supreme Court of Nebraska informed Leonor that it did not have jurisdiction of his case, because Leonor's motion to Alter or Amend the Judgment was still pending, and the district court had not yet ruled upon. (Exhibit # 1). Then,

Leonor sought to withdrawn his motion to alter or amend judgment, on September 25, 2012. (Court Records, Motion to Withdraw, Leonor's Mot. to Alt. Or Amend Judg., filed on October 1, 2012, pp. 1-2)

On or about November 2013, Leonor through a telephonically conversation with the Clerk of the Court, Leonor learned that his motion to withdraw had been already ruled upon. Leonor thought there must have been a mistake because Leonor did not receive notification of that ruling from the Clerk. So, Leonor was prompted to write the Clerk requesting to specify whether it was or not true, that the Court had already ruled upon his motion to withdraw. (Exhibit # 2, pp. 1-2; letter submitted to the Clerk on November 12, 2013).

Then, on December 17, 2013, Leonor received the District Court's Order pertaining to Leonor's Motion to withdraw, in which, it states, that the Court had ruled upon his motion on October 2, 2012. (See Exhibit # 3)

On November 16, 2012, the Nebraska Supreme Court held that State V. Smith, 282 Neb. 720., was a "new rule" of law retroactive only in cases on direct appeal, citing Griffith V. Kentucky, 479 U.S. 314 (1987). See State V. Smith, 284 Neb. 636, 646 (2012).

Then, on June 17, 2013, the U.S. Supreme COurt in Alleyne V. United States, 133 S.Ct. 2151 (2013), held that:

> The essential Sixth Amendment inquiry is whether a fact is is an element of the crime. When a finding of fact alters the legally prescribed punishment so as to aggravated it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury.

Id. at 2162.:

Leonor's convictions for second degree murder and the weapon charges with respect to the murders, are void because, (1) Leonor stands convicted upon a charge that did not exist in Nebraska, (2) upon a charge that he was not informed of neither tried for, and (3) that illegal charged shifted the burden of proof on Leonor. Leonor's U.S. Constitutional rights to due process and fair trial, Amendments 5th, 6th and 14th, were violated.

Leonor seeks an evidentiary hearing on each claim that he seeks amendment on, or that he seeks to amend, because they are not procedurally barred; they state facts amounting to a violation of the U.S. Constitution; and they are facts that if proven, would entitled Leonor to relief.

ARGUMENTS

II.

DUE PROCESS ENTITLED LEONOR TO REFILED AN APPEAL

The relief that Leonor seeks here is, that the Court vacate its judgment entered on October 2, 2012, granting his Motion to Withdraw the Motion to alter or amend judgment, filed on October 1, 2012. (See District Court Records.)

Leonor was never notified that this Court had ruled on his motion to withdraw, which deprived him from timely file a Notice of Appeal following the Court's ruling, a timely notice of appeal pertaining to this Court's denial of his postconviction motion.

The fact that Leonor was not able to timely appeal, had been due to

the fault of the District Court Clerk, who failed to forward notification of this Court's ruling, to Leonor. The Supreme Court of Nebraska said that the best way to remedy this denial of due process, is through a motion to vacate. See, State V. Haynes, 2014 Neb. App. LEXIS 29 *.

In support of Leonor's claim that he had never received notification of this Court's ruling, he provides the Court with a copy of the Prison Confidential Correspondence records from the months of October and November, 2012, showing the only legal correspondence that Leonor recieved during this periods. (Exhibit # 5, five sheets with dates: 10-3-12, 10-19-12, 10-30-12; 11-8-12 & 11-24-12; and the Inmate Request that Leonor sent to prison officials requesting such a record.) None of the prison records show that Leonor had received notification of the Court's ruling entered on October 2, 2012, and Leonor asserts under oath that he never received such a notification. (Exhibit # 6)

It was not until Leonor had telephonically contacted the Clerk of the Court, on or about November 2013, that he first acquired that this Court had already ruled on his motion. Then, on November 12, 2013, Leonor sent a letter to the Clerk to verify in writing whether it had been true that the Court had already ruled upon his motion. (Exhibit # 2, pp. 1-2).

On December, 17, 2013, Leonor received the District Court's Order ruling on his motion, from the Clerk of the District Court, which was made possible after Leonor had requested information about it. (Exhibit # 3)

The Court has discretion to grant this motion under § 25-2001(2)

and State V. Haynes, and State V. Manning. A violation of due process under the U.S. Constitution, Amendments 5th and 14th, would occur is Leonor not given an opportunity to refile his appeal.

Therefore, Leonor prays that the Court grant this motion to vacate, vacate its judgment entered on October 2, 2012, and reenter it with notifying Leonor of its ruling; so that Leonor can adequately file his notice of appeal.

CONCLUSION

Leonor is entitled to obtain an amendment of his postconviction motion issues, II, III, V, & TEN, as he has offered them in amendment within this motion to vacate; entitle to appointment of counsel, who will litigate effectively and persuade this Court that these amended claims entitle him to postconviction relief; entitle to an evidentiary hearing on these claims; entitled to postconviction relief and to proceed in forma pauperis; if Leonor is required to resubmit his in forma pauperis motion, he asks this Court to direct him to do so. Thus, this Court has the dicretion to grant motion to vacate on this argument; and Leonor asks the Court to exercise its discretion and grant this motion because justice so requires it.

Further, Leonor is entitled to refile his appeal because due to the Clerk's fault, Leonor was not able to adequately file his notice of appeal within the 30 days proscribed by law. This Court has discretion to vacate its October 2, 2012-Order and reenter it so that Leonor can timely appeal within the 30 days following this Court's new order. Leonor asks the Court to exercise its discretion because justice so requires it.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon the state's attorney, Mr. Donald Kleine, Hall of Justice, 17th and Farnam St., Omaha, NE 68183, through U.S. Mail Service, postage prepaid, on this 5th day of MAY, 2014;

* Motion to Vacate.
* Exhibits in support 1 through 6.

Juan L. Leonor DOC# 54664
P.O. Box 2500
Lincoln, NE 68542-2500

NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES

INMATE INTERVIEW REQUEST

TO: J. Witte "Jodi" - Administrator Assistant DATE: 3-31-14

FROM: Juan Leonor #54664 NSP 1-B-11
NAME / NUMBER FACILITY LOCATION

WORK LOCATION: _____ UNIT STAFF: _____

MESSAGE: I would like to know if I can get a copy of the legal mail incoming-signing sheet from the month of October and November 2012, showing whether I've received any legal mail. During October and November 2012 I was housed in the Control Unit. In reference to pending legal matters I am told that a ruling was made by a judge but I did not receive the notification from the court. I need to send proof to the court to show that I never received any legal mail from the court during these months, or following the court's decision made in October 2012.

Attached is a check.

Thank you.
God bless you.

ORIGINAL – DCS Employee
YELLOW – Inmate
Both copies need to be submitted for response.

Signature

REPLY: 5 copies - check submitted

EXHIBIT 5

4-1-14
Date

Signature

DCS-A-adm-013 (rev. 2/97)

NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES

RECEIPT LOG FOR CONFIDENTIAL MAIL

Picked up by: [signature] Housing Unit: CH Date: 11/8/12

To	Number	Location	From	Inmate Signature & Date	Number	Witness	Time & Date Delivered-Comment
Leonor	54664	A17	Atty. A. Miller - ACLU	[signature]	54664	[signature]	1620 / 11/8/12

ORIGINAL: Mail Room

NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES

RECEIPT LOG FOR CONFIDENTIAL MAIL

Picked up by: 7652 Housing Unit: Cu Date: 10/3/12

To	Number	Location	From	Inmate Signature & Date	Number	Witness	Time & Date Delivered-Comment
Leonor	54664	A17	Ombudsman	[signature]	54669	C/W Gordon	1455 10/3/12

ORIGINAL: Mail Room

NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES

RECEIPT LOG FOR CONFIDENTIAL MAIL

Picked up by: ZGeh Housing Unit: A10 Date: 10:30:12

To	Number	Location	From	Inmate Signature & Date	Number	Witness	Time & Date Delivered-Comment
J. Leonor	54664	A-17	NE Supreme Court	[signature]	54664	[signature]	10/30/12 1800
J. Leonor	54664	A-17	Amy Miller, AH	[signature]	54664	[signature]	✓ 1800

ORIGINAL: Mail Room

NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES

RECEIPT LOG FOR CONFIDENTIAL MAIL

Picked up by: [illegible] Housing Unit: CU Date: 10/19/12

To	Number	Location	From	Inmate Signature & Date	Number	Witness	Time & Date Delivered- Comment
[illegible]	54664	A17	[illegible]	[signature]	54664	[illegible]	10/19/12 1440

ORIGINAL: Mail Room

YELLOW: Mail R[illegible]

NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES

RECEIPT LOG FOR CONFIDENTIAL MAIL

Picked up by: Zdch Housing Unit: CJ Date: 11/24/12

To	Number	Location	From	Inmate Signature & Date	Number	Witness	Time & Date Delivered-Comment
Leonor	546664	A12	ACLU Amy Miller		546604		1630 11-24-12

ORIGINAL: Mail Room