APPENDIX L

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

STATE OF NEBRASKA, Plaintiff, VS. JUAN LUIS LEONOR, Defendant.	CR 10-9042117 Doc. 149 Page 834 **Successive Motion for Postconviction Relief**

COMES NOW, Juan Luis Leonor, the defendant, pro se, and pursuant to Neb. Rev. Stat. § 29-3001 (reissue 2008 & cum supp 2014), hereby asks the Court to vacate his sentences and convictions for murder in the second degree and use of a weapon linked to the murders, because (as will be shown below), these convictions and sentences were **in violation of the Nebraska and U.S. Constitutions.**

Mr. Leonor addresses that he meets the requirements of § 29-3001(4)(Cum supp. 2014). That is, under the new U.S. Supreme Court decision in Montgomery v. Louisiana, 2016 U.S. LEXIS 862 (decided January 25, 2016), Mr. Leonor is entitled to the rule made in State v. Ronald-Smith, 282 Neb. 720 (2011), a rule that was held not to be retroactive to cases already final on direct review. See State v. William-Smith, 284 Neb. 636, 654-655 (2012).

Under Montgomery, however, Mr. Leonor addresses that Ronald-Smith applies retroactively to his case. In Montgomery, the U.S. Supreme Court held that, "[w]here a state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." Id. 2016 U.S. LEXIS 862, * 23. Montgomery also requires that Alleyne v. United States, 133 S.Ct. 2151 (2013) and Johnson v. United States, 135 S.Ct. 2551 (2015), be applied retroac-

tively to Mr. Leonor's case which is already final on direct review.

A. Ronald-Smith is a "substantive" rule.

"A decision that modifies the elements of an offense is normally substantive rather than procedural." See Schriro v. Summerlin, 542 U.S. 348 (2004); see also State v. Mantich, 287 Neb. 320 (2014)(citing Schriro v. Summerlin). Mr. Leonor asserts that the decision in Ronald-Smith **modified** the **elements** of Murder in the Second degree and voluntary manslaughter, see State v. Hinrichsen, 292 Neb. 611, 622 (2016)("Based on [the] clarification of the elements of the crimes of second degree murder and voluntary manslaughter, [the Nebraska Supreme Court] concluded that the second degree murder to manslaughter step instruction given in Smith was incorrect.")(emphasis added).

Also, in Ronald-Smith, the Nebraska Supreme Court addressed a question grounded in the "due process" realm, yet the Court did not say whether it was "due process" under the Nebraska or the U.S. Constitution. See Id. 282 Neb. at 727 ("Smith contends that the step instruction given by the district court deprived him of due process because it did not allow the jury to consider whether his specific intent to kill was the result of a sudden quarrel."). The Nebraska Supreme Court agreed with Smith, and held the following: "the second degree murder to manslaughter step instruction given ... was incorrect." See Hinrichsen, 292 Neb. at 622.

Therefore, Mr. Leonor has made a showing that the decision in Ronald-Smith is a substantive decision that modified the elements of murder in the second degree and voluntary manslaughter, which applies retroactively to his case.

B. Alleyne v. United States is a "substantive" rule.

Montgomery, 2016 U.S. LEXIS 862, *21 ("A conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void.")(citing Ex parte Siebold, 100 U.S. 371 (1880)).

D. Montgomery overcomes any procedural bars to Mr. Leonor's Claims.

In Montgomery, the U.S. Supreme Court held that "as a general principle, that a court has no authority to leave in place of a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced." Id. 2016 U.S. LEXIS 862, * 21.:

> This Court's precedents addressing the nature of substantive rules, their differences from procedural rules, and their history of retroactive application establish that the constitution requires substantive rules to have retroactive effect regardless of when a conviction became final.

Id. at 16.

Mr. Leonor asserts that, because his claims are based on Alleyne, Johnson, and Ronald-Smith, a procedural bar or a waiver, do not apply in this proceeding.

E. Mr. Leonor's convictions and sentences are unconstitutional by virtue of the following issue:

1. The U.S. Constitution requires that Mr. Leonor be entitled to have his jury consider whether Mr. Leonor committed manslaughter and not murder in the second degree.

On November 18, 2011, the Nebraska Supreme Court decided Ronald-Smith, holding that a defendant is entitled to have his jury consider whether that defendant committed manslaughter and not murder in the second degree. That is, a jury must be

permitted "to consider the alternative possibility that the killing was intentional but provoked by a sudden quarrel, and therefore constituted manslaughter." Id. 282 Neb. at 734. Mr. Leonor's jury, however, did not have the opportunity to consider the alternative possibility that the killing was intentional but provoked by a sudden quarrel; i.e., Mr. Leonor's jury was not given the opportunity to know that the presence or absence of sudden quarrel was the determinative factor for a finding of guilt of the charge of intentional manslaughter or intentional murder in the second degree.

Mr. Leonor's jury was instructed as follows in regards to the charges of murder in the second degree, two counts:

> The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant Juan L. Leonor, ... of the crime of murder in the second degree are:
>
> 1. That the defendant, on or about November 22, 1999, either alone or while aiding and abetting another, did kill Sylvia Valadez;
> 2. That he did so in Douglas County, Nebraska; and
> 3. That the defendant, either alone or while aiding and abetting another, did so intentionally, but without premeditation.
>
> The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements of the crime of murder in the second degree in order to convict the defendant of the crime of murder in the second degree.
>
> If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements in this Section I is true, it is your duty to find the defendant guilty of the crime of murder in the second degree ... done intentionally, but without premeditation, and you shall indicate by your verdict.
>
> On the other hand, if you find that the State has failed to prove any one or more of the material elements in Section I, it is your duty to find the defendant not guilty of the crime of murder in the second degree ... You shall then proceed to consider the lesser-included offense of manslaughter....

See (Exhibit # 1, Instruction No. 4, COUNTS I & II of SECTION I).

This Jury Instruction No. 4, that Mr. Leonor has addressed above in regards to murder in the second degree, did not allow the jury to consider the possibility that the killing was intentional but provoked by a sudden quarrel, as required by State v. Ronald-Smith.

Mr. Leonor's Jury was also instructed as follows:

> The defendant can be guilty of murder in the second degree or manslaughter even though he personally did not commit every act involved in the crime so long as he aided 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;
> (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.

(Exhibit # 2, Jury Instruction No. 6).

This Jury Instruction No. 6, that Mr. Leonor has addressed above in regards to both murder in the second degree and manslaughter being intentional crimes, did not allow the jury to consider the possibility that the killing was intentional but provoked by a sudden quarrel, as required by Ronald-Smith. The only thing that this Jury Instruction No. 6, did, was not to require the State to prove beyond a reasonable doubt the material element of "intent." In fact, there was not Jury Instruction regarding "aiding and abetting," that required the State to comply with its "beyond a reasonable doubt" burden. The only "beyond a reasonable" burden that the State had in the eyes of the jury, was only if Mr. Leonor was on trial as the principal. (Exhibit # 1). See also (Exhibit # 2 & 3) regarding aiding and abetting.

Further, Mr. Leonor asserts that the trial court, by instructing the jury on

manslaughter (Exhibit # 1, Instruction No. 4, Counts I & II, Sections II; & Exhibit # 2, Instruction No. 6), it means that the trial court complied with § 29-2027, by finding that there was evidence of the presence of sudden quarrel, as required by Ronald-Smith and William-Smith, see State v. Hinrichsen, 292 Neb. at 623. But as argued above, Mr. Leonor's jury was not instructed in accord with federal due process because that jury was not given the option to consider the possibility that the killing was intentional but provoked by that sudden quarrel.

The evidence presented at trial by the State, established the presence of sudden quarrel. The State argued that the victims, members of the rival gang "LOMAS", sought to beef up with Mr. Leonor and his co-defendant, Mr. Gonzales, by throwing gang signs to them; that Gonzales reacted to the victims provocation by throwing gang signs back, and consequently Gonzales started shooting at the victims' car, while Mr. Leonor was driving his vehicle. See State v. Leonor, 263 Neb. 82, 97 (2002)("Evidence showed that [Mr. Leonor] and Gonzales has shot someone who had thrown a Lomas gang sign at them.").

Also, a police officer testified that, since the middle of 1998, there was a marked increased 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. See (Exhibit # 4).

Evidence was also adduced at trial that a mother of a member of the Surenos gang (which Mr. Leonor belonged to), had been shot days before this shooting by a Lomas gang member. See (Exhibit # 5).

Based on the evidence above, there had been sufficient provocation upon which Mr. Leonor's co-defendant, Mr. Gonzales was not going to stand the chance of getting killed or shot by the Lomas gang members who had provoked them by calling for war initiated by Lomas' gang signs. Gonzales did not have to wait to see if the victims

had or not a gun. Rather, it was foreseeable that if the victims called out for war, it meant that Leonor and his co-defendant could have been shot or killed. See State v. Foster, 286 Neb. 826, 850-853 (2013)("Smith's general statement 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." "It is common knowledge that gang members have guns, the gang members use guns....").

Therefore, Mr. Leonor asserts that he is entitled to have his jury consider the alternative possibility that the intentional killing was the result of a sudden quarrel, in accordance with the 5th, 6th and 14th Amendments to the U.S. Constitution, and as held in Ronald-Smith. Mr. Leonor is entitled to a new trial.

Mr. Leonor asserts that he has pleaded sufficient facts showing a violation of his constitutional rights, that entitles him to an evidentiary hearing. But to avoid all that process, Mr. Leonor asserts that § 29-3001 gives this Court the power to grant him a new trial without the evidentiary hearing.

A final note, Mr. Leonor asserts that in May 30, 2012, he brought a postconviction motion within one year following the decision in Ronald-Smith asking for a new trial based on that holding, but this Court denied him relief; the court found that this claim was procedurally barred. (See Court records, Order denying postconviction relief, filed April 6, 2012; and successive postconviction motion, pp. 28-33). However, as argued above, under Montgomery v. Louisiana, this Court is compell to apply retroactively the ruling in Ronald-Smith to Mr. Leonor's case, without regard to a procedural bar.

2. **The U.S. Constitution requires that Mr. Leonor's convictions for murder in the Second Degree and the weapon convictions related to the murders, be dismissed as insufficient because the State failed to meet its burden of proving the absence of sudden quarrel beyond a reasonable doubt.**

The U.S. Constitution "protects the accused against a conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. See In re Winship, 397 U.S. 397 U.S. 358 (1970). The State has a duty to prove beyond a reasonable doubt a "fact" or ingredient that would constitute an element of the offense charged, when that fact will increase either the mandatory "minimum" or the mandatory "maximum" punishment. See Alleyne v. United States, 133 S.Ct. at 2151.

The current law in Nebraska is that the fact that distinguishes murder in the second degree from intentional manslaughter, is the presence or absence of sudden quarrel. See State v. Hinrichsen, 292 Neb. at 622. Although current Nebraska law does not command the State to prove beyond a reasonable doubt the "absence of sudden quarrel," but only if there is any evidence of sudden quarrel, the trial court is required to instruct the jury to consider whether the intentional killing was committed under provocation, so that the crime be reduced to manslaughter, however, under the U.S. Constitution as envisioned in Alleyne, makes the "absence of sudden quarrel" an element of the offense (in this case will be murder in the second degree), and that element must be proven beyond a reasonable doubt to a jury. This is because, the absence of sudden quarrel increases the minimum sentence of one year to twenty years from otherwise the presence of sudden quarrel, to 20 years to life. Therefore, Alleyne requires that the absence of sudden quarrel be proven bevond a reasonable doubt.

It follows that, based on the evidence adduced at trial by the State, it is evident that the presence of sudden quarrel is established. With that evidence of sudden quarrel, Mr. Leonor should not have been charged with murder in the second degree, but rather, with manslaughter. Because the State has failed to meet its burden of proving beyond a reasonable doubt the absence of sudden quarrel, Mr. Leonor is entitled to the dismissal of the charges of murder in the second degree and the

weapon charges that derived of the murders.

As argued above, in claim D, 1, p. 8, the evidence at trial establishes that the killing was the result of a sufficient provocation. The evidence established that the victims had provoked Mr. Leonor and his co-defendant with gang signs, which meant war, see State v. Leonor, 263 Neb. at 97 ("Evidence showed that [Mr. Leonor] and Gonzales had shot someone who had thrown a Lomas gang sign at them."). It is common knowledge that gang members have guns and use them. See State v. Foster, 286 Neb. at 850 & 853. The evidence at trial also established that Mr. Leonor's gang and the victims' gang were involved in violence against each other, which it included killings and drive-by shootings. (Exhibit # 4).

Therefore, Mr. Leonor asks that the charges for murder in the second degree be dismissed because those convictions and sentences (including the weapon convictions and sentences), were in violation of the 5th, 6th and 14th Amendments to the U.S. Constitution, that is, the State failed to prove the absence of sudden quarrel, an element that is required to be proven to obtain a conviction of murder in the second degree. If that element was not proven, it means murder in the second degree was not proven.

Montgomery v. Louisiana commands that Alleyne be applied retroactively to Mr. Leonor's case. Mr. Leonor has made a showing of a violation of his U.S. Constitutional rights, and thus he is entitled to postconviction relief, without the requirment of an evidentiary hearing; unless the court finds it necessary. Everything necessary is on the record before the court. In the alternative, Mr. Leonor asks for an evidentiary hearing.

3. § 28-304 and the Ronald-Smith Jury Instruction are unconstitutionally vague.

The Fifth [and Fourteenth] Amendment[s] provide[] that no person shall

him to postconviction relief, i.e., the dismissal of the charges against him, and his discharge from these charges and sentences. Mr. Leonor asserts that relief can be granted without an evidentiary hearing, however, if the Court finds it should be granted, it should order it so.

CONCLUSION

Leonor respectfully asks that postconviction relief be granted, and that he be discharged from the murder in the second degree and weapon charges, or be granted a new trial.

Submitted this 25th day of February, 2016. By,

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

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, Motion for Postconviction Relief. That he knows the contents therein, and states and avers that to the best of his knowledge and understanding of the facts and statements contained therein are true and accurate. The motion was filed by the defendant himself.

Juan Luis Leonor

SUBSCRIBED AND SWORN TO before me and in my presence on this 25th day of February, 2016.

SEAL:

GENERAL NOTARY - State of Nebraska
BRADLEY S. EXSTROM
My Comm. Exp. March 2, 2018

NOTARY PUBLIC

APPENDIX M

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

CR 10-9042117

THE STATE OF NEBRASKA,	)	DOC. 149 NO. 834
	)	
Plaintiff,	)	
	)	
Vs.	)	**ORDER DENYING**
	)	**SUCCESSIVE MOTION**
JUAN LUIS LEONOR,	)	**FOR POSTCONVICTION**
	)	**RELIEF**
Defendant.	)	

PROCEDURAL HISTORY

The defendant, Juan L. Leonor was convicted of one count of first degree assault and use of a deadly weapon to commit a felony and with two counts of second degree murder and two counts of use of a deadly weapon to commit a felony after a trial by jury. On November 28, 2000, the defendant was sentenced to a term of twenty years to life for two counts of second degree murder, five to ten years on 3 counts of use of a deadly weapon to commit a felony and five to ten years for 1 count of assault with all sentences to run consecutive.

The defendant appealed his conviction to the Nebraska Supreme Court on December 14, 2000. On February 1, 2002, the Nebraska Supreme Court affirmed the defendant's conviction and the trial court's sentence of the defendant. In 2003 and 2008, the defendant filed motions for post-conviction relief which were denied by the Douglas County District Court and the denials of which were affirmed on appeal (See Memorandum Opinion and Judgment on Appeal, Dec 8, 2010).

On or about March 9, 2012, the defendant filed a Successive Motion for Postconviction Relief, a Motion to Recuse in Postconviction Proceeding, a Motion for Appointment of Counsels and a Motion to Proceed in forma Pauperis which this Court denied on the basis of Defendant's motion being an improper successive motion.

On March 2, 2016, the Defendant filed a Successive Motion for Postcoviction Relief wherein the Defendant is seeking to have this Court vacate his sentences and convictions for second degree murder and use of a weapon. Defendant now claims that during his trial the trial court gave an erroneous step jury instruction for second degree murder to manslaughter which led to his conviction. And that subsequent to his conviction the Nebraska Supreme Court in State v. R. Smith, 282 Neb. 720 (Neb. 2011), held that a step instruction that required a jury to convict on second degree murder if it found that a defendant killed intentionally, but did not permit the jury to consider the alterative possibility that the killing was intentional but provoked by a sudden quarrel and there constituted manslaughter was an incorrect statement of the law.

ANALYSIS

After considering the matter, the Court now finds as follows:

1. A defendant requesting post-conviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. State v. Marshall, 269 Neb. 56, 61 (Neb. 2005). The need for finality in the criminal process requires that a d defendant bring all claims for relief at the first opportunity. Hall v. State, 264 Neb. 151, 159 (Neb. 2002). A motion for post-conviction relief cannot be used to secure review of issues which have already been litigated on direct appeal, or which were known to the defendant and counsel at the time of trial and

which were capable of being raised, but were not raised, in defendant's direct appeal. State v Kiethley, 238 Neb. 966, 969 (Neb. 1991).

2. Section 29-3001 of the Nebraska Revised Statutes provides with regard to successive postconviction motions, "the court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner. Neb. Rev. Stat. § 29-3001 (Reissue 2008). Postconviction proceedings are not a tool whereby a defendant can continue to bring successive motions for relief. Hall v. State, 264 Neb. 151, 159 (Neb. 2002).

3. A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the state of federal Constitution. State v. Ryan, 257 Neb. 635, 646 (Neb. 1999). The Court in Ryan further stated with regard to the filing of additional postconviction motions:

> An appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its fact the basis relied upon for relief was not available at the time the movant filed the prior motion. [citation omitted]. 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 fact that the basis relied upon for relief was available at the time the prior motion was filed.

Id. at 647.

4. Postconviction motions are subject to the limitations period set forth in § 29- 3001(4), which states:

> A one-year period of limitation shall apply to the filing of a verified motion for postconviction relief. The one-year limitation period shall run from the later of:
>
> (a) The date the judgment of conviction became final by the conclusion of a direct appeal or the expiration of the time for filing a direct appeal;

(b) The date on which the factual predicate of the constitutional claim or claims alleged could have been discovered through the exercise of due diligence;

(c) The date on which an impediment created by state action, in violation of the Constitution of the United States or the Constitution of Nebraska or any law of this state, is removed, if the prisoner was prevented from filing a verified motion by such state action;

(d) The date on which a constitutional claim asserted was initially recognized by the Supreme Court of the United States or the Nebraska Supreme Court, if the newly recognized right has been made applicable retroactively to cases on postconviction collateral review; or

(e) August 27, 2011.

Neb. Rev. Stat. § 29- 3001(4) (Reissue 2016).

5. An evidentiary hearing on a motion for post-conviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal constitution. When such an allegation is made, an evidentiary hearing may be denied only when the records and files affirmatively show that the defendant is entitled to no relief. State v. Marshall, 269 Neb. 56, 61 (Neb. 2005); State v. McHenry, 268 Neb. 219, 224 (Neb. 2005).

ANALYSIS

6. Upon review of Defendant's successive motion it appears that Defendant's motion is both procedurally barred as a "successive" motion and also time barred under Neb. Rev. Stat. § 29- 3001(4) (Reissue 2016). This matter is controlled by the Nebraska Supreme Court's ruling in State v. Harrison, 293 Neb. 1000 (Neb. 2016).

7. In the instant case, Defendant Leonor is contending that his sentences and convictions should be vacated because of a step jury instruction on second degree murder and manslaughter that was given during his trial back in 2002 which was later found to be an incorrect statement of the law in State v. R. Smith, 282 Neb. 720 (Neb 2011) and again in State v. Trice, 286 Neb. 183 (Neb. 2013). Defendant Leonor contends that the decision in State v. R. Smith where the Court held that a step instruction which required the jury to convict a defendant of second degree murder if it found an intentional killing, but did not permit the jury to first consider whether the killing was provoked by a sudden quarrel, was an incorrect statement of the law, should be applied retroactively to his case since it is a newly recognized substantive constitutional right. From a limitations standpoint it appears that Defendant Leonor would be basing his claim upon the applicability of § 29-3001(4)(d).

8. However, the Court in State v. W. Smith, 284 Neb. 636 (Neb. 2012) stated that its decision in State v. R. Smith did not announce a new constitutional rule regarding the second degree murder to manslaughter step instruction. Id. at 655. Thus, it does not appear that Defendant Leonor can use § 29-3001(4)(d) as a triggering event to get around the applicability of the limitations period. See State v. Harrison, 293 Neb. 1000 (Neb. 2016). Similar to the postconviction filing defendant in Harrison, even if State v. R. Smith or State v. Trice, had recognized a new constitutional claim Defendant Leonor's successive motion would still be untimely. The opinions in State v. R. Smith were released in 2011 and in 2013 for State v. Trice. Defendant Leonor filed his successive motion that is before this Court in March of 2016, which is well after the 1-year limitations period would have expired if either State v. R. Smith or State v. Trice had

recognized a new constitutional claim. Thus, Defendant Leonor's claims are time barred under Neb. Rev. Stat. § 29- 3001(4).

9. After a thorough review of Defendant Leonor's claims this Court finds that the records and files in the case affirmatively show that Defendant Leonor is entitled to no relief and that an evidentiary hearing is not necessary.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant Juan Luis Leonor's Motion to Proceed In Forma Pauperis is granted;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant Juan Luis Leonor's Successive Motion for Postconviction Relief is hereby denied;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant Juan Luis Leonor's request for an evidentiary hearing, to the extent requested, is hereby denied;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant Juan Luis Leonor's request for an appointment of competent counsel is hereby denied.

IT IS SO ORDERED.

DATED this 6th day of September, 2017.

BY THE COURT:

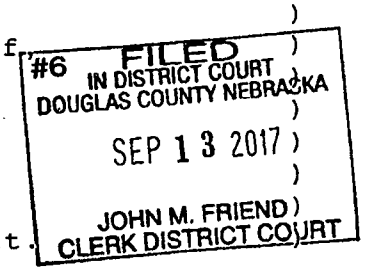
MARLON A. POLK
DISTRICT COURT JUDGE

APPENDIX N

DK

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

STATE OF NEBRASKA,) DOC. 149 . NO. 834
) CR10-9042117
Plaintiff,)
) MOTION TO ALTER OR AMEND
VS.) JUDGMENT
)
JUAN LUIS LEONOR,)
)
Defendant.)



COMES NOW, the Defendant, Juan Luis Leonor, and pursuant to Neb. Rev. Stat. § 25-1329 (Reissue 2008; and/or current reissue), hereby requests that this motion to alter or amend judgment be granted, in which he seeks substantive alteration of the judgment entered by the Court on September 6, 2017, ordering the denial of Mr. Leonor's successive postconviction motion.

FACTS

On or about March 2, 2016, Mr. Leonor sought successive post-conviction relief in this Court. In this current successive motion, Mr. Leonor raises three claims (hereinafter "Ronald-Smith claims"). Mr. Leonor's Ronald-Smith claims raised in his current successive motion are premised on the combination of the decisions in State v. Ronald-Smith, 282 Neb. 720 (2011), Johnson v. United States, 135 S.Ct. 2551 (2015), and Montgomery v. Louisiana, 138 S.Ct. 718 (2016).

On September 6, 2017, the Court entered an order denying post-conviction relief. See (Court Records). In its order the Court held that Mr. Leonor failed to meet the requirement in Neb. Rev. Stat. § 29-3001(4)(d), because State v. Ronald-Smith's decision was not held to be a constitutional rule, and that even if that decision

were to be a constitutional rule, Mr. Leonor has also failed to bring the current postconviction motion within the one-year allowed by § 29-3001(4). See (Court's Order entered on September 6, 2017, denying Succ. Post. Mot., at pp. 5-6).

14. Mr. Leonor now brings in a timely fashion this motion seeking substantive alteration of the judgment entered on September 6, 2017, denying postconviction relief, for the reasons that follow:

1. **Whether or not Nebraska Recognizes that the Decision in Ronald-Smith is a new constitutional rule that applies retroactively to cases in collateral review, Federal Law, However, Compels such an Action.**

First, Mr. Leonor acknowledges that the Nebraska Supreme Court in State v. Williams-Smith, 284 Neb. 636, 655 (2012), held that the decision in Ronald-Smith is not a new constitutional rule of law. However, it is not Nebraska law but through the veins of federal law, as held in Schriro v. Summerlin, 542 U.S. 348 (2004), that the decision in Ronald-Smith is a substantive constitutional rule, and federal law mandates that if Nebraska law is in contradiction with federal law, it must yield. See Felder v. Casey, 487 U.S. 131, 138 (1988)("Under the Supremacy Clause of the Federal Constitution, "the relative importance to the State of its law is not material when there is a conflict with a valid federal law," for any state law, however clearly within a state's acknowledged power, which interferes with ir is contrary to federal law, must yield.")(Citations omitted). As such, the analysis to consider whether the

decision in Ronald-Smith is a substantive constitutional rule, is under federal law, alone, as Mr. Leonor alleged in his current post-conviction motion, at p. 2.

"A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." See Welch v. United States, 136 S.Ct. 1257, 1265 (2016)(citing Schriro v. Summerlin, supra). "This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons convered by the statute beyond the state's power to punish." Id.(citations omitted). Also, a substantive constitutional rule is a rule that "modifies the elements of an offense." Schriro v. Summerlin, 542 U.S. at 354.

In 2011, the Nebraska Supreme Court held that manslaughter upon a sudden quarrel (Neb. Rev. Stat. § 28-305), and murder in the second degree (Neb. Rev. Stat. § 28-304), are both intentional crimes, and that the factor that distinguishes them is only the presence or absence of the sudden quarrel provocation. See Ronald-Smith, supra. Before Ronald-Smith, and at the time Mr. Leonor's judgment became final, the interpretation of murder in the second degree and manslaughter upon a sudden quarrel, was that the presence or absence of intent was what distinguished them. See State v. Jones, 245 Neb. 821 (1994).

The decision in Ronald-Smith necessarily modified the elements

of murder in the second degree and manslaughter upon a sudden quarrel, by interpreting its terms and placing particular conduct covered by the statute beyond the State's power to punish. Thus, Ronald-Smith fits within the criteria of what constitutes a substantive constitutional rule. See Welch v. United States, 136 S.Ct. 1257 (2016)(Slip Opinion, at pp. 7-15)(discussing the nature of a substantive constitutional rule). Therefore, under federal law the decision in Ronald-Smith is a substantive constitutional rule, and Nebraska law must yield.

Second, the U.S. Supreme Court recently held that new substantive rules "must have retroactive effect regardless of when the defendant's conviction became final." See Montgomery v. Louisiana, 138 S.Ct. at 730. "[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." Id. at 729. Therefore, the substantive rule in Ronald-Smith applies retroactively in postconviction review, either through subsections (b), (c), or (d) of Section § 29-3001(4), as will be shown below.

The Court erred in limiting its review and assessment to Nebraska law, and not on federal law, when deciding whether Ronald-Smith is a substantive constitutional rule that applies retroactively to cases in collateral review.

2. **Following the Decision in Ronald-Smith Mr. Leonor brought Claims One, Two, and Three in line with § 29-3001(4)(d).**

Section § 29-3001(4)(d) states as follows:

> (4) A one-year period of limitation shall apply to the filing of a verified motion for postconviction relief. The one-year limitation period shall run from the later of:
>
> ...
>
> (d) The date on which a constitutional claim asserted was initially recognized by the Supreme Court of the United States or the Nebraska Supreme Court, if the newly recognized right has been made applicable retroactively to cases on postconviction collateral review....

The Nebraska Supreme Court in recent case law construed the applicability of the one-year period of limitation outlined in § 29-3001(4), to subparagraph (d) of that section. It was determined that the one-year limitations starts at the time the right is recognized and not at the time the right is made applicable retroactively to cases on collateral review.

With that principle in mind, since Ronald-Smith was decided on November 11, 2011, then Mr. Leonor had until November 11, 2012 to have brought his Ronald-Smith claims in accord with § 29-3001(4)(d), regardless that Ronald-Smith was not held to apply retroactively on collateral review. That's exactly what Mr. Leonor did. On or about March 9, 2012 Mr. Leonor filed a successive postconviction motion, which this Court recognizes in its order denying the current post-conviction motion. See (September 6, 2017-order denying post. mot., at p. 2).

The three Ronald-Smith claims raised in Mr. Leonor's current postconviction motion, were also raised in his March 9, 2012-post-conviction motion. **Claim One** of the current motion (pp. 5-9), was raised as Claim Three in the March 9, 2012-motion (See Court Records Succ. Post. Mot. filed until May 30, 2012, pp. 28-35). **Claim Two** of the current motion (pp. 9-11), was raised as Claim Ten in the March 9, 2012-motion (See Court Records Succ. Post. Mot., filed until May 30, 2012, pp. 79-81). And **Claim Three** of the current motion (pp. 11-17), was raised as Claim Five in the March 9, 2012-motion (See Court Records Succ. Post. Mot., filed until May 30, 2012, pp. 38-41).

The Court denied Mr. Leonor's March 9, 2012-motion by entering two orders each with different findings. See (Court Records, Order Denying Succ. Post. Mot., entered on April 5, 2012); see also (Exhibit # 1)(Order denying Succ. Post. Mot., entered on May 22, 2012). Seven months later, the Nebraska Supreme Court held that Ronald-Smith was not a constitutional rule and that it did not apply retroactively on collateral review. See State v. Williams-Smith, 284 Neb. at 646.

As shown above, Mr. Leonor did raise his Ronald-Smith claims in a postconviction action within the one-year limitation of § 29-3001(4)(d) and in accord with current case law, which is what the defendant in State v. Harrison, 293 Neb. 1000 (2016) failed to do.

Moreover, Montgomery v. Louisiana, supra, was decided on

January 25, 2016. And Mr. Leonor filed the current postconviction motion on March 2, 2016, within the one-year limitation set forth in § 29-3001(4), alleging that the decision in Ronald-Smith is a substantive constitutional rule under federal law which through the veins of Motgomery v. Louisiana it now applies retroactive to Mr. Leonor's postconviction collateral review. See (Court Records, Defendant's current Post. Mot., at pp. 1-2, & 5).

Therefore, the Court erred in time barring his current postconviction Ronald-Smith claims and it was error to apply State v. Harrison, supra, to the circumstances of Mr. Leonor's case.

3. **Mr. Leonor's Ronald-Smith Claims are Proper under § 29-3001(4)(b).**

Section § 29-3001(4)(b) states as follows:

> (4) A one-year period of limitation shall apply to the filing of a verified motion for postconviction relief. The one-year limitation period shall run from the later of:
>
> ...
>
> (b) The date on which the factual predicate of the constitutional claim of claims alleged could have been discovered through the exercise of due diligence....

Mr. Leonor was not able to discover the predicate of his Ronald-Smith claims until Ronald-Smith was decided in November 11, 2011. Previous to 2011, the law held that the difference between murder in the second degree and manslaughter upon a sudden quarrel, was the presence or absence of intent. See State v.

Jones, supra. In Ronald-Smith the Nebraska Supreme Court held that murder in the second degree and manslaughter upon a sudden quarrel are both intentional crimes, which is the predicate discovered by Mr. Leonor. Following the discovery of the predicate from the decision in Ronald-Smith, as Mr. Leonor explained above in Section 2 of this motion to alter or amend judgment, he brought his Ronald-Smith claims in a postconviction proceeding within the one-year limitation period that § 29-3001(4) imposes, on March 9, 2012. See (Court Records, Succ. Post. Mot., filed until May 30, 2012; Claims 3, 5, & 10). Thus, the predicate of Mr. Leonor's Ronald-Smith claims was discovered through the exercise of due diligence.

However, the predicate of Mr. Leonor's Ronald-Smith claims could not have been completely discovered until such predicate would have applied retroactively to cases on collateral review. That is, Mr. Leonor exercised due diligence in the discovery of the predicate of Ronald-Smith claims until Montgomey v. Louisiana, supra, held that a substantive rule ought to apply retroactively to cases in collateral review.

Thus, even assuming arguendo that Mr. Leonor's Ronald-Smith claims do not meet the criteria in § 29-3001(4)(d), which Mr. Leonor still contends it still do, his claims also meet the criteria within § 29-3001(4)(b). It is not whether the Nebraska Supreme Court has said that the decision in Ronald-Smith provided a constitutional rule that makes Mr. Leonor's claim of constitutional nature, but the predicate of the decision in Ronald Smith

for purposes of § 29-3001(4)(b).

ALso, since Mr. Leonor had raised his Ronald-Smith claims in his March 9, 2012-postconviction proceeding, it should be noted that the Court denied that postconviction proceeding by finding that:

> [I]n reviewing his third motion, [the Court] does not believe that it affirmatively shows on its face the basis relied upon for relief was not available at the time the prior motion was filed. Nor does his third motion does not raised any new issues that were not raised, or available to be raised, by the defendant at trial or in his initial post-conviction motion.

See (Exhibit # 1, p. 4).

As far as the Ronald-Smith claims are concerned, Mr. Leonor has not been able to appeal to the appellate court the Court's denial of his March 9, 2012-postconviction motion, because that 2012-postconviction proceeding has been still pending before the Court on a "Motion to Vacate or Modify Judgment" submitted for filing since May 5, 2014. See (Court Records).

However, notable here is that the reasoning of the Court in its order denying the March 9, 2012-postconviction motion differs from the reasoning of the Court in its order denying the current postconviction motion in that, the order denying the current post-conviction motion states that Mr. Leonor is timely barred because he could have raised his Ronald-Smith claims within one-year

following the decision in Ronald-Smith, see (Order entered on September 6, 2017-denying Succ. Pot. Mot., at pp. 5-6), while the order denying his March 9, 2012-postconviction motion states that his Ronald-Smith claims were procedurally barred because he could have raised these claims at trial or in his initial postconviction motion. See (Exhibit # 1, p. 4).

As previously stated, Mr. Leonor's Ronald-Smith claims were only available until after Ronald-Smith was decided in November 11, 2011, and he did raise these claims in his March 9, 2012-postconviction proceeding within one-year following the decision in Ronald-Smith. Thus, it was error of the Court not to consider that Mr. Leonor's Ronald-Smith claims qualify for the current postconviction proceeding under § 29-3001(4)(b).

4. Mr. Leonor's Ronald-Smith Claims are Proper under § 29-3001(4)(c).

Section § 29-3001(4)(c) states as follows:

> (4) A one-year period of limitation shall apply to the filing of a verified motion for postconviction relief. The one-year limitation period shall run from the later of:
>
> ...
>
> (c) The date on which an impediment created by State action, in violation of the Constitution of the United States or the Constitution of Nebraska or any law of this state, is removed, if the prisoner was prevented from filing a verified motion by such state action....

The impediment given here is that the Nebraska Supreme Court failed to hold that the decision in Ronald-Smith qualifies as a "substantive rule" under federal law. The Nebraska Supreme Court also is the State of Nebraska. And such action by the State had impeded Mr. Leonor from bringing his postconviction motion under § 29-3001(4)(d) because § 29-3001(4)(d) requires that the newly recognized right has been made applicable retroactively to cases on postconviction collateral review. Id.

The farthest that Mr. Leonor could have advanced following the decision in Ronald-Smith to bring his Ronald-Smith claims was to file a postconviction motion to meet the one-year limitation period under § 29-3001(4), but nothing else, until the decision in Ronald-Smith would have applied retroactively to cases on collateral review.

Such time has come. The U.S. Supreme Court in Montgomery v. Louisiana, supra, held that "[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." Id. 136 S.Ct. at 729. Thus, it was a violation of the U.S. Constitution as recognized in Montgomery v. Louisiana that the Nebraska Supreme court failed to hold that its decision in Ronald-Smith was a substantive constitutional rule that applies to cases on collateral review. This means, that through Montgomery v. Louisiana, the impediment created by the Nebraska Supreme Court has been removed.

Therefore, the Nebraska Supreme Court provided an impediment by not holding that Ronald-Smith is a substantive rule under federal law that would have applied retroactively in collateral review, and that was a violation of the U.S. Constitution. The impediment created by the Nebraska Supreme Court prevented Mr. Leonor from bringing a postconviction motion under § 29-3001(4)(d). Through Montgomery v. Louisiana, that impedimend has now been lifted, which entitles Mr. Leonor to bring his Ronald-Smith claims under § 29-3001(4)(c). The Court erred in not holding that Mr. Leonor's Ronald-Smith claims were proper under § 29-3001(4)(c).

5. The Granting of the Appointment of Counsel and an Evidentiary Hearing is Proper in the Current Proceeding.

For the reasons stated above in sections 1-4 of this motion to alter or amend judgment, Mr. Leonor asserts that the appointment of counsel and an evidentiary hearing is proper for the current postconviction proceeding. Thus, the Court erred in not granting an evidentiary hearing and the appointment of counsel.

6. The U.S. and Nebraska Constitutions and Montgomery v. Louisiana require States to Provide a Remedy for Mr. Leonor's Ronald-Smith claims.

In Montgomery v. Louisiana, the U.S. Supreme Court held that "[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." Id. 136 S.Ct. at 729. If the Court still is not convinced that the Post-

conviction Act is the remedy available for Mr. Leonor to raise his Ronald-Smith claims, then he asks the Court to consider the holding in Montgomery v. Louisiana as a mandate for this Court to treat his motion titled Succesive Postconviction Motion, as the proper motion or remedy that is available for Mr. Leonor.

Mr. Leonor's right to Access to the Courts, Due Process and Equal Protection Clauses under the U.S. and the Nebraska Constitutions guarantee a remedy for Mr. Leonor to raise his Ronald-Smith claims to be heard and redressed.

CONCLUSION+

For the reasons argued above, Mr. Leonor asks the Court to alter or amend its judgment entered on September 6, 2017, and provide the remedy and relief that he is entitled to.

Respectfully submitted on this 11th day of September, 2017, by,

Juan Leonor DOC #54664

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Motion to Alter or Amend Judgment, was served upon the State's Attorney, Mr. Don Kleine, Douglas County Attorney, Hall of Justice, 17th and Farnam Streets, Omaha, Nebraska 68183, through U.S. Mail Service, postage prepaid, on this 11th day of September, 2017.

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

APPENDIX O

In *State v. Abdulkadir*, 286 Neb. 417 (Neb. 2013), the defendant argued that "the step instruction given to his jury did not allow the jury consider the crime of manslaughter while deliberating the elements of second degree murder." *Id.* at 426-427. In response, the Nebraska Supreme Court held, "[b]ecause the **second degree murder instruction required the State to disprove beyond a reasonable doubt that Abdulkadir killed]the victim] during a sudden quarrel**, we disagree." *Id* (emphasis added). The Nebraska Supreme Court added, "[h]ere, the jury instructions allowed the jury to resolve the fact issue regarding "upon a sudden quarrel" within the second degree murder instruction." *Id.* at 427-428. Moreover, the Nebraska Supreme concluded that the second degree murder jury instruction "satisfie[s] the requirements set out in [*William-]Smith*...." *Abdulkadir*, 286 Neb. at 427-428.

In *State v. Hinrichsen*, 292 Neb. 611 (Neb. 2016), the jury instruction given in that case to that defendant's jury also instructed that to have convicted Hinrichsen of second degree murder the jury must have found that "the killings occurred (1) intentionally (2) without premeditation and (3) **not upon a sudden quarrel**. If the jury found the State proved each of those elements **beyond a reasonable doubt**, it was instructed that its duty was to convict Hinrichsen of

second degree murder." If not, "it was then to consider whether the State had proved manslaughter." Id. at 620. (original internal quotations) (emphasis added). The Nebraska Supreme Court added, "[t]he jury instructions given properly enumerated each statutory element of **each degree of homicide.** *Id.* at 621 (emphasis added).

Similar, In *State v. Gonzales*, 294 Neb. 627 (Neb. 2016), the jury in that case was instructed on the second degree murder instruction that "[t]o find Gonzales guilty of second degree murder, ... it must find the **State proved beyond a reasonable doubt** that Gonzales killed [the victim] and that he did so intentionally and **not as a result of a sudden quarrel.**" *Id.* at 643 (emphasis added).

APPENDIX P

on-the-job training and training through journals and other publications, based on my assignment in those units that I have been assigned to.

Q. Have you also dealt with gang involved shootings and homicides in your experience?

A. Yes.

Q. And in your experience as a homicide investigator and investigating crimes involving gangs, are there guidelines for gang members' identification or documentation that's used?

A. Yes.

Q. And what are those guidelines?

A. There is a set of criteria that includes a list of common denominators. Associate members would be people that would have -- wear gang clothing, would be included in gang photographs, would associate with known gang members, would do gang graffiti. Then the members, they would include having things like gang tattoos on their body. The most important being their own self-admission that they were gang members, if they were also included in gang affiliated crimes such as destruction of properties or misdemeanor crimes, assaults, things of that nature. And then hard-core gang members, they also elevate to the status of when they do violent crimes such as homicides or drive-by shootings, they may have a leadership role within the gang. And, also, if they are involved in narcotics distribution.

And then, finally, any of all three of those designations, whether it be associate, member, or hard-core member, if you were to get information from confidential sources from other jurisdictions, if they had had a record in their -- while they were incarcerated in prison of gang activity, all of those factors would figure into whether or not they would be considered an associate, a member, or a hard-core member. And usually we use two or more of those criteria to designate those parties and their status.

Q. And being involved in the gang unit, do you keep gang files on each member that you have information on?

A. Yes.

Q. And you use those criteria to rank them whether they are a hard-core member or associate member?

A. We utilize those to categorize them in those three statuses, either an associate, a member, or hard-core member.

Q. What type of information is included -- when you have a documented gang member, what type of documentation is included in that file?

A. Any kinds of stops that officers would make, traffic stops when they would have been with known gang members, any crimes in which they would have been investigated in, if they were -- made a self-admission to an officer that they were a gang member, those types of things. If they were incarcerated for a long period of time, they might have some prison

information from the penitentiary about their gang activity down in Lincoln.

Q. And what does it mean to be "jumped in"?

A. Jumping in is a way -- sort of a gang initiation-type atmosphere where any number from three or more people will initiate a new member by a physical assault on them. They will try to fight back. And it's usually for a set time period, anywhere from 30 seconds to a minute. And once they've been, quote, "jumped in" or assaulted and they have, you know, stood up and taken their beating, then they are considered a member.

Q. What does it mean if someone says they are going to take a bat to someone's house?

A. It's been used in the context of a drive-by shooting.

Q. And, Detective Ferrell, in the course of your experience and training, have you had experience with Lomas gang members?

A. Yes.

Q. And have you had experience with Surenos gang members?

A. Yes.

Q. And what experience have you had involving both of those gangs?

A. 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.

Q. And did you determine in your investigating any reason for the sig- -- the significant increase in crimes involving Surenos gang members?

A. Yes. Through interviews of Surenos gang members and also confidantial informants, the basic thing was that the Surenos gang members wanted everyone to be a Surenos gang member, and if you weren't, then they were going to have problems with you. They were going to assault you, do drive-by shootings on you until you decided to become a Surenos gang member.

Q. Detective Ferrell, I would like to direct your attention to the early morning hours of November 20th, 1999. Were you on duty that morning?

A. Yes.

Q. And were you called out to LaLoma Cafe at 21st and Q Street?

A. Yes.

Q. And why were you called to that location?

A. The uniform officers needed some investigators at the scene of a shooting at 2102 Q Street.

Q. And do you recall what time you arrived at that scene?

A. About 1:30 in the morning.

MR. ANTHONY TROIA: May I cross-examine?

CROSS-EXAMINATION

BY MR. ANTHONY TROIA:

Q. Mr. Chavez, how long did you say you were a member of the Surenos gang?

A. About three years.

Q. About three years. Since you were 15 years old?

A. Yeah.

Q. And you talked about a code or something. She asked you about a code of silence? Is that right -- or something?

A. Yeah.

Q. You get in the gang by you getting beat up or other people getting beat up?

A. I getting beat up.

Q. All right. And you testified that you are out -- the purpose of your gang is to go out and commit crimes; right?

A. Pretty much -- not like go after other people, like other gangs that we don't get along with.

Q. Like Lomas?

A. Yes, like fight them or stuff like that.

Q. All right. And have you ever been convicted of a felony?

A. No.

Q. When did you first -- when were you first interviewed by the police department?

Q. So you are saying that four of you went in there?
A. Yeah.
Q. Now, are you sure it wasn't just three of you that went in there?
A. No. I remember it was four.
Q. How long were you in there?
A. A couple of minutes or so.
Q. What was the reason that the gang was mad at Mr. Silva?
A. To my knowledge, because, I guess, he has done stuff to us, too, or to other individuals of my gang.
Q. Wasn't there a drive-by shooting where one of the members of the Lomas gang -- or the Surenos gang's mother was shot?
A. I heard about it.
Q. Whose mother was that?
A. Gorge.
Q. Gorge Vargas Gutierrez, or was it Gorge Macias, also known as Speedy?
A. Yes.
Q. And did Speedy know, if you know, that Lomas was responsible for the shooting of his mother?
A. I didn't know nothing of it.
Q. All right. On that evening was Speedy with you?
A. Not that I can remember, no, he wasn't.

Q. And what did Malo say to you?
A. That they had shot somebody.
Q. That they had shot somebody?
A. Yeah.
Q. They were laughing?
A. Yeah.
Q. Did he tell you who was driving?
A. He was driving.
Q. Malo was driving?
A. Yeah.
Q. And Creeper was shooting?
A. Yeah.
Q. Did Malo tell you something about they had thrown Surenos gang signs at this car?
A. They had thrown some at -- the other person had thrown Lomas at them. That's why they had thrown Surenos back at them.
Q. And that's why they did what they did?
A. Yeah.
Q. Does he tell you how they did it?
A. They didn't say. They just said they were following them, just shooting them.
Q. Now, the -- you have talked to the police several times -- a couple of times actually; is that right?
A. Yeah.

APPENDIX Q

28 U.S.C. § 2242, states, in relevant part:

Application for a writ of habeas corpus shall be in writing signed and verified the person for whose relied it is intended or by someone acting on his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, ... it shall state the reasons for not making application to the district court of the district in which the applicant is held.

APPENDIX R

28 U.S.C § 2243, states, in relevant part:

"A court, justice or judge entertaining an application for a writ of habeas corpus shall forwith award the Writ or issue an order directing the respondent to show cause why shall writ should not be granted, unless it appears from the application or person detained is not entitled thereto.

The writ or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order be directed shall make a return certifying the true cause of detention.

When the writ or order is returned a day shall be set for a hearing, not more than five days after the return unless for good cause additional time is allowed.

When the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of the court, before or after being filed.

The Court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

APPENDIX S

28 U.S.C. § 2244(b), states in relevant part that:

(1) A claim presented in a second or successive habeas corpus application under Section 2254 that was presented in a prior application shall be dismissed. ...

(2) A claim presented in a second or successive habeas corpus application under Section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this Section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application. ...

(E) 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. ...

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court. The limitation period shall run from the latest of—

(A) The date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by state action in violation of the Constitution or laws of the United States is removed; if the applicant was prevented from filing such state action;

(C) The date on which the constitutional right asserted was initially recognized by the Supreme Court, if made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for state postconviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

APPENDIX T

28 U.S.C. § 2254, states in relevant part:

(a) The Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States...

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(C) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has a right under the law of the States, by any available procedure, the question presented.