

APPENDIX A: Opinion, *Iromuanya v. Frakes*, 866 F.3d 872 (8th Cir. 2017)1a

APPENDIX B: Order of the United States Court of Appeals for the Eighth Circuit denying Petition for Rehearing or Rehearing *En Banc* in *Iromuanya v. Frakes*, dated October 20, 201710a

APPENDIX C: Memorandum and Order, *Iromuanya v. Frakes*, No. 4:12CV3091 (D. Neb. March 31, 2016) ECF No. 4911a

866 F.3d 872
United States Court of Appeals,
Eighth Circuit.

Lucky I. IROMUANYA, Petitioner-Appellant

v.

Scott FRAKES, Director, Nebraska Department
of Correctional Services, Respondent-Appellee

No. 16-1935

|
Submitted: May 10, 2017

|
Filed: August 7, 2017

Synopsis

Background: Following affirmance of convictions for attempted second degree murder, second degree murder, and two related counts of use of a weapon on direct appeal, 272 Neb. 178, 719 N.W.2d 263, and denial of post-conviction relief, 282 Neb. 798, 806 N.W.2d 404, the United States District Court for the District of Nebraska, Joseph F. Bataillon, Senior District Judge, 2016 WL 1270985, denied state prisoner's petition for writ of habeas corpus. Defendant appealed.

Holdings: The Court of Appeals, Beam, Circuit Judge, held that:

[1] prisoner's due process issues were raised in and adjudicated by Nebraska Supreme Court, as required to seek federal habeas review, but

[2] Nebraska Supreme Court's findings were not contrary to, or unreasonable application of, clearly established federal law.

Affirmed.

West Headnotes (8)

[1] **Habeas Corpus**

⇌ Sufficiency of Presentation; Fair
Presentation

A state prisoner must present the substance of each federal constitutional claim to the state courts before seeking federal habeas corpus relief. 28 U.S.C.A. § 2254.

Cases that cite this headnote

[2] **Habeas Corpus**

⇌ Review by highest state court

Under the postconviction procedures available in Nebraska, a state prisoner must have presented each federal habeas claim to the Nebraska Supreme Court, either on direct review or postconviction review, before federal habeas review is available, and if the prisoner fails to do so, the claim is procedurally defaulted. 28 U.S.C.A. § 2254.

Cases that cite this headnote

[3] **Habeas Corpus**

⇌ Review by highest state court

State prisoner's due process issues were raised in and adjudicated by Nebraska Supreme Court, as required to seek federal habeas review of claims that trial court violated his due process rights by failing to properly instruct the jury; although supreme court did not explicitly address all of the due process issues in denying relief on direct appeal, due process claims were addressed in its postconviction opinion. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254.

1 Cases that cite this headnote

[4] **Habeas Corpus**

⇌ Instructions

Nebraska Supreme Court's finding that habeas petitioner's due process rights were not offended by lack of jury instructions on lesser-included offense of manslaughter or sudden-quarrel provocation with respect to charge of second degree attempted murder, or by sudden-quarrel step instruction requiring jury to find defendant not guilty of second degree murder charge prior to considering sudden-quarrel with respect to manslaughter was not

contrary to, or unreasonable application of, clearly established federal law, or based on an unreasonable determination of the facts in light of the evidence, as required to obtain federal habeas relief; at time of trial, crime of attempted sudden-quarrel manslaughter did not exist under Nebraska law, and absence of provocation was not element of second-degree murder. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d); Neb. Rev. Stat. §§ 28-304, 28-305(1).

1 Cases that cite this headnote

[5] **Constitutional Law**

⚖ Presumptions, inferences, and burden of proof

Constitutional Law

⚖ Degree of proof; reasonable doubt

Due process requires the state to prove, beyond a reasonable doubt, every fact necessary to constitute the crime with which a defendant is charged, but does not require the state to disprove every possible fact that would mitigate or excuse the defendant's culpability. U.S. Const. Amend. 14.

Cases that cite this headnote

[6] **Constitutional Law**

⚖ Presumptions, inferences, and burden of proof

A state legislature does not violate a defendant's due process rights when it allocates the burden of proving an affirmative defense to the defendant when the defense merely excuses conduct that would otherwise be punishable; but when a defense necessarily negates an element of an offense, it is not a true affirmative defense, and the legislature may not allocate to the defendant the burden of proving the defense. U.S. Const. Amend. 14.

Cases that cite this headnote

[7] **Criminal Law**

⚖ States

It is a state's prerogative to define the elements of its crimes.

Cases that cite this headnote

[8] **Habeas Corpus**

⚖ Instructions

A federal court may grant habeas relief on the basis of a faulty state law jury instruction only if the erroneous instruction so infected the entire trial that the resulting conviction violates due process. U.S. Const. Amend. 14.

1 Cases that cite this headnote

***874 Appeal from United States District Court for the District of Nebraska—Lincoln**

Attorneys and Law Firms

Counsel who presented argument on behalf of the appellant was Jennifer L. Gilg, AFD, of Omaha, NE. The following attorney(s) appeared on the appellant brief; Julie Beth Hansen, AFD, of Omaha, NE., Jennifer L. Gilg, AFD, of Omaha, NE.

Counsel who presented argument on behalf of the appellee was James D. Smith, AAG, of Lincoln, NE. The following attorney(s) appeared on the appellee brief; James D. Smith, AAG, of Lincoln, NE.

Before RILEY, BEAM, and SHEPHERD, Circuit Judges.

Opinion

BEAM, Circuit Judge.

Lucky Iromuanya appeals the district court's¹ denial of his 28 U.S.C. § 2254 petition for habeas corpus relief. We affirm.

I. BACKGROUND

The following facts were set forth by the Nebraska Supreme Court and are presumed to be correct under our standard of review. See 28 U.S.C. § 2254(e). Iromuanya was at a college house party in Lincoln, Nebraska, in April 2004 when a dispute arose over an allegedly

stolen shot glass collection. A house resident confronted Iromuanya and Iromuanya's friend when they sought to leave the party. She asserted that no one was leaving the party until the shot glasses were recovered. A shoving match ensued between her boyfriend, Nolan Jenkins, and Iromuanya, wherein Iromuanya punched Jenkins and the parties were separated. Jenkins was subsequently informed that Iromuanya had not taken the shot glasses, and approximately five minutes later, Jenkins walked back toward Iromuanya, ostensibly to shake hands and settle the matter, but Iromuanya again shoved Jenkins when Jenkins got close to him. Another scuffle ensued, but this time Iromuanya took a handgun from his pants and fired a shot. The bullet hit Jenkins, but traveled through him and hit Jenna Cooper, another resident at the house where the party took place. Cooper subsequently died of her injuries. Iromuanya left the scene but was arrested later that evening. In a videotaped statement taken that evening (which was shown to the jury during trial), Iromuanya informed the police that he did not intend to shoot the gun but did not intend to hit anyone, and that he instead attempted to shoot to the side of Jenkins to scare him. *State v. Iromuanya (Iromuanya I)*, 272 Neb. 178, 719 N.W.2d 263, 273-77 (2006).

The primary issue at Iromuanya's trial was whether the state could prove second-degree murder or only manslaughter for Cooper's death and the attempted versions of those crimes for Jenkins' shooting. Iromuanya requested that the trial court include "malice" as an element of the second-degree-murder instruction (which was declined) and also proposed his own theory-of-defense instruction, which spelled out his assertion from the taped statement *875 that he did not intend to shoot anyone but only intended to scare them. The court declined this request, finding that the other instructions adequately conveyed Iromuanya's theory of defense. Iromuanya apparently requested a self-defense instruction, which the court also declined to give.

On the attempted second-degree-murder charge (involving Jenkins), the court instructed the jury that it could find Iromuanya either guilty or not guilty of the charge, but it did not include an option for finding Iromuanya guilty of a lesser included offense of attempted manslaughter. Nor did the attempted second-degree-murder instruction include any instructions about lack of provocation. With regard to the charge of second-degree murder (of Cooper), the court did include manslaughter

as a lesser included offense, and included instructions about sudden-quarrel provocation, but it did so in a "step" instruction—meaning that the jury would only consider manslaughter and sudden-quarrel provocation if it found Iromuanya not guilty of second-degree murder and proceeded to the next part of the instruction. During deliberations, an additional instruction was given after the jury posed a question about the effect of a "sudden quarrel" on attempted second-degree murder. The court instructed the jury that it could not consider "sudden quarrel" when deciding guilt on the charge of attempted second-degree murder. The jury ultimately convicted Iromuanya of the attempted second-degree murder of Jenkins, second-degree murder of Cooper, and both weapons charges, and he was sentenced to an aggregate prison term of 70 years to life imprisonment. *Id.* at 273.

The Nebraska Supreme Court affirmed Iromuanya's conviction on direct appeal. In that appeal, Iromuanya argued that the trial court erred in failing to instruct the jury on malice as an element of second-degree murder and failed to give his requested self-defense instruction. *Id.* at 286. The Nebraska Supreme Court held that because "[m]alice is not an element of second degree murder ... the district court ... did not err in refusing to instruct that it was." *Id.* at 289 (citing Neb. Rev. Stat. § 28-304(1); *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998)). The court further held that there was "no evidence in the record to support a reasonable and good faith belief that Iromuanya was threatened with death or serious bodily harm at the time he fired the handgun" and a self-defense instruction was therefore not warranted. *Id.* at 290.

During state postconviction proceedings, Iromuanya challenged his trial counsel's effectiveness for failing to properly challenge the jury instructions. On appeal of the denial of postconviction relief, the Nebraska Supreme Court again denied relief. *State v. Iromuanya (Iromuanya II)*, 282 Neb. 798, 806 N.W.2d 404 (2011). As relevant to this appeal, after *Iromuanya I* but before *Iromuanya II*, the Nebraska Supreme Court decided *State v. Ronald Smith*, 282 Neb. 720, 806 N.W.2d 383, 394 (2011),² which overruled an earlier case holding that manslaughter was an unintentional crime, and held that the offense of manslaughter was an intentional killing without malice, upon a sudden quarrel. In *Iromuanya II*, the court held that counsel was not ineffective for not anticipating this change in the law, and also held that the state was not constitutionally required to prove a lack of sudden-

quarrel provocation for the attempt to cause Jenkins' death. 806 N.W.2d at 435.

*876 Iromuanya filed the current 28 U.S.C. § 2254 petition for habeas corpus relief in 2012, raising an ineffective assistance of counsel claim for counsel's deficient performance during plea negotiations and for failing to object to the sudden-quarrel jury instruction as a step instruction for second-degree murder. Iromuanya also alleged that the following due process violations occurred during his trial: that the trial court failed to include manslaughter as a lesser included offense of second-degree murder; failed to instruct that the prosecutor must prove the absence of a sudden quarrel beyond a reasonable doubt; and failed to properly instruct the jury on the distinction between "intent to kill" and "intent to kill resulting from a sudden quarrel."

The district court held that the ineffective assistance claims failed on the merits, because the Nebraska Supreme Court's determination that counsel's performance was not deficient was not an unreasonable application of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), nor was it an unreasonable determination of the facts in light of the evidence adduced at trial. See 28 U.S.C. § 2254(d). With regard to the due process claims, the district court determined that the claims were not fairly presented to the state courts and were thus procedurally defaulted. However, the court went on to discuss and reject the due process claims on the merits, noting that at the time of Iromuanya's trial, manslaughter on a sudden quarrel was not a lesser included offense of second-degree murder. The due process claims were certified for appellate review.

II. DISCUSSION

A. Standard of Review

We review petitions for writ of habeas corpus under the standards set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). If Iromuanya's claims were "adjudicated on the merits in State court proceedings," 28 U.S.C. § 2254(d), he is entitled to relief only by showing that the adjudication resulted in a decision that was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "based on an unreasonable determination of

the facts in light of the evidence presented in the State court proceeding."

[1] [2] A state prisoner must present the substance of each federal constitutional claim to the state courts before seeking federal habeas corpus relief. Arnold v. Dormire, 675 F.3d 1082, 1086-87 (8th Cir. 2012). Under the postconviction procedures available in Nebraska, the prisoner must have presented each § 2254 claim to the Nebraska Supreme Court, either on direct review or postconviction review, before federal habeas review is available. Akins v. Kenney, 410 F.3d 451, 454-55 (8th Cir. 2005) (construing Nebraska law). If the prisoner fails to do so, the claim is procedurally defaulted. Id.

B. Procedural Default

[3] The first dispute is whether Iromuanya has fairly presented his due process claims to the state courts, and if he did, whether they were adjudicated on the merits by the Nebraska courts. Iromuanya argues the trial court violated his due process rights by failing to properly instruct the jury as previously stated. The government argues that Iromuanya did not raise these claims in briefing to the Nebraska Supreme Court on direct or postconviction appeal. Our review of Iromuanya's direct appeal and postconviction appeal briefs indicates that Iromuanya arguably did raise the due process issues, both independently *877 and in the context of ineffective assistance of counsel claims. And while the Nebraska Supreme Court did not explicitly address all of the due process issues³ in the denial of relief on direct appeal, it did address due process in its postconviction opinion. Iromuanya II, 806 N.W.2d at 435. The court stated:

We reject Iromuanya's argument that the instructions relieved the State of its burden to prove beyond a reasonable doubt that the attempt to cause death was not committed during a sudden quarrel provocation. Due process requires the prosecution to prove, beyond a reasonable doubt, every fact necessary to constitute the crime charged. Here, the instruction for attempted second degree murder of Jenkins informed the jury that the State had to prove Iromuanya's intent to kill beyond a reasonable

doubt. The absence of a provocation is not an element of second degree murder, and no element of the charge is presumed. If the jurors had believed that Iromuanya did not intend to kill Jenkins, the instructions required them to find him not guilty of attempted second degree murder.

Id. (footnotes omitted). We find that Iromuanya adequately, though possibly inartfully, presented the due process claims to the Nebraska Supreme Court, and that the court adjudicated them. Further, even were we to find the procedural issue in doubt, we may, and in fact will, proceed to the merits of Iromuanya's claims. *See Barrett v. Acevedo*, 169 F.3d 1155, 1162 (8th Cir. 1999) (holding that while normally procedural issues should be resolved first, judicial economy sometimes dictates reaching the merits if the merits are more easily resolvable).

C. Merits

[4] Because the state court adjudicated Iromuanya's due process claim on the merits, *Iromuanya II*, 806 N.W.2d at 435, we review under the deferential standard of 28 U.S.C. § 2254(d). Although Iromuanya's habeas corpus petition lists due process claims with multiple parts, we find that based upon his appellate briefing the claims can be distilled as follows: Iromuanya's jury should have been able to consider sudden-quarrel provocation to distinguish between second-degree murder and manslaughter, and the state has the burden of proving the absence of sudden-quarrel provocation. Iromuanya challenges the fact that the jury was precluded from considering sudden quarrel on the attempt charge (involving Jenkins and based upon the trial court's answer to the jury question), and the fact that the step instruction in the second-degree-murder charge did not allow the jury to consider sudden quarrel unless and until it found Iromuanya not guilty of second-degree murder. The Nebraska Supreme Court found that there was no due process violation and the state was not relieved of its burden to prove the elements of second-degree murder because in the State of Nebraska in 2004, "[t]he absence of a provocation [was] not an element of second degree murder." *Iromuanya II*, 806 N.W.2d at 435.

At this point, the state of Nebraska law on second-degree murder and manslaughter between 1994 and 2011 merits

our attention. In *State v. Ryan*, 249 Neb. 218, 543 N.W.2d 128, 137 (1996), the court reaffirmed numerous of its prior holdings that malice is, and has been for a very long time, an element of second-degree murder, despite the fact that the Nebraska legislature omitted the term "malice" from the *878 statutory definition of second-degree murder in the 1977 revision of the Nebraska code. However, merely two years later, in *Burlison*, 583 N.W.2d at 36, the court overruled *Ryan* and numerous other cases, and held that malice is not an element of second-degree murder based on the statutory definition. *See* Neb. Rev. Stat. § 28-304 (Reissue 2016) (defining second-degree murder since 1977 as "caus[ing] the death of a person intentionally, but without premeditation").

Relatedly, manslaughter is defined in Nebraska as the killing of another, without malice, either upon a sudden quarrel or by unintentionally causing the death of another while committing an unlawful act. *See State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890, 896 (1989) (citing Neb. Rev. Stat. § 28-305(1)). The *Pettit* court noted that based upon the disjunctive nature of the statute and other common law principles, intent is an essential element of manslaughter committed upon a sudden quarrel (voluntary manslaughter) and intent is not an element of manslaughter when a person is killed during the commission of an unlawful act (involuntary manslaughter). *Id.* at 901. However, in *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654, 659 (1994), the court relied upon recent prior Nebraska cases defining "malice" and ultimately equated the concept of "malice" with intent. *Id.* Accordingly, the *Jones* court held that because manslaughter is defined to be a killing committed without malice, manslaughter is an unintentional crime. *Id.* *Jones* remained the state of the law with regard to manslaughter until 2011, when the court overruled *Jones* and held that voluntary manslaughter is an intentional crime. *Ronald Smith*, 806 N.W.2d at 393-94.

In *Ronald Smith*, the defendant was convicted of second-degree murder after killing his girlfriend, following a night of drinking and methamphetamine use, as well as an ongoing argument between the two of them over money. Ronald pushed her from the bed and as she lay motionless on the floor, he smothered her with a pillow for one to two minutes. Before he left, he covered her with a blanket and absconded until he was arrested in Illinois. *Id.* at 387. On direct appeal, he argued (as Iromuanya now argues), that the jury was incorrectly instructed because

the step instruction given did not allow the jury to consider whether his specific intent to kill was the result of a sudden quarrel. *Id.* at 390. The court acknowledged that at the time of Ronald's trial post-*Jones*, because manslaughter was not an intentional crime, the step instruction was the correct statement of the law at the time. *Id.* However, the court decided that *Jones* was wrongly decided (in part because it was based upon malice cases that were subsequently overruled in *Burlison*) and held that the state must prove intent to kill for a conviction for manslaughter upon a sudden quarrel. *Id.* at 392-94. Thus, the court found the step jury instruction to be erroneous. *Id.* at 394. However, the court also analyzed the evidence presented at trial and found that the jury could not have reasonably concluded that Ronald committed sudden-quarrel manslaughter, and therefore the erroneous jury instruction was not prejudicial. *Id.* at 395. The court acknowledged that although Ronald and his girlfriend were arguing and he was angry, there was no evidence that this anger would have provoked a reasonable person in Ronald's position to obscure and disturb his power of reasoning so as to make him smother her with a pillow for two minutes after he had knocked her unconscious. *Id.*

In *State v. William Smith (William Smith I)*, 19 Neb.App. 708, 811 N.W.2d 720, 733 (2012), the Nebraska Court of Appeals explained that during the time between *Jones* and *Ronald Smith*, "the crime of attempted voluntary manslaughter *879 (even upon a sudden quarrel) [did] not exist in Nebraska." *Id.* at 734. This was so because an attempt crime required the actor to take a substantial step toward committing the crime, which was an intentional act. Because manslaughter was legally considered an unintentional crime from 1994 through 2011, a person could not "perform the same act both intentionally and unintentionally." *Id.* Essentially, one can commit an unintentional crime, but one cannot attempt an unintentional crime. Furthermore, also during this time frame, the absence of sudden-quarrel provocation could not be considered an element of second-degree murder, again because of the unintentional nature of manslaughter upon a sudden quarrel between the time of 1994 and 2011. On further review to the Nebraska Supreme Court, the court ruled that the change in law announced in *Ronald Smith* was not a new rule of constitutional law and could therefore only be applied to cases pending on direct review (and by implication, not to cases on collateral review). *State v. William Smith (William Smith II)*, 284 Neb. 636, 822 N.W.2d 401, 416 (2012).

So, when Iromuanya committed and was tried for this crime in 2004, malice was not an element of second-degree murder, and a conviction for manslaughter did not require proof of intent. The effect of the foregoing was that the crime of attempted sudden-quarrel manslaughter did not exist (and therefore could not be considered by the jury as a lesser included offense for the attempt charge), and the absence of provocation was not an element of second-degree murder. Given all of this, the Nebraska Supreme Court found that there was no due process violation and the state was not relieved of its burden to prove the elements of second-degree murder in 2004 during Iromuanya's trial. *Iromuanya II*, 806 N.W.2d at 435. This was not contrary to, nor an unreasonable application of, Supreme Court precedent.

However, Iromuanya argues that *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), and dicta from *Martin v. Ohio*, 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987) compel a contrary conclusion. *In re Winship* sets forth the outer boundaries of our inquiry as it held that the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364, 90 S.Ct. 1068. Five years later in *Mullaney*, the Supreme Court granted habeas corpus relief because the State of Maine placed the burden of proof on the defendant to prove that he acted "in the heat of passion" to avoid a conviction for murder (and its resulting life sentence) and reduced the homicide charge to manslaughter. 421 U.S. at 686, 700-01, 95 S.Ct. 1881. The State of Maine at that time recognized two forms of homicide—murder and manslaughter. Once the state had proved that a killing was both unlawful and intentional, the jury would then consider the distinction between murder and manslaughter. In so doing, the jury was instructed that malice aforethought was implied "unless the defendant proved by a fair preponderance of the evidence that [the defendant] acted in the heat of passion on sudden provocation." *Id.* at 686, 95 S.Ct. 1881. The Court held that the malice presumption, though subject to rebuttal, relieved the state of its due process burden to prove every element of the crime beyond a reasonable doubt, as required by *In re Winship*. *Id.* at 700-01, 95 S.Ct. 1881.

A few years later, however, in Patterson, the Court distinguished Mullaney and found no due process violation where the accused was required to prove self defense *880 by a preponderance of the evidence. Id. at 215-16, 97 S.Ct. 2319. This was because the New York murder statute at issue did not have malice as an element (and did not allow the jury to presume an element, unlike in Mullaney), and thus the state was not required to “disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused.” Id. at 210, 216, 97 S.Ct. 2319. Ten years after Patterson, in Martin, the Court held that the State of Ohio likewise did not unconstitutionally shift the burden by requiring the defendant to prove the elements of self defense. However, the Court went on to state:

It would be quite different if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State's case, i.e., that self-defense evidence must be put aside for all purposes unless it satisfied the preponderance standard. Such an instruction would relieve the State of its burden and plainly run afoul of Winship's mandate.

Martin, 480 U.S. at 233-34, 107 S.Ct. 1098.

[5] [6] To summarize applicable Supreme Court precedent: 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. at 364, 90 S.Ct. 1068. Due process does not, however, require the state to disprove every possible fact that would mitigate or excuse the defendant's culpability. Patterson, 432 U.S. at 207, 97 S.Ct. 2319. Nor does a state legislature violate a defendant's due process rights when it allocates the burden of proving an affirmative defense to the defendant when the defense merely excuses conduct that would otherwise be punishable. Martin, 480 U.S. at 237, 107 S.Ct. 1098. But when a “defense” necessarily negates an element of an offense, it is not a true affirmative defense, and the legislature may not allocate to the defendant the burden of proving the defense. Mullaney, 421 U.S. at 699-701, 95 S.Ct. 1881.

Iromuanya argues that his “sudden-quarrel provocation” defense would have negated an element of the offense of attempted second-degree-murder in violation of the Mullaney rule, and that the step instruction, precluding consideration of sudden-quarrel provocation until an acquittal on second-degree-murder, violates due process as explicated by the Martin dicta, quoted above. However, the Nebraska Supreme Court's determination that there was no due process violation in connection with the sudden-quarrel instructions was not an unreasonable application of Supreme Court precedent. The state was required to prove all the elements of second-degree-murder at the time of Iromuanya's trial, in keeping with In re Winship. Sudden-quarrel provocation did not negate any element of second-degree-murder as contemplated by Mullaney because it (manslaughter) was not considered an intentional crime at the time of trial. Therefore, the finding of a sudden quarrel would not negate proof of intent, an element of second-degree murder. As the Ronald Smith court acknowledged, the argument about the step instruction was foreclosed by Nebraska law at the time of Iromuanya's trial. 806 N.W.2d at 390.

[7] It is the state's prerogative to define the elements of its crimes. Bounds v. Delo, 151 F.3d 1116, 1118 (8th Cir. 1998) (“The elements of state law crimes are defined by state law.”); cf. Patterson, 432 U.S. at 201, 97 S.Ct. 2319 (“It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government....”). After Jones, there was no requirement of an intention to kill in committing *881 voluntary manslaughter and thus attempted sudden-quarrel manslaughter did not exist in Nebraska. William Smith II, 822 N.W.2d at 415. And the characterization of sudden-quarrel manslaughter as an unintentional crime further precluded it from being an element of second-degree murder. The Iromuanya II court recognized the unique timing at issue in this case:

So under Jones, the district court correctly instructed the jurors that they could not consider a sudden quarrel provocation in deciding whether Iromuanya was guilty or not guilty of attempted second degree murder for shooting at Jenkins. It is true that we have recently overruled our decision in Jones and held that sudden quarrel

manslaughter is an intentional killing. But this decision was issued well after Iromuanya's trial and direct appeal.

806 N.W.2d at 435 (footnotes omitted). Had Iromuanya's trial occurred after Ronald Smith, the case that overruled Jones, Iromuanya's jury likely would have been instructed differently. But while Ronald Smith changed Nebraska manslaughter law, it did so on Ronald Smith's direct appeal, and this change was not retroactively applied to other cases pending on collateral review. William Smith II, 822 N.W.2d at 415-16 (noting that Ronald Smith "did not announce a new constitutional rule"). Indeed, the change in law announced in Ronald Smith did not even help Ronald Smith, as the court found that there was no evidence of sudden-quarrel provocation introduced at trial, and thus he was not prejudiced by the newly erroneous step jury instruction. Ronald Smith, 806 N.W.2d at 395.

[8] To the extent Iromuanya implicitly complains about Ronald Smith not applying retroactively, this again is a state law problem, not a federal due process problem. See Estelle v. McGuire, 502 U.S. 62, 71-72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). A federal court may grant habeas relief on the basis of a faulty state law jury instruction only if the erroneous instruction "so infected the entire trial that the resulting conviction violates due process." Id. at 72, 112 S.Ct. 475 (quoting Cupp v. Naughten, 414 U.S. 141, 147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973)). The stringent Estelle standard cannot be met here, because similar to Ronald Smith, there was likely a lack of evidence from which the jury could have concluded⁴ that Iromuanya committed sudden-quarrel manslaughter instead of second-degree murder. See Ronald Smith, 806

N.W.2d at 395. The Nebraska Supreme Court's factual recitation of Iromuanya's case indicates that sudden-quarrel provocation was not really an issue during Iromuanya's trial. The jury heard Iromuanya's videotaped statement that while he was angry that he had been accused of stealing the shot glasses, he did not intend to hit Jenkins, but just wanted to scare him away. Further, Iromuanya admitted that when he fired the shot, he knew that he was no longer suspected of stealing the shot glasses. Most importantly, five minutes had passed between the initial shoving match between Iromuanya *882 and Jenkins, and when Iromuanya fired the fatal shot. Iromuanya I, 719 N.W.2d at 275-77. These recitations are presumed to be correct. 28 U.S.C. § 2254(e). Thus, any possible error did not infect the entire trial so as to result in a denial of due process, Estelle, 502 U.S. at 72, 112 S.Ct. 475, because sudden-quarrel provocation was likely not a viable theory given the evidence presented at trial. See Ronald Smith, 806 N.W.2d at 395.

III. CONCLUSION

The Nebraska Supreme Court determined that due process was not offended by either the lack of jury instructions, or the step jury instruction, with regard to sudden-quarrel manslaughter. This adjudication was not contrary to, nor did it involve an unreasonable application of, clearly established Supreme Court precedent. The adjudication also was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. We affirm.

All Citations

866 F.3d 872

Footnotes

- 1 The Honorable Joseph F. Bataillon, United States District Judge for the District of Nebraska.
- 2 There are two Nebraska cases relevant to the issues in this case wherein the defendant's surname is Smith. We will differentiate them by including the defendant's first name in the citation.
- 3 The court did discuss the manslaughter lesser included instruction while disposing of Iromuanya's arguments about his theory-of-defense instruction. Iromuanya I, 719 N.W.2d at 288.
- 4 Although Iromuanya (understandably) relies upon the jury question asking if it could consider sudden-quarrel manslaughter for the attempt charge, we really have no way of knowing what the jury was thinking when it submitted that question. It is quite possible the jury was confused by the comparison of the attempted second-degree-charge's instructions (and noted the lack of any mention of sudden-quarrel manslaughter), with the second-degree instructions which included sudden-quarrel manslaughter as a lesser included offense of second-degree murder. Having wrestled

with applicable Nebraska law while considering this case, we can easily comprehend the jury's possible confusion over why the crime of attempted sudden-quarrel manslaughter did not exist in 2004.

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**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 16-1935

Lucky I. Iromuanyo

Appellant

v.

Scott Frakes, Director, Nebraska Department of Correctional Services

Appellee

Appeal from U.S. District Court for the District of Nebraska - Lincoln
(4:12-cv-03091-JFB)

ORDER

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

October 20, 2017

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

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

LUCKY I. IROMUANYA

Petitioner,

vs.

SCOTT FRAKES

Respondent.

4:12CV3091

MEMORANDUM AND ORDER

This matter is before the court on Lucky Iromuanya's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Filing No. 1. The action was briefed on the merits and submitted on the record. In 2004, a jury convicted Iromuanya in the District Court of Lancaster County, Nebraska of Count I, attempted murder in the second degree, Count III, murder in the second degree, and Counts II and IV, using a weapon to commit a felony. See Neb. Rev. Stat. §§ 28-201, 28-304, and 28-1205. Iromuanya's convictions were twice affirmed by the Nebraska Supreme Court.¹ Iromuanya is currently serving an aggregate prison term of 70 years to life.² After an extended and careful review of the record, the court finds no violation of Lucky Iromuanya's constitutional rights and thus denies his Petition for a Writ of Habeas Corpus.

I. Factual Background

¹ See *State v. Iromuanya*, 719 N.W.2d 263, 296 (Neb. 2006) ("*Iromuanya I*") and *State v. Iromuanya*, 806 N.W.2d 404 (Neb. 2011) ("*Iromuanya II*").

² The District Court of Lancaster County sentenced Iromuanya to an indeterminate term of 10 to 25 years' imprisonment for each of Counts II and IV, 25 to 35 years for Count I, and a term of not less than life imprisonment nor more than life imprisonment for Count III. The Court ordered that Iromuanya serve all counts consecutively. On direct appeal, the Nebraska Supreme Court affirmed Iromuanya's convictions on all counts, but modified the sentence for Count III "to not less than 50 years' imprisonment nor more than life imprisonment" *State v. Iromuanya*, 719 N.W.2d 263, 296 (Neb. 2006). Counts I and III were modified from consecutive to concurrent terms, while Counts II and IV remained consecutive to Counts I and III and to each other. *Id.*

a. Underlying Crimes

The parties do not dispute the trial court's factual findings. Facts relevant to Iromuanya's claims, as recounted in *Iromuanya I* & *Iromuanya II*³, are as follows:

In the early morning hours of April 25, 2004, Lucky Iromuanya and a friend, Aroun Phaisan, attended a party at the shared residence of Jenna Cooper and Lindsey Ingram in Lincoln, Nebraska. *Iromuanya I*, 719 N.W.2d at 273. At some point after Iromuanya and Phaisan's arrival, a dispute arose over a missing collection of shot glasses that belonged to Cooper or Ingram. *Id.* at 274. After Cooper became aware of the missing shot glasses, she followed an unidentified individual outside and said she wanted the shot glasses returned. *Id.* Iromuanya and Phaisan were standing near the shot glass collection before it went missing. *Id.* Apparently Iromuanya and Phaisan were concerned they would be accused of the theft, so they left the residence. *Id.* Outside, Ingram observed Iromuanya and Phaisan leaving the house "very quickly" and she told the two men no one could leave until the items were returned. *Id.* Shortly thereafter, Nolan Jenkins exited the residence. *Id.* Jenkins grabbed and pushed Iromuanya, and inquired whether Iromuanya was responsible for the missing glasses. *Id.* After a brief scuffle between Jenkins and Iromuanya, several bystanders intervened and separated the two men. *Id.* During this intervention, Iromuanya punched Jenkins in the back of the head. *Id.*

After the physical altercation, Iromuanya became visibly agitated. *Iromuanya I*, 719 N.W.2d at 275. Several individuals, including Cooper, approached Iromuanya in an

³ See *State v. Iromuanya*, 719 N.W.2d 263, 296 (Neb. 2006) ("*Iromuanya I*") and *State v. Iromuanya*, 806 N.W.2d 404 (Neb. 2011) ("*Iromuanya II*").

effort to calm him down, but their attempts were unsuccessful. *Id.* Iromuanya remained agitated and fixated on Jenkins. *Id.* Iromuanya eventually calmed down, but only briefly; after Cooper asked Iromuanya about the shot glasses, Iromuanya became upset again and denied taking them. *Id.* Approximately five minutes after the initial altercation, Jenkins walked back across the yard toward Iromuanya. *Iromuanya I*, 719 N.W.2d at 275. Jenkins walked at a normal pace and “some witnesses testified that [Jenkins’] hand was outstretched, as if he intended to shake hands with Iromuanya. Jenkins testified that [that] was his intent.” *Id.* One witness “observed that Iromuanya appeared to become more upset as Jenkins approached” *Id.* Once Jenkins came within one step of Iromuanya, Iromuanya shoved Jenkins in the chest with both hands, knocking Jenkins backward. *Id.* Several individuals stepped-in between Jenkins and Iromuanya. *Id.* At that point, Iromuanya removed a handgun from his pants pocket, pointed the weapon at Jenkins, who was approximately five feet away, and fired one round. *Iromuanya I*, 719 N.W.2d at 276. “It was later determined that a single bullet entered Jenkins’ left temple and exited above his left ear. The bullet then pierced Cooper’s neck, causing her death.” *Id.*

In 2004, a jury convicted Iromuanya in the District Court of Lancaster County, Nebraska, of Count I, attempted murder in the second degree, Count III, murder in the second degree, and Counts II and IV, using a weapon to commit a felony. See Neb. Rev. Stat. §§ 28-201, -304, and -1205.

b. Procedural History

i. Direct Appeal

The same counsel represented Iromuanya at trial and on direct appeal. *Iromuanya II*, 806 N.W.2d at 418. On direct appeal, Iromuanya made no claims regarding ineffective assistance of trial counsel, and he made only one assignment of error regarding jury instructions. *Iromuanya I*, 719 N.W.2d at 277. Iromuanya claimed the trial court erred in giving jury instruction No. 8, which pertained to the element of intent.⁴ *Id.* Iromuanya did not argue that the instruction incorrectly stated the law, nor did he argue it violated his constitutional rights; instead, Iromuanya argued that the instruction was prejudicial because it impermissibly allowed the jury to infer his intent from the result of his actions. *Id.* at 287. The Nebraska Supreme Court rejected Iromuanya's argument and concluded the trial court did not err. *Id.* at 288. Iromuanya's direct appeal concluded when the Supreme Court of the United States denied his petition for writ of certiorari. Filing No. 12, United States Supreme Court Order Direct Appeal.

ii. Post-Conviction Appeal

After the conclusion of Iromuanya's direct appeal, he filed a petition for postconviction relief. New counsel represented Iromuanya during his postconviction proceedings. Filing No. 12-12, Order Appointing Counsel Other Than Public Defender.

⁴ Instruction No. 8 contained the following language:

Intent is an element of the crimes charged against the defendant. In deciding whether the defendant acted with intent, you should consider his words and acts and all of the surrounding circumstances.

You may infer, but are not required to infer, that a person intended a reasonably probable result of his or her act.

Filing No. 12-11, at ECF p.15.

The District Court of Lancaster County, Nebraska, denied Iromuanya's petition for postconviction relief without an evidentiary hearing. Filing No. 12-12, Transcript *Iromuanya II*, at ECF pp.8-32. Iromuanya appealed to the Nebraska Supreme Court. *See Iromuanya II*, 806 N.W.2d 404 (Neb. 2011).

On appeal, Iromuanya argued that the district court erred by failing to grant an evidentiary hearing on all his claims pertaining to ineffective assistance of trial counsel and appellate counsel.⁵ *Id.* at 418. Iromuanya argued that trial counsel "failed to provide objectively reasonable advice and representation in respect to plea negotiations" and that he "was not adequately informed of the status and substance of offers made by the prosecution" Filing No. 12-9, Brief of Appellant *Iromuanya II*, at ECF p.33. Iromuanya concluded that "[b]ut for the ineffectiveness of [his] attorneys, the results of the proceedings would have been different." *Id.* The Nebraska Supreme Court rejected Iromuanya's argument. *Iromuanya II*, 806 N.W.2d at 420. The Court observed that "at Iromuanya's sentencing hearing, his trial counsel stated that (1) he had sent a letter to the prosecution extending Iromuanya's offer to plead guilty to manslaughter; and (2) if the prosecutor had accepted the offer, Iromuanya would have pleaded guilty." *Id.* The Court concluded that because Iromuanya "[did] not allege that the prosecutor offered him a plea agreement[,]" his allegations were "insufficient to overcome the presumption that his trial counsel acted reasonably."⁶ *Iromuanya II*, 806 N.W.2d at 420.

⁵ Iromuanya's placed his constitutionally relevant postconviction claims within sizeable headings. *See Filing No. 12-9, at ECF pp.18, 33, Brief of Appellant Iromuanya II.* In relevant part, Iromuanya alleged the denial of his right to effective assistance of counsel and due process of the law in violation of the 5th, 6th, and 14th Amendments to the United States Constitution.

⁶ Under Nebraska law, "[a] court must grant an evidentiary hearing on a postconviction motion when the motion contains factual allegations which, if proven, constitute an infringement of the movant's

Additionally, Iromuanya argued “the [district] court erred in failing to find that trial counsel was ineffective for failing to (1) properly challenge jury instructions and (2) object to the court’s response to the jurors’ question during deliberations.”⁷ *Iromuanya II*, 806 N.W.2d at 434. The relevant instructions for Iromuanya’s claims were Jury Instruction No. 3 and Jury Instruction No. 5. In *Iromuanya II*, the Nebraska Supreme Court explained these instructions by stating that,

Jury instruction No. 3 set out the elements for attempted second degree murder of Jenkins. The instruction informed jurors that they could find Iromuanya guilty or not guilty and did not have a lesser-included offense.⁸

Jury instruction No. 5 set out the elements for the charge of second degree murder of Cooper. It did have a lesser-included offense of

rights under the Nebraska or federal Constitution.” *Iromuanya II*, 806 N.W.2d at 419 (citing *State v. McGhee*, 787 N.W.2d 700 (Neb. 2010)). “But if a postconviction motion alleges only conclusions of fact or law—or if the records and files in the case affirmatively show that the movant is entitled to no relief—no evidentiary hearing is required.” *Id.*

⁷ “During the jury’s deliberations, jurors sent this question to the court: ‘Can a “sudden quarrel” be a consideration when making a decision of not guilty or guilty in the charge of attempted murder in the 2nd degree?’” *Iromuanya II*, 806 N.W.2d at 434-35. “Defense counsel agreed with the prosecutor that the jury could not consider a sudden quarrel for attempted second degree murder, and that is how the court instructed the jury.” *Id.* at 435.

⁸ The material elements for Attempted Murder in the Second Degree were put to the jury in Instruction No. 3 as follows:

1. That the defendant, Lucky Ikenna Iromuanya, intended to commit Murder in the Second Degree; and
2. That the defendant attempted to commit Murder in the Second Degree by attempting to cause the death of Nolan Jenkins, intentionally but without premeditation; and
3. That the defendant did so by intentionally engaging in conduct which, under the circumstances as he believed them to be, constituted a substantial step in a course of conduct intended to culminate in his commission of the crime of Murder in the Second Degree; and
4. That the defendant’s conduct strongly corroborated his intent to commit Murder in the Second Degree; and
5. That the defendant did so on or about April 25, 2004, in Lancaster County, Nebraska.

Filing No. 12-11, Jury Instruction No. 3, at ECF pp.6-7.

manslaughter and informed jurors that they could find Iromuanya guilty of murder in the second degree, or guilty of manslaughter, or not guilty. If the jury found that the State had failed to prove second degree murder, the instruction stated that it must acquit Iromuanya of that charge and consider the crime of manslaughter.⁹

The manslaughter elements in instruction No. 5 required the State to prove that Iromuanya killed Cooper without malice upon (1) a sudden quarrel or (2) unintentionally while in the commission of an unlawful act, to wit: recklessly causing bodily injury to Jenna Cooper.

Iromuanya II, 806 N.W.2d at 433 (internal quotation marks omitted). Iromuanya claimed “[t]he critical factual question to be decided [was] whether [he] acted intentionally but by the provocation of a sudden quarrel.”¹⁰ Filing No. 12-9, Brief of Appellant *Iromuanya II*, at ECF pp. 22-23. He claimed the jury was disallowed from considering the issue because “the jury was expressly informed both by Instruction No. 10 and the answer to the jurors’ question, that provocation and sudden quarrel [could not] be considered while addressing the intent requirement for second degree murder related offenses.”¹¹ Filing No. 12-9, Brief of Appellant *Iromuanya II*, at ECF p. 23.

⁹ The material elements for Murder in the Second Degree were put to the jury in Instruction No. 5 as follows:

1. That the defendant, on or about April 25, 2004, did kill Jenna Cooper;
2. That the defendant did so in Lancaster County, Nebraska; and
3. That the defendant did so intentionally, but without premeditation.

Filing No. 12-11, at ECF p.10.

¹⁰ The gravamen of Iromuanya’s argument was that Instructions No. 3 and No. 5 should have included a negative element that required the prosecution to prove beyond a reasonable doubt that sudden quarrel provocation did not precipitate Iromuanya’s intent to kill. See Filing No. 12-9, Brief of Appellant *Iromuanya II*, at ECF p.18 (“[t]here [was] no lesser-included offense instruction [in Instruction No. 3] and the instruction [did] not require the State to prove beyond a reasonable doubt that the [attempted murder] of Nolan Jenkins was intentional but not intentional by provocation caused by a sudden quarrel.”).

¹¹ Jury Instruction No. 10 contained the following language:

Iromuanya further alleged the instructions relieved the State of its burden to "prove beyond a reasonable doubt that the death or the attempt to cause the death was not committed by provocation during the course of a sudden quarrel." Filing No. 12-9, Brief of Appellant *Iromuanya II*, at ECF p.24. Thus, Iromuanya argued, defense counsel's failures resulted in "a denial of due process . . . and the right to effective assistance of counsel." Filing No. 12-9, Brief of Appellant *Iromuanya II*, at ECF p. 24.

The Nebraska Supreme Court rejected all of Iromuanya's arguments. First, the Court addressed Iromuanya's argument that counsel failed to challenge the trial court's response to the jurors' inquiry. The Court noted that the trial court "instructed the jurors that they could not consider a sudden quarrel provocation in deciding Iromuanya's intent for attempted second degree murder" *Iromuanya II*, 806 N.W.2d at 434. The Court determined the "response was correct under the governing law at the time of Iromuanya's trial." *Id.* The Court explained that sudden quarrel provocation was derived from Neb. Rev. Stat. § 28-305(1) (Reissue 2008), which "provides that '[a] person commits manslaughter if he kills another without malice, either upon a sudden quarrel,

"Sudden quarrel" is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self control. The phrase "sudden quarrel" 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 Nolan Jenkins. In considering the offense of manslaughter, you should determine whether the defendant acted under the impulse of sudden passion suddenly aroused which clouded reason and prevented rational action, whether there existed reasonable and adequate provocation to excite the passion of the defendant and obscure and disturb his power of reasoning to the extent that he acted rashly and from passion, without due deliberation and reflection, rather than from judgment, and whether, under all the facts and circumstances as disclosed by the evidence, a reasonable time had elapsed from the time of provocation to the instant of the killing for the passion to subside and reason resume control of the mind. You should determine whether the suspension of reason, if shown to exist, arising from sudden passion, continued from the time of provocation until the very instant of the act producing death took place.

Filing No. 12-11, at ECF p. 19.

or causes the death of another unintentionally while in the commission of an unlawful act.” The Court explained the law governing at the time of Iromuanya’s trial:

In *State v. Jones*, [515 N.W.2d 654, 659 (Neb. 1994) (subsequent history omitted)], we specifically held that “there is no 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.”

So under *Jones*, the district court correctly instructed the jurors that they could not consider a sudden quarrel provocation in deciding whether Iromuanya was guilty or not guilty of attempted second degree murder for shooting at Jenkins. It is true that we have recently overruled our decision in *Jones* and held that sudden quarrel manslaughter is an intentional killing. But this decision was issued well after Iromuanya’s trial and direct appeal. The failure to anticipate a change in existing law does not constitute deficient performance.¹²

Iromuanya II, 806 N.W.2d at 434-35. Thus, the Court reasoned, “Iromuanya’s trial counsel was not ineffective for failing to object to the court’s response to the jury.” *Id.* at 435.

Next, the Court addressed Iromuanya’s argument that counsel failed to challenge various jury instructions. The Court observed, “Instruction No. 10 informed jurors that they should consider whether the conflict between Iromuanya and Jenkins was a sufficient provocation for the charge of manslaughter.” *Iromuanya II*, 806 N.W.2d at 435. The Court noted, however, that sudden quarrel provocation was relevant only to the charge of manslaughter as a lesser-included offense to the charge of second- degree murder of Cooper. *Id.* The Court concluded that, “[i]f the jurors had believed that

¹² The holding in *State v. Jones*, 515 N.W.2d 654 (Neb. 1994) was overruled by *State v. Ronald Smith*, 806 N.W.2d 383 (Neb. 2011) (holding that sudden quarrel manslaughter is an intentional killing). Although *Ronald Smith* was decided before *Iromuanya II*, retroactive application of the *Ronald Smith* holding applies only to cases on, or pending on, direct review. See *State v. William Smith*, 822 N.W.2d 401 (Neb. 2012) (citing *Griffith v. Kentucky*, 479 U.S. 314 (1987)) (establishing that “a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, *pending on direct review or not yet final*”) (emphasis added). This Court notes that Iromuanya’s direct appeal (*Iromuanya I*) concluded January 16, 2007. See Filing No. 12-2, US Supreme Court Order Direct Appeal.

Iromuanya did not intend to kill Jenkins, the instructions required them to find him not guilty of attempted second degree murder.”¹³ *Iromuanya II*, 806 N.W.2d at 435. The Court also rejected “Iromuanya’s argument that the instructions relieved the State of its burden to prove beyond a reasonable doubt that the attempt to cause death was not committed during a sudden quarrel provocation.” *Id.* The Court stated, “[d]ue process requires the prosecution to prove, beyond a reasonable doubt, every fact necessary to constitute the crime charged.”¹⁴ *Id.* The Court explained that “[h]ere, the instruction for attempted second degree murder of Jenkins informed the jury that the State had to prove Iromuanya’s intent to kill beyond a reasonable doubt[]” and that “[t]he absence of a provocation is not an element of second degree murder” *Id.* The Court concluded Iromuanya’s “[d]efense counsel [was] not ineffective for failing to object to jury instructions that, when read together and taken as a whole, correctly state[d] the law and [were] not misleading.” *Id.*

c. Federal Habeas Corpus Action

Iromuanya timely filed his petition in this action *pro se* in 2012. Filing No. 1. In 2013, this court appointed counsel to Mr. Iromuanya for the limited purpose of submitting briefs, Filing No. 33, and Iromuanya filed a brief in support of his petition on

¹³ This reasoning would have necessarily led the jury to the same result for the charge of second-degree murder in *re Cooper*. Had the jury found no intention to kill, then, and only then, would the jury have been prompted to consider manslaughter as set forth in Instruction No. 5.

¹⁴ Although Iromuanya did not allege a Due Process violation by the trial court in his postconviction brief, the Nebraska Supreme Court appears to, at least implicitly, address the issue as if he had. As authority, the Court cited cases regarding the constitutional requirement that guilt must be proven beyond a reasonable doubt. *See State v. Putz*, 662 N.W.2d 606, 611-12 (Neb. 2003) (addressing claim of erroneous jury instruction defining “reasonable doubt”) (citing *In re Winship*, 397 U.S. 358, 364 (1970) (“hold[ing] that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”)). The court addresses this issue beginning at page 24, below.

the merits. Filing No. 39. Respondent filed a brief in response to Iromuanya's petition, Filing No. 22, and a reply brief to Iromuanya's brief in support. Filing No. 44. In 2015, the court granted respondent's Motion to Substitute Party and Scott Frakes, acting in his official capacity as Director of the Nebraska Department of Correctional Institutions, was named Respondent. Filing No. 48.

The court addresses Iromuanya's claims below.

II. Legal Framework

a. Standard of Review

When a state court has adjudicated a habeas petitioner's claim on the merits, there is a very limited and extremely deferential standard of review both as to the law and the facts. See 28 U.S.C. § 2254(d). Section 2254(d)(1) states that a federal court may grant a writ of habeas corpus if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). As explained by the Supreme Court in *Williams v. Taylor*, 529 U.S. 362 (2000), a state court acts contrary to clearly established federal law if it applies a legal rule that contradicts the Supreme Court's prior holdings or if it reaches a different result from one of that Court's cases despite confronting indistinguishable facts. 529 U.S. at 405-06. A state court decision involves an "unreasonable application" when it identifies the correct legal rule, but unreasonably applies it to the facts. *Id.* at 407. "A state court's application of clearly established federal law must be objectively unreasonable, not merely incorrect, to warrant the granting of a writ of habeas corpus." *Arnold v. Dormire*, 675 F.3d 1082, 1085 (8th Cir. 2012) (internal citations and quotation marks omitted).

With regard to the deference owed to factual findings of a state court's decision, Section 2254(d)(2) states that a federal court may grant a writ of habeas corpus if a state court proceeding "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Additionally, a federal court must presume that a factual determination made by the state court is correct, unless the petitioner "rebut[s] the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

As the Supreme Court noted, "[i]f this standard is difficult to meet, that is because it was meant to be." *Harrington v. Richter*, 131 S.Ct. 770, 786 (2011). The deference due state court decisions "preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [Supreme Court] precedents." *Id.* In short, "[i]t bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* However, this high degree of deference only applies where a claim has been adjudicated on the merits by the state court. See *Brown v. Luebbbers*, 371 F.3d 458, 460 (8th Cir. 2004) ("[A]s the language of the statute makes clear, there is a condition precedent that must be satisfied before we can apply the deferential AEDPA standard to [the petitioner's] claim. The claim must have been 'adjudicated on the merits' in state court.").

The Eighth Circuit clarified what it means for a claim to be adjudicated on the merits, finding that:

AEDPA's requirement that a petitioner's claim be adjudicated on the merits by a state court is not an entitlement to a well-articulated or even a correct decision by a state court Accordingly, the postconviction trial court's discussion of counsel's performance—combined with its express determination that the ineffective-assistance claim as a whole lacked merit—plainly suffices as an adjudication on the merits under AEDPA.

Worthington v. Roper, 631 F.3d 487, 496-97 (8th Cir. 2011) (internal quotation marks and citations omitted).

The Eighth Circuit also determined that a federal court reviewing a habeas claim under AEDPA must “look through” the state court opinions and “apply AEDPA review to the ‘last reasoned decision’ of the state courts.” *Id.* at 497 (internal citation omitted). A district court should do “so regardless of whether the affirmance was reasoned as to some issues or was a summary denial of all claims.” *Id.* The Supreme Court agrees, stating:

There is no text in the statute requiring a statement of reasons. The statute refers only to a “decision,” which resulted from an “adjudication.” As every Court of Appeals to consider the issue has recognized, determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning.

Harrington, 131 S.Ct. at 784.

III. Discussion

Condensed and summarized for clarity, Iromuanya's claims are as follows:¹⁵

a. Claim One: Ineffective Assistance of Counsel

Iromuanya's first claim alleges he was denied due process of law and the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments *because his trial counsel: (1) rejected a plea agreement without first informing Petitioner*

¹⁵ Iromuanya's petition for Writ of Habeas Corpus is located in Filing No. 1.

of the plea offer; and (2) failed to recognize that the prosecutor had a duty to prove beyond a reasonable doubt "the absence of a sudden quarrel provocation" regarding the second degree murder charge and therefore failed to object on that basis. Filing No. 7. Iromuanya asks the court to grant his petition or, in the alternative, grant an evidentiary hearing.

i. Procedural Defenses

Respondent concedes that Iromuanya's claim of ineffective assistance of counsel "does not appear to have been procedurally defaulted." Filing No. 22, at ECF p. 7. The court finds that Iromuanya's claims of ineffective assistance of counsel were fairly presented to the Nebraska Supreme Court and properly exhausted at the state level pursuant to 28 U.S.C. § 2254(b)(1)(A), and thus are ripe for this court's review.¹⁶

ii. Principles of Law

Claims of ineffective assistance of counsel are reviewed under the two-pronged standard outlined in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* requires that the petitioner demonstrate both that his counsel's performance was deficient, and that such deficient performance prejudiced the petitioner. *Id.* at 687; *see also Bryson v.*

¹⁶ The court notes that, in *Iromuanya II*, the Nebraska Supreme Court viewed the "core issue" as "whether the [district] court erred in dismissing Iromuanya's postconviction motion without an evidentiary hearing." *Iromuanya II*, 806 N.W.2d at 419. The Court's posture may have been due to the disorganized construction of Iromuanya's brief in *Iromuanya II*. Cf. Filing No. 12-9, Brief of Appellant *Iromuanya II*, at ECF p.i (where the "Table of Contents" contained a heading that referenced only the district court's denial of an evidentiary hearing) with Filing No. 12-9, Brief of Appellant *Iromuanya II*, at ECF p. 2 (where the "Assignments of Error" contained an ineffective assistance of counsel claim pursuant to *Strickland v. Washington*, *supra*, as its own assignment of error). Nevertheless, this court is satisfied that the claims were fairly presented to, *see Dye v. Hofbauer*, 546 U.S. 1, 3-4 (2005) ("Outlining specific allegations of prosecutorial misconduct, the text of the brief under this argument heading cites the Fifth and Fourteenth Amendments to the Constitution of the United States."), and adjudicated by, the Nebraska Supreme Court in *Iromuanya II*.

United States, 268 F.3d 560, 561 (8th Cir. 2001); *Williamson v. Jones*, 936 F.2d 1000, 1004 (8th Cir. 1991).

The first prong of the Strickland test requires the petitioner to demonstrate that his or her attorney failed to provide reasonably effective assistance. *Strickland*, 466 U.S. at 687. In conducting such a review, the courts “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance[.]” *Id.* at 689. When addressing a claim of ineffectiveness, a court must assess the “reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 691.

The second prong requires the petitioner to demonstrate “a reasonable probability that but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694; *see also Hubbeling v. United States*, 288 F.3d 363, 365 (8th Cir. 2002). “When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.” *Id.* at 695. A court need not address the reasonableness of the attorney’s skills and diligence if the movant cannot prove prejudice under the second prong of this test. *See United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996).

In the context of section 2254 habeas corpus petitions, ineffective assistance of counsel claims are afforded “a substantially higher threshold” of deference that does not focus on “whether a federal court believes the state court’s determination [under *Strickland*] was incorrect” but whether the “determination was unreasonable[.]” *Knowles*

v. Mirzayance, 556 U.S. 111, 123 (2009). Additionally, “because the *Strickland* standard is a general standard[.]” state court decisions are given “doubly deferential judicial review[.]” *Id.*

iii. Analysis

In order for this court to grant Iromuanya's petition, it must find that the Nebraska Supreme Court's decisions (1) were contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) were based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d)(1)-(2) (1996).

1. Plea Negotiations

Since Iromuanya argues the Nebraska Supreme Court's decision regarding counsel's assistance in plea negotiations resulted from an unreasonable factual determination, See Filing No. 39, at ECF p. 17, the court will look to section 2254(d)(2) as the controlling statutory provision. As a preliminary matter, however, Iromuanya must rebut, by clear and convincing evidence, the Nebraska Supreme Court's factual determinations. *See Cochran v. Dormire*, 701 F.3d 865, 869 (8th Cir. 2012) (citing 28 U.S.C. § 2254(e)(1)).

First, Iromuanya challenges the Nebraska Supreme Court's factual determination that he did not allege in his postconviction brief that the prosecutor offered a plea agreement. Filing No. 39, at ECF pp. 15-17. Iromuanya thus argues that he did “allege a prosecution offer in his post-conviction motion[.]” Filing No. 39, at ECF p. 17. As evidence of this claim, Iromuanya quotes an excerpt from his postconviction brief, which

states, “[Iromuanya] was not adequately informed of the status and substance of offers made by the prosecution[.]” Filing No. 39, Brief in Support of Petition, at ECF pp. 15-16 (quoting Filing No. 12-9, Brief of Appellant *Iromuanya II*, at ECF p. 33). Although the court concedes that reasonable minds could differ interpreting whether the statement alleges, albeit implicitly, that the prosecution had in fact made a plea offer, “even if reasonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court’s . . . determination.” *Wood v. Allen*, 558 U.S. 290, 301 (2010) (internal citations omitted). Even assuming, arguendo, that this court believed the Nebraska Supreme Court incorrectly interpreted Iromuanya’s allegation, “a state court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.” *Cochran v. Dormire*, 701 F.3d 865, 869 (8th Cir. 2012) (quoting *Wood v. Allen*, 558 U.S. 290 (2010)). The court finds that Iromuanya has not rebutted the Nebraska Supreme Court’s factual determination by clear and convincing evidence.

Next, Iromuanya argues that the Nebraska Supreme Court’s decision—that defense counsel was not deficient during plea negotiations—was based on an unreasonable determination of the facts. Filing No. 39, at ECF pp. 15-17. As stated in its opinion, the Nebraska Supreme Court’s decision was based on two factors: (1) Iromuanya’s failure to allege a prosecution plea offer and (2) defense counsel’s statement at Iromuanya’s sentencing hearing. *Iromuanya II*, 806 N.W.2d at 809. As to the first factor, Iromuanya argues that his allegation, “if true, would justify a finding of deficient performance[.]” thus satisfying the first prong under *Strickland*. Filing No. 39, at ECF p. 16. As for the second prong, regarding prejudice, Iromuanya argues that “had

[he] received objectively reasonable representation, [he] would have pursued and plead [sic] to a lesser offense(s) than the offenses to which he was charged and convicted.”

Id. As to the second factor, Iromuanya argues that it is unreasonable because it requires two additional assumptions: Iromuanya made the only offer, and the prosecution made no counter-offer. Filing No. 39, at ECF p. 16. Iromuanya speculates that “[i]t is completely possible that, while the prosecution rejected Iromuanya’s offer, [the prosecution] made a counter-offer that was never communicated to Iromuanya.” Filing No. 39, at ECF p. 17. In its opinion, the Nebraska Supreme Court concluded, “Under this record, Iromuanya’s allegations are insufficient to overcome the presumption that his trial counsel acted reasonably.” *Iromuanya II*, 806 N.W.2d at 809. This court agrees with the Nebraska Supreme Court. Iromuanya has established neither that “counsel’s representation fell below an objective standard of reasonableness[.]” *Knowles v. Mirzayance*, 556 U.S. 111, 124 (2009), nor “that there [was] a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. 668, 694 (1984). As noted above, the Nebraska Supreme Court’s factual determination regarding its interpretation of Iromuanya’s allegation was reasonable. Furthermore, the record supports defense counsel’s statement during the sentencing hearing, and this court cannot say the Nebraska Supreme Court’s decision was unreasonable for having relied upon it. This court concludes that the Nebraska Supreme Court’s decision—that defense counsel’s performance during plea negotiations was not deficient—was based on a reasonable determination of the facts in light of the evidence presented in the State court proceeding. *See* 28 U.S.C. § 2254(d)(2).

The court also denies Iromuanya's request for an evidentiary hearing. Iromuanya alleges in his petition that, subsequent to his trial and conviction, defense counsel informed his mother of a prosecution offer. Filing No. 1, at ECF p. 6. However, Iromuanya fails to identify with any sort of particularity *when* after his trial he learned of this alleged offer. To warrant an evidentiary hearing the claim must rely on "a factual predicate that could not have been previously discovered through the exercise of due diligence[.]" 28 U.S.C. § 2254(e)(2)(A)(ii). Iromuanya's claim fails to meet this threshold.

Given the foregoing, Iromuanya has failed to rebut the Nebraska Supreme Court's factual determination and establish that the Nebraska Supreme Court's decision was based on an unreasonable determination of the facts in light of the evidence adduced during the state court proceedings.

2. Jury Instructions

Iromuanya's second ineffective assistance of counsel claim concerns 28 U.S.C. § 2254(d)(1). Iromuanya argues that defense counsel was ineffective because counsel "failed to recognize that the prosecutor had a duty to prove beyond a reasonable doubt the absence of a sudden quarrel provocation regarding the second degree murder charge and therefore failed to object on that basis." See Filing No. 7, at ECF p. 1. Pursuant to 28 U.S.C. § 2254(d)(1), this court may grant Iromuanya's petition only if it concludes that the Nebraska Supreme Court's "decision was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

Iromuanya's focuses his argument primarily on the "wildly fluctuating" changes to Nebraska's second-degree murder and manslaughter laws. Filing No. 39, at ECF p. 29.

Because the “law on second degree murder and sudden quarrel manslaughter was in flux for decades[.]” *Iromuanya* argues, “it was indeed deficient performance for Iromuanya’s attorney not to insist that ‘sudden quarrel’ be a consideration on the second degree murder/attempted second degree murder charges.” *Id.* He further argues, “federal law was such that Counsel should have requested instructions making it clear that the state bore the burden of proving absence of sudden quarrel.”¹⁷ *Id.*

On postconviction review, the Nebraska Supreme Court found that defense counsel’s performance was not deficient. See *Iromuanya II*, 806 N.W.2d at 434-35. The Nebraska Supreme Court observed that “[t]he absence of a provocation [was] not an element of second degree murder [at the time of the trial], and no element of the charge [was] presumed.” *Id.* at 435. Thus, the Nebraska Supreme Court concluded, defense counsel’s “failure to anticipate a change in existing law d[id] not constitute deficient performance.” *Id.* at 435. This court agrees with the Nebraska Supreme Court’s decision, and thus concludes it was neither contrary to, nor an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States.

In *Strickland v. Washington*, the United States Supreme Court stated, “[i]n any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.” 466 U.S. at 688. Under Nebraska law, “absence of a provocation is not an element of second degree murder[.]” *Iromuanya II*, 806 N.W.2d at 435. Thus, it would have been

¹⁷ The court notes the issue concerning burden of proof is addressed in *Iromuanya*’s Claim Two. See Filing No. 7, at ECF p. 2.

erroneous, as a matter of Nebraska law, to include Iromuanya's requested negative element to the instruction for second-degree murder.¹⁸ As such, the court cannot conclude defense counsel's performance "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. At the time of Iromuanya's trial, notwithstanding the subsequent changes to Nebraska's second-degree murder and manslaughter laws, a jury could not consider a sudden quarrel provocation in deciding intent for second-degree murder. *Id.* The court rejects the notion that counsel should have foreseen a change in the existing law at the time of trial. The Eighth Circuit has addressed the issue and determined that counsel is not deficient for failing to anticipate a change in existing law. See *Carter v. Hopkins*, 92 F.3d 666, 670 (8th Cir.1996) ("[C]ounsel need not 'anticipate a change in existing law' to render constitutionally effective assistance of counsel."), *cert. denied*, 520 U.S. 1107 (1997); see also *Ruff v. Armontrout*, 77 F.3d 265 (8th Cir.1996) (failure to anticipate change in existing law does not amount to ineffective assistance of counsel), *cert. denied*, 519 U.S. 889; *Johnson v. Armontrout*, 923 F.2d 107 (8th Cir.1991), *cert. denied* 502 U.S. 831, 112 S.Ct. 106, 116 L.Ed.2d 75; *Horne v. Trickey*, 895 F.2d 497 (8th Cir.1990). "[T]he proper standard for attorney performance is that of reasonably effective assistance[.]" *Strickland*, 466 U.S. at 687, and this court believes Iromuanya's counsel met that standard. Because Iromuanya's counsel was not deficient, Iromuanya cannot establish that there is a reasonable probability the outcome would have been different. See *Strickland*, 466 U.S.

¹⁸ Iromuanya also argues, "federal law was such that Counsel should have requested instructions making it clear that the state bore the burden of proving absence of sudden quarrel. [*In re*] *Winship*, [397 U.S. 358 (1970)], *Mullaney [v. Wilbur]*, 421 U.S. 684 (1965)], and *Apprendi [v. New Jersey]*, 530 U.S. 466 (2002)], all demand such an instruction, and each of those cases was decided well before [his] trial." Filing No. 39, at ECF p. 29. The court will address this issue beginning at page 22, below.

at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

Given the foregoing, Iromuanya has failed to establish that the Nebraska Supreme Court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d)(1).

b. Claims Two and Three: Due Process Violations

Iromuanya's second claim is that he was denied due process of law in violation of the Fourteenth Amendment *because* the trial court: (1) omitted a "lesser included offense instruction for attempted manslaughter"; (2) failed to instruct the jury that the prosecutor must prove beyond a reasonable doubt "the absence of a sudden quarrel provocation" regarding the charges of attempted second degree murder and second degree murder; and (3) did not properly instruct the jury on the distinction between "intent to kill" and "intent to kill resulting from a sudden quarrel." Iromuanya's third claim alleges that he was denied due process of law in violation of the Fourteenth Amendment *because* the Nebraska Supreme Court upheld the trial court's errors, as set forth directly above in Claim two, parts two and three. Based on these alleged errors, Iromuanya seeks habeas relief.

i. Procedural Defenses

The State argues that Claims two and three both have been procedurally defaulted. Filing No. 22, at ECF p. 6. To further this argument, the State asserts that Iromuanya's due process claims were made only "in the context of the [sic] Iromuanya's

Sixth Amendment right to effective assistance of counsel or as matters of state law, not as violations of the constitutional right to due process.” Filing No. 22, at ECF p. 6. On the other hand, Iromuanya argues these claims are not procedurally defaulted because they were both fairly presented to, and addressed by, the Nebraska Supreme Court. Filing No. 39, at ECF pp. 20-21. After carefully reviewing the record, the court finds that Iromuanya’s Claims two and three are either procedurally defaulted or not proper for this court’s review.

ii. Principles of Law

“Ordinarily, a federal court reviewing a state conviction in a 28 U.S.C. § 2254 proceeding may consider only those claims which the petitioner has presented to the state court in accordance with state procedural rules.” *Arnold v. Dormire*, 675 F.3d 1082, 1086-87 (8th Cir. 2012) (internal citations and quotations marks omitted). “In order to fairly present a federal claim to the state courts, the petitioner must have referred to ‘a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue in a claim before the state courts.’” *McCall v. Benson*, 114 F.3d 754, 757 (8th Cir. 1997) (quoting *Myre v. State of Iowa*, 53 F.3d 199, 200 (8th Cir. 1995)). “If a petitioner has not presented his habeas corpus claim to the state court, the claim is generally defaulted.” *Carney v. Fabian*, 487 F.3d 1094, 1096 (8th Cir. 2007) (citing *Barrett v. Acevedo*, 169 F.3d 1155, 1161 (8th Cir. 1999) (en banc)). “Resolving whether a petitioner has fairly presented his claim to the state courts, thus permitting federal review of the matter, is an intrinsically federal issue that must be determined by the federal courts.” *Wylde v. Hundley*, 69 F.3d 247, 251 (8th Cir. 1995). “Because exhaustion functions as a federal

court gatekeeper, the federal, not the state, courts decide when the state process has been exhausted or should be deemed ineffective because of delay." *Id.* (internal citation and quotations marks omitted).

The United States Supreme Court "ha[s] stated many times that 'federal habeas corpus relief does not lie for errors of state law.'" *Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (citing *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990); *Pulley v. Harris*, 465 U.S. 37, 41 (1984)). "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions [A] federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle*, 502 U.S. at 67-68; see *Arnold*, 675 F.3d at 1086 ("We do not second-guess the decision of a Missouri state court on Missouri law.").

iii. Analysis

1. Claims Two and Three

As noted above, the court finds that Iromuanya's Claims two and three are either procedurally defaulted or not proper for this court's review. Furthermore, the court finds that even if the claims had been properly raised and addressed, they are nevertheless without merit. As such, the court also will address the claims on the merits.

Claim two, part one, concerns the trial court's failure to instruct the jury on the lesser-included offense of attempted manslaughter. However, Iromuanya did not raise this claim either in his direct appeal brief or in his motion for postconviction relief. In fact, in his direct appeal brief, Iromuanya conceded "[a]tttempted manslaughter does not currently exist in Nebraska." Filing No. 12-6, at ECF p. 39 (citing Nebraska caselaw). Even assuming, *arguendo*, that the trial court failed to instruct the jury on the lesser-

included offense of attempted manslaughter, the United States Supreme Court “has never held that there is a constitutional requirement that lesser-included offense instructions be given in noncapital cases.” *Carney v. Fabian*, 487 F.3d 1094, 1097 (8th Cir.2007). As such, neither the trial court nor the Nebraska Supreme Court denied Iromuanya due process of the law. Claim one, part one, is procedurally defaulted or without merit, or both.

Claim two, parts two and three, and Claim three, entirely, concern the trial court's failure to instruct the jury and the Nebraska Supreme Court's subsequent affirmance. Iromuanya argues the trial court failed to instruct the jury (1) about the prosecution's burden to prove beyond a reasonable doubt the absence of sudden quarrel provocation and (2) about the distinction between “intent to kill” and “intent to kill resulting from a sudden quarrel provocation.” Iromuanya raised neither claim in his brief on direct appeal. The court finds that Claim two, part three, and Claim three, part two, were neither presented to, nor addressed by, the Nebraska Supreme Court. Accordingly, those claims are procedurally defaulted. Iromuanya argues the remaining claims—Claim two, part two, and Claim three, part one—were fairly presented to, and addressed by, the Nebraska Supreme Court on postconviction review.

Iromuanya argues the due process claim was fairly presented to the Nebraska Supreme Court by his referencing a denial of due process within the broader context of his ineffective assistance of counsel claim. Filing No. 22, at ECF p. 20. In his postconviction brief, Iromuanya argued the failure to instruct the jury regarding absence of sudden quarrel provocation relieved the State of its burden to prove that negative element. Filing No. 12-9, at ECF pp. 23-24. Therefore, Iromuanya concluded, defense

counsel's failure to object on that basis resulted in denials of due process and effective assistance of counsel. *Id.* As further evidence that he fairly presented the due process claim, Iromuanya argues the Nebraska Supreme Court addressed the issue of due process in its opinion, which states,

We reject Iromuanya's argument that the instructions relieved the State of its burden to prove beyond a reasonable doubt that the attempt to cause death was not committed during a sudden quarrel provocation. Due process requires the prosecution to prove, beyond a reasonable doubt, every fact necessary to constitute the crime charged. Here, the instruction for attempted second degree murder of Jenkins informed the jury that the State had to prove Iromuanya's intent to kill beyond a reasonable doubt. The absence of a provocation is not an element of second degree murder, and no element of the charge is presumed. If the jurors had believed that Iromuanya did not intend to kill Jenkins, the instructions required them to find him not guilty of attempted second degree murder.

Filing No. 22, at ECF p. 21 (citing *Iromuanya II*, 806 N.W.2d at 435).

It is true the Nebraska Supreme Court mentions due process in its *Iromuanya II* opinion; however, the Nebraska Supreme Court addresses due process only as it relates to Iromuanya's ineffective assistance of counsel claim. It is clear, from both Iromuanya's postconviction brief and the Nebraska Supreme Court's opinion in *Iromuanya II*, that all claims funneled through a Sixth Amendment filter. Iromuanya argued the absence of a sudden quarrel provocation ought to have been included in the instructions as a negative element of the second-degree murder charges. The gravamen of his argument, however, was not that the trial court erred by refusing its inclusion, which was correct under Nebraska law, but rather that defense counsel erred by not recognizing the supposed necessity of its inclusion and thus failed to object on those grounds. Even assuming Iromuanya *had* claimed trial court error, the error would be one of state law and not a violation of the federal Constitution. Had his conviction or

direct appeal occurred after the decisions in *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011) or *State v. [William] Smith*, 284 Neb.636, 822 N.W.2d 401(2012) the trial court's jury instructions would have required the procedure he asserts herein.

Manslaughter on a sudden quarrel is not a lesser included of second degree murder and does not require a sequential decision. The Nebraska Supreme Court did not hold this change in the law either constitutional or retroactive. See *[William] Smith supra*.

Unfortunately for Mr. Iromuanya, the inclusion of elements to a second-degree murder instruction is an issue of state, not federal, law. Accordingly, "It is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. *Estelle*, 502 U.S. at 67-68 (1991); see *Arnold*, 675 F.3d at 1086 ("We do not second-guess the decision of a Missouri state court on Missouri law."). The Writ of Habeas Corpus was designed to liberate the unlawfully imprisoned. The court finds no such unlawful imprisonment in Iromuanya's case.

IT IS ORDERED that Iromuanya's petition for writ of habeas corpus and request for an evidentiary hearing are denied. A judgment in conformity with this Memorandum and Order will issue this date.

DATED this 31st day of March, 2016

BY THE COURT:

s/ Joseph F. Bataillon
Senior United States District Judge