No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

STEVEN M. JACOB — PETITIONER
(Your Name)

vs.

SCOTT FRAKES — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

STEVEN M. JACOB #41659
(Your Name)

P.O. BOX 2500
(Address)

LINCOLN, NE 68542-2500
(City, State, Zip Code)

None
(Phone Number)

QUESTION(S) PRESENTED

The Statement of the Case details how the Petitioner's retrial voir dire of a very prejudiced panel resulted in a jury where a "newspaper juror" brings a 3 week old newspaper into the juryroom folded open to a headline reading, "Prosecution in Jacob case won't use dying declaration." State Courts affirmed the conviction by keeping the inadequate voir dire claim separate from the newspaper mistrial claim and finding no prejudice because the newspaper juror was dismissed prior to deliberations and accepting the other juror's claims of impartiality as dispositive. The Federal Habeas Courts applied AEDPA deference, found the State Court's decision "reasonable," denying the writ and certificate of appealability (COA).

I.

Was the Petitioner's demonstration, that the State Courts' decision was dependent on their failure to apply the holding in Murphy v. Florida by accepting juror's assurances of impartiality to find the voir dire adequate rather than apply the McDonough Power Equipment holding to find the newspaper juror's prejudice that the voir dire had not been adequate to reveal (contrary to Morgan v. Illinois), sufficient to require de novo review under the Panetti v. Quarterman standard OR was the Petitioner's demonstration sufficient to rebut any presumption that the State Court's decision had silently applied those Supreme Court holdings, thus requiring de novo review under the Johnson v. Williams standard, and was sufficient to require a COA to issue?

II.

Should a Certificate of Appealability have issued for the Petitioner's Double Jeopardy claims under the standard set out in Miller-El v. Cockeral because "jurists of reason could conclude the issues presented are adequate to deserve encouragement to proceed further."

III.

Should a Certificate of Appealability have issued for the question of whether the 14th Amendment's Due Process Clause prohibits Nebraska Courts from adjudicating Second Degree Murder cases when Nebraska's Second Degree Murder statute (that provides trial courts with the power to impose a judgment) is facially unconstitutional because it is too vague to prevent its arbitrary enforcement?

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page. *

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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* Scott Frakes is the Director of the Nebraska Department of Correctional Services and is represented by the Nebraska Attorney General Douglas Peterson (see the Proof of Service, attached).

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United State Court of Appeals appears at Appendix A to the petition and is unpublished (2018 WL 947664).

The opinion of the United States district court appears at Appendix C to the petition and is unpublished (2017 WL 2414531).

JURISDICTION

The date on which the United States Court of Appeals decided my case was February 8th, 2018.

A timely petition for rehearing was denied by the United States Court of Appeals on May 15th, 2018, and a copy of the order denying rehearing appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 14 of the U.S. Constitution (Due Process of Law)

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Amendment 5 of the U.S. Constitution (Double Jeopardy & Due Process)

No person ...; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; ... nor be deprived of life, liberty,

or property, without due process of law; ....

Amendment 6 of the U.S. Constitution (Fair trial/impartial jury)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, ...

Article V, §9 of the Nebraska Constitution (Limit to adjudication power)

The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide; and judges thereof may admit persons charged with felony to a plea of guilty and pass such sentence as may be prescribed by law.

Neb.Rev.Stat. §28-304 (Second Degree Murder)

(1) A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation. (2) Murder in the second degree is a Class IB felony.

Neb.Rev.Stat. §28-305 (Manslaughter)

(1) A person commits manslaughter if he or she kills another without malice upon a sudden quarrel or causes the death of another unintentionally while in the commission of an unlawful act. (2) Manslaughter is a Class IIA felony.

STATEMENT OF THE CASE

In August of 1989 police officer Barksdale was the first to arrive at the scene of a shooting call. Searching through a dark house he found the body of the first victim, James Etherton, dead in an upstairs hallway. Continuing his search Barksdale hears Melody Hopper cry out, "Help me," from under the bed. She has received two gunshot wounds. Barksdale asks her, "Who did this to you?" She fails to answer. He asks, "Do you know who did this to you?" Again, she fails to answer.

After being transported to the hospital and barely surviving a complicated surgery Melody arrives in the Intensive Care Unit some 7 hours later. Barely conscious, Melody's sister, Pat Okinga, asks her: "Was it Steve?" Unable to speak because of a breathing tube, Hopper nods.

After assisting in the crime scene examination Officer Barksdale is sent to the hospital to question Hopper. After establishing that Hopper feels she will be all right, Barksdale asks three times if it was Steven Jacob who shot her. Hopper nods "yes" each time. As he testifies later, police want to ask questions they know are false to make sure the victim is not simply nodding yes to every question. Barksdale then asks Hopper: "Did you crawl under the bed after Steve shot you?" Hopper nods, "Yes."

Hopper dies in the ICU 5 days later. The Petitioner is arrested on two counts of First Degree Murder.

In a September 1989 preliminary hearing prosecutor Gary Lacey asks Officer Domgard, who led the crime scene examination, if there had been a bullet trajectory through the east wall of the bedroom toward a car windshield in the driveway below it. Domgard testifies, "Yes." The Petitioner is bound over to the state District Court to stand trial.

In the mandatory discovery process the State does not include either of the Report on the Physical Examination of the Crime Scene (required by state statute) nor does it contain Barksdale's report on his questioning of Hopper.

A series of hearings are held to determine the admissibility of what are now being called Hopper's "dying declarations." In those hearings Barksdale testifies that he asked Hopper three times if it was Steve Jacob who shot her. He testifies Hopper nodded, "Yes," to each question. He then testifies Hopper nodded, "Yes," to the question about crawling under the bed after she was shot. He testifies that he then asked Hopper, "Did you try and use the telephone?" Hopper then shrugged her shoulders and continued to give that response to questions about the crime scene. The state District Court ruled the "statements" of Hopper admissible under the dying declaration and residual hearsay exceptions.

Following that decision the State offered the Petitioner's counsel a "reciprocal discovery agreement." As a result of that agreement the Defense obtained both the Report on the Physical Examination of the Crime Scene and Officer Barksdale's report on questioning Hopper. These revealed two surprises.

First, the bullet trajectory through the bedroom's east wall was NOT in a downward trajectory. Instead, it was in an upward direction from under the bed. Following that trajectory it lines up with a headwound Hopper received while she was under the bed. This and the other evidence from the bedroom lead to the conclusion that Hopper received both her gunshot wounds while laying under the bed. (After the first trial is concluded a ballistics expert agrees with this conclusion in a report offered with a new trial motion.) The state District Court refused to reopen the admissibility hearing.

The evidence in the crime scene report shows two things. It shows why

Barksdale had asked the question if Hopper had crawled under the bed AFTER she had been shot. He had expected her to indicate, "No." And she did NOT. It also raised the question as to why the Prosecutor had pointedly asked Officer Domgard, in a leading question, about the trajectory of that bullet. That trajectory was irrelevant to the issue in that preliminary hearing. So why was the question asked and answered in a deceptive way?

Second, Barksdale's report shows his admissibility hearing testimony about questioning Hopper was incomplete. The report has him asking three times if it was Steven Jacob and then asking about crawling under the bed. But when she nodded, "Yes," his report has Barksdale asking a fourth time, "Was it Steve?" The Petitioner argued that Barksdale was surprised by Hopper's answer about crawling under the bed. Hopper's later answers indicate she recognized his surprise. Now the questions about the crime scene result in Hopper shrugging her shoulders as if she didn't want to answer them.

The Petitioner was convicted in the first trial with the State using the "dying declaration" hearsay statements of Melody Hopper. In that trial, Officer Domgard admitted on cross-examination that he had known that the trajectory of the bedroom bullet was NOT in a downward direction at the time of his preliminary hearing testimony.

The Petitioner's first trial convictions were reversed on appeal to the Nebraska Supreme Court; State v. Jacob, 242 Neb 176, 494 N.W.2d 109(1993). The Court reversed and remanded for a new trial by finding the hearsay statements of Melody Hopper to be unreliable and inadmissible. Id., at 193-202.

Upon remand to the state District Court the Petitioner filed a "Plea in Bar" arguing that the prosecution's Brady violation of withholding the crime scene report and Barksdale's report were examples of intentional misconduct

to force a second trial; a claim under the holding in Oregon v. Kennedy, 456 U.S. 667 (1982)(An intent to subvert the protections of the Double Jeopardy clause). The evidence at the Plea in Bar hearing included accounts of (now) County Attorney Gary Lacey saying the State had new evidence with which they would be allowed to use the dying declarations in the second trial. The state District Court, Judge Cheuvront, denied the Plea in Bar; ruling that there had been no Brady violation because the reports of the crime scene examination and of Barksdale's questioning of Hopper had been provided "prior to trial." The court did NOT follow the holding in U.S. v. Bagley, 473 U.S. 667, 676 (1985)(discovery materials must be provided at a time when the defense can make effective use of them, not merely "before trial"). If that evidence had been made available and presented to the District Court hearing the admissibility issue it is reasonably likely it would have reached the same result the Nebraska Supreme Court did with that evidence. This would meet the standard held in Kyles v. Whitley, 514 U.S. 419, 434-35 (1995)(undermining confidence in [the admissibility hearing's] outcome).

The Petitioner appealed the denial of the Plea in Bar (S-93-520). The Nebraska Supreme Court refused to hear that appeal. (In a later case, the Court says the appeal from a Plea in Bar is a matter of right in Nebraska; State v. Kula, 254 Neb 962, 970, 579 N.W.2d 541 (1997)).

Petitioner filed a habeas corpus petition in the federal court and an appeal to the Eighth Circuit Court of Appeals was denied; Jacob v. Clarke, 52 F.3d 178 (1995); by finding no expansion of Oregon v. Kennedy's Double Jeopardy protection exists.

Preparing for a second trial, prosecutors continue to tell appointed defense counsel and the state District Court judge that they intend to use all the

evidence presented in the first trial, including the dying declarations. A Motion in Limone on that issue is scheduled for before the jury selection is to begin.

The Motion in Limone is continued past the start of voir dire. Eventually the Deputy County Attorney admits to the Court that they have no new evidence to support the hearsay statements of Melody Hopper. But the the state District Court Judge Witthoff holds off ruling on the Motion in Limone until after the jury is selected.

Appointed counsel used questionnaires of the prospective jurors to move for a change of venue because of the pervasive prejudice in the local community. Like the cases: Irvin v. Dowd, 366 U.S. 717 (1961); Rideau v. Louisiana, 373 U.S. 723 (1963); and Patton v. Yount, 467 U.S. 1025 (1984); almost 75% of the venire had knowledge of the dying declarations and many presumed the Petitioner guilty.

A separate hearing on the pretrial publicity was held before voir dire. The Bill of Exceptions contains a Supplemental Volume I containing the newspaper articles and television stories. Newspaper accounts had 5 out of 6 people believed the Petitioner was guilty. The state District Court held the venue motion in abeyance until after the voir dire was completed.

As the voir dire began, Judge Witthoff quickly became frustrated as he one by one began removing panel members who admitted knowledge of the hearsay statements. He asked the panel if there was anyone who had already decided the Petitioner was guilty. One man, Mr. Yost, raised his hand and said: Yes, based upon what he had read in the newspapers. Judge Witthoff became angry; his face and bald head were beet red as he leaned over the bench and angrily told the entire venire panel to "withhold your judgment and be fair jurors."

That outburst changed everything. Mr. Yost shrank back into his chair and the other panel members had shocked looks on their faces. From that point panel members, like Christy Waldo, began by saying they knew nothing about the case; but on careful cross-examination she slowly revealed she had heard about the dying declarations. Charlene Bady, a deliberating juror, was so afraid she said she did not want to give the judge a "wrong" answer. Other deliberating jurors who admitted some knowledge of the hearsay but would not admit any prejudice were Gerald Nelson and Ray Ross. Seven others would admit they knew something about the case but would not admit knowing the hearsay, even upon careful cross-examination. Thirteen panel members who admitted knowing knowing the hearsay statements survived Defense motions to strike. When it came time to exercise peremptory strikes the Defense did not have enough to remove them all. The Defense refused to pass the jury for cause.

The prosecution objected to the Defense's motions to strike those panel members who admitted knowledge of the hearsay statements. Their argument was that state law did not require removing a juror simply because of their knowledge. The state law test is what I call the "magic question." Jurors are asked: "Can you set aside what you know, follow the instructions of the court, and base your decision on the evidence presented during the trial?"

When Prosecutor Lipovski argued this to Judge Witthoff the Defense again objected and moved to dismiss the case on Double Jeopardy grounds. It was obvious to the Petitioner that this was the object of the Prosecution's deception(s): Make potential jurors aware of the dying declarations, make them believe those statements would be presented in the second trial and then ask them the "magic question." Even a juror who was completely prejudiced by the dying declarations, but who believed they would be presented in the trial

could say they would base their decision on that evidence and answer the magic question, "Yes." The prosecution had revealed their method of gaining an advantage in the second trial. This violated the Double Jeopardy protection described in Arizona v. Washington, 434 U.S. 497, 508 n.24 & 25 (1978)(Prosecutors can't use the first trial as a trial run to gain an advantage in a second trial). The Judge overruled the Motion to Dismiss on Double Jeopardy grounds.

One of the jurors who, after Judge Witthoff's outburst, claimed he had no knowledge of the case was Mr. Meier. He was asked the magic question and answered, "Yes." That would turn out not to be true.

The retrial jury was empaneled on August 29th, 1994, with all the jurors and alternates taking the oath to obey the Court's instruction to not read the newspaper articles about the case and to not discuss the case with the other jurors until deliberations began. On September 7th opening statements began and Judge Witthoff decided the Motion in Limone, ruling the dying declarations would NOT be admissible. On September 8th the local newspaper ran an article in response to the Judge's decision. The page 13 headline reads: "Prosecution in Jacob case won't use dying declarations."

The State presented its case over the next 3 weeks and rested without offering or presenting the dying declarations.

On September 30th, the September 8th newspaper was found in the juryroom following the noon recess. The newspaper was folded open to the page 13 headline and positioned to be seen as the jurors entered the room. Four jurors who had been in the juryroom when the newspaper was found were questioned in an initial mistrial hearing. The juror who picked the newspaper up and gave it to the Bailiff, admitted reading the headline, "Prosecution in Jacob case won't use dying declaration" and was dismissed from the jury. Ms. Bady,

always with the "right" answer, said she did not read past the "Jacob case". A police investigation ensued and a second mistrial hearing was held. The investigation identified Mr. Meier as the "newspaper juror" and he was dismissed. More than one mistrial motion was denied by the trial court.

The Petitioner was convicted and the newspaper issue was raised again in a Motion for a New Trial. In that hearing Juror Bady now admits to having read the entire headline. Deputy County Attorney John Colborn submits a proposed order for the New Trial Motion. It contains a number of factual errors to favor the State's case (described in ¶147 of the Amended Habeas Petition). It claims the newspaper was left behind by lawyers who used the juryroom for motion hearings that morning, even though the Bailiff testified she cleaned out the juryroom before any of the jurors entered it. Judge Witthoff signed the proposed order without any corrections and the Motion for New Trial was denied.

The Public Defender appointed for the Petitioner's direct appeal raised, among other issues, the claims that the Petitioner's 6th Amendment right to a fair trial before an impartial jury had been violated (1) when the failure to change venue resulted in the impaneling of a biased jury, (2) by the failure to grant the newspaper mistrial motion, and (3) (at the insistence of the Petitioner) that the combination of these errors entitled the Petitioner to a new trial. The Petitioner also filed a pro se Brief arguing that the juror bias test set out in McDonough Power Equipment v. Greenwood, 464 U.S. 548, 556 (1984) showed the newspaper juror was presumed to be biased from his voir dire answers and his actions. Had Mr. Meier given an honest answer that he would NOT follow the instructions of the court, by reading the newspapers and trying to communicate with the other jurors before deliberations, he would

have been removed for cause. The voir dire was inadequate to reveal his bias violating the Petitioner's 6th Amendment right to a voir dire that is adequate to reveal prejudiced jurors; Morgan v. Illinois, 504 U.S. 719, 729 (1992); and the opportunity to prove actual bias; Smith v. Phillips, 455 U.S. 209, 216 (1982).

The Nebraska Supreme Court denied the Petitioner relief in their published opinion; State v. Jacob, 253 Neb 950, 574 N.W.2d 117 (1998) (Jacob II). The Court found the voir dire had been adequate by focusing only on the responses of Gerald Nelson and accepted jurors claims of not being prejudiced as sufficient. Id., 253 Neb at 961-63. The Court found that the Petitioner had not been prejudiced by the newspaper incident because Mr. Meier, the newspaper juror, had been removed from the jury before deliberations began. Id., 253 Neb at 967. The Court refused to make any connection between the voir dire issue and the newspaper mistrial issue and never considered that Meier's prejudice had not been revealed during voir dire.

The Petitioner was also left to raise the Double Jeopardy claims by himself in his pro se brief. The Nebraska Supreme Court evaded these claims by finding the Petitioner had not argued a Double Jeopardy claim in the trial court below. Id., 253 Neb at 981.

The Petitioner timely filed a state postconviction relief petition raising claims of ineffective assistance of trial and direct appeal counsel, which included the failure to investigate and present the evidence of the Petitioner's defense, reraised the Double Jeopardy claims, and for the first time claimed Nebraska's Second Degree Murder statute was facially unconstitutional because it cannot prevent its arbitrary enforcement as well as under Mullaney v. Wilbur, 421 U.S. 684 (1975).

The Amended Petition alleges the facts revealed by the investigation conducted by the Petitioner's parents. This includes evidence of a business rivalry between the Ethertons and the Okingas (Hopper's sister and brother in law). The Okingas owned a gas station in the small town of Harvard, Nebraska, that was being run out of business by a nearby convenience store owned by the Ethertons. The crime scene examination revealed that Jim Etherton had discovered the Okinga's plans to move to Texas, to protect their assets in a bankruptcy filing. Had this been revealed to the Okinga's local banker it would have financially ruined them.

The jury had not been allowed to hear the evidence of Jim Etherton's violent jealousy. In deposition, Etherton's former wife and girlfriend testified to his locking his wife in the bedroom and forcing her to have sex. The girlfriend said he had stalked her and slapped her around for seeing other people; she had called the police about him. The man who lived in Jim Etherton's basement testified to hearing Melody and Jim bumping around in the living room the evening before the shooting. Melody had bruises on her left thigh and right arm unrelated to her bullet wounds. She was also menstruating when she arrived in the ICU seven hours after the shooting. A blood stain on the living room floor has yet to be tested to see if it contains DNA from both victims; both have O- blood type.

The Amended Petition argues that Etherton discovered Hopper's deceit and forced himself on her in the living room the night of the shooting. Hopper shot Etherton and the man in the basement shot Hopper and tried to blame the Petitioner only after Hopper's head nodding was revealed. Hopper's initial shooting of Etherton explains why she refused to answer Officer Barksdale's initial questions about the shooting in the bedroom.

State Trial Court Judge Witthoff sat on the Petitioner's state postconviction petition for over 12 years. Eventually he retired and Judge Cheuvront, again, would take it up. In the mean-time the Petitioner had filed his first Petition for a Writ of Habeas Corpus in the Federal District Court after waiting years for Judge Witthoff to rule on discovery motions. The Federal District Court held that Petition in abeyance until the state courts' exhaustion of the postconviction remedy. Judge Cheuvront finds many of the postconviction claims were raised on the direct appeal and bars them from further consideration. One significant finding Cheuvront makes is that the Petitioner had in fact raised and argued the Double Jeopardy claims in the state District Court (because he had presided over the Plea in Bar hearing) but denied them by referencing Jacob v. Clarke, supra.

An appeal of the denial of the state postconviction petition was affirmed by the Nebraska Supreme Court in State v. Jacob, (S-11-439), an unpublished "Memorandum Opinion and Judgment on Appeal" dated July 10, 2013. (See, ¶31, Amended Petition for Writ of Habeas Corpus).

The Petitioner then filed an Amended Petition for a Writ of Habeas Corpus in the Federal District Court to properly allege and refer to these later state court proceedings for exhaustion purposes.

The Amended Petition claimed the fair trial/jury bias issue was entitled to de novo revue under Panetti v. Quarterman, 551 U.S. 930 (2007) and Johnson v. Williams, ___ U.S. ___, 133 S.Ct. 1088 (2013). The Nebraska Supreme Court's failure to acknowledge and follow the clearly established juror bias standard from McDonough Power Equipment conclusively established the newspaper jurors bias that had not been revealed in the inadequate voir dire; violating Morgan v. Illinois, supra; and accepting jurors claims that they could be impartial

after exposure to the pervasive prejudicial publicity violated the holdings in Patton v. Yount, 467 U.S. 1025, 1031 (1984)(Jurors claims of impartiality cannot be believed where adverse pretrial publicity creates a presumption of prejudice) and Murphy v. Florida, 421 U.S. 794, 800 (1975)(Juror's assurances of impartiality cannot be dispositive of the accused's rights).

The Amended Petition claimed that the first Double Jeopardy issue was based on Oregon v. Kennedy, supra, holding that a prosecutor's misconduct with the intent to subvert the protections of the Double Jeopardy clause might have applied to the prosecutions' Brady violations and subterfuge to get the dying declarations admitted into the first trial. The prosecutors knew that only when and if the facts surrounding Hopper's head nodding for Barksdale came out would that result in a second trial. The second Double Jeopardy claim involved the prosecutions' misconduct of deceiving the Defense, the Court, and especially the public from which the venire would be drawn, into believing the hearsay was reliable enough to be used in the second trial; using the first trial as a trial run of their case to gain an advantage in a second trial. Their deceptive intent was shown by prosecutor Lipovski's pointed argument about getting to use the "magic question" to their advantage. The Petitioner's case is significant because the "magic question" backfired on the prosecution and revealed the bias they had sought for an advantage in the second trial. The Amended Petition also recites to the footnote in Lockhart v. Nelson, 488 U.S. 33, 36 n.2 (1988), that suggests that "deception" by the prosecution might affect the holding in Oregon v. Kennedy.

The Amended Petition continued to raise the facial unconstitutionality of the Second Degree Murder statute and that this jurisdictional issue can never be waived. The Nebraska Supreme Court's claims that it can be waived are a

subterfuge to evade the guarantees of the Federal Constitution; see, Mullany v. Wilbur, supra, 421 U.S. at 691 n.11.

The Federal District Court issued its Memorandum and Order denying the Petitioner relief on 6/2/2017. The Order addresses the jury and fair trial issues by finding, "that the Nebraska Supreme Court's decision with regard to Jacob's claims relating to a fair trial and due process constitutes an objectively reasonable application of clearly established federal law as determined by the Supreme Court of the United States." The Federal Court's opinion (p.14-16) relies upon the Nebraska Supreme Court's direct appeal opinion in Jacob II and finds the Petitioner has not met his burden to overcome the rebuttable presumption discussed in Johnson [v. Williams]." The Order makes no mention of the competing standard from Panetti v. Quarterman, supra, and applies AEDPA deference. This raises the Petitioner's first question regarding the conflicting standards in Panetti and Harrington v. Richter's progeny, Johnson v. Williams.

The Memorandum and Order addresses Double Jeopardy on (p.18-20). The Federal Court, like the State Courts, fail to distinguish between the two different Double Jeopardy claims. It recites to the first Double Jeopardy claim, again ignoring the State Courts' failure to apply the Bagley standard to the Brady violation analysis. Then it looks through the State Court decisions to the postconviction ruling that ignored the standard from Arizona v. Washington. Neither the State Courts nor the Federal Courts have considered the Double Jeopardy standard set out in Arizona v. Washington and the significant evidence of the prosecution's deceptions to gain an advantage in the second trial of this case. The Order finds the State Court ruling to be "objectively reasonable" and dismisses it under the deferential AEDPA standard (p.20).

The Order finds the constitutionality of Nebraska's Second Degree Murder statute to be procedurally barred (p.6-7). This raises the Petitioner's third question of whether the Federal Constitution's guarantee of Due Process permits the issue of the facial unconstitutionality of a criminal statute to ever be waived.

The Order denied a Certificate of Appealability (COA). Petitioner filed a Motion to Alter or Amend primarily arguing against the failure to issue a COA. The Motion was denied without comment.

The Petitioner appealed, requesting that a COA should issue because jurists of reason could disagree whether AEDPA deference should have been applied and that a COA should have issued for the Double Jeopardy claims under the "issue presented was adequate to deserve encouragement to proceed further" standard set out in Miller-El v. Cockeral, 537 U.S. 322 (2003).

The Petitioner argued that a COA should issue for the fair trial/jury issue because AEDPA deference should not have been applied under Panetti because the State Courts failed to follow the clearly established law in Murphy v. Florida, supra, by accepting the juror's assurances of impartiality as dispositive of no prejudice and McDonough Power Equipment, supra, by failing to find the newspaper juror's voir dire responses and actions as proving the voir dire had been adequate to reveal his prejudice that the law presumes, and then failed to follow the complete harmless error standard in Chapman v. California, 386 U.S. 18 (1967) by failing to hold the State to proof beyond a reasonable doubt that none of the other jurors were prejudiced once the voir dire had been exposed as inadequate to reveal the newspaper juror's prejudice.

On the Double Jeopardy claims the Petitioner argued that this case contains a great deal of evidence of the prosecutions' deceptions such that the pointed

footnote in Lockhart v. Nelson, supra, suggests that the U.S. Supreme Court would welcome consideration of this case to elaborate the Double Jeopardy protection questioned in Oregon v. Kennedy yet described in Arizona v. Washington. Thus, the unique combination of facts in this case and the Supreme Court's recognition of the unsettled status of the Double Jeopardy protection make this issue "adequate to deserve encouragement to proceed further." Miller-El, supra.

On the unconstitutional Second Degree Murder statute, the Petitioner argued that even the Eighth Circuit Court of Appeals admitted it "had wrestled with applicable Nebraska law..." in a second degree murder case; Iromuanya v. Frakes, 2017 WL 3379395 n.4 In addition, the jurisdictional claim that a facial challenge to the constitutionality of the criminal statute cannot be waived because it questions the Court's authority to impose a judgment had been raised in Class v. U.S., Case No. 16-424 and was (then) pending before the U.S. Supreme Court. [Class v. U.S., ___ U.S. ___, 138 S.Ct. 798 (2018) was resolved without deciding the "jurisdictional" aspect.]

The Eighth Circuit Court of Appeals denied the Request for a COA and denied a Petition for Rehearing and Rehearing En Banc on May 15th, 2018.

REASONS FOR GRANTING THE PETITION

I.

Question #1 presents the growing conflict between the de novo review standard in Panetti v. Quarterman, 551 U.S. 930 (2007) and the consequences of the holding in Harrington v. Richter, 562 U.S. 86 (2011). The Federal District Court in the Petitioner's case used the "presumption of correctness" to silently make an end run around the holding in Panetti. Harrington did NOT say a Federal Habeas Corpus Court could substitute its own reasonable argument for a State Court's, but a conflict emerges from what the Court means by "not expressly addressed." Harrington held:

> Where a State Court decision does not expressly address a federal claim, a Federal Habeas Corpus Court must presume, subject to rebuttal, that Federal claim was adjudicated "on the merits."
>
> Johnson v. Williams, 568 U.S. 289, 292 (2013)(emphasis added)

This conflict is described in Judge Jordan's concurring opinion in Dennis v. Sec., Penn. Dept. of Corr., 834 F.3d 263, 349 (3rd Cir. 2016). He says: Under Harrington, habeas review requires that we engage in so-called "gap-filling" and apply AEDPA deference to whatever reasonable arguments or theories ... could have supported [] the state court's decision if that decision does not provide reasoning for its conclusions; citing to Harrington, supra, 562 U.S. at 102. Judge Jordan concludes: Thus Federal Courts must fill gaps in a state court's reasoning so that there is something against which to measure a Petitioner's efforts ... [but] we ought not engage in error correction under the guise of gap-filling. Judge Jordan recognized that the high Court is iterating in to a standard for the distinction by recognizing that "not expressly addressed" has been expanded "a bit beyond cases devoid of all reasoning" in Premo v. Moore, 562 U.S. 115 (2011) but also that a limit on gap-filling

was created in Lafler v. Cooper, 566 U.S. 156 (2012).

In Premo v. Moore, supra, the Court said that by finding a "motion to supress would have been fruitless," the state court concluded that Moore had NOT received ineffective assistance of counsel. Id. at 123. The "not expressly addressed" aspect was that the state court did not specify whether this was because there was no deficient performance or because Moore suffered no prejudice or both. Thus, the Court presumed that state court addressed the federal constitutional claim when it said the motion was fruitless, but had merely been silent as to its reasoning why that met the Strickland standard. From there the Court could provide a reasonable argument to fill that gap under Harrington.

In Lafler v. Cooper, supra, the state court identified the ineffective-assistance-of-counsel claim but failed to apply Strickland to assess it. Instead, the state court simply found the Respondent's rejection of the offered plea to be knowing and voluntary. The Court found that was NOT the correct standard to address the claim; it was contrary to Hill v. Lockhart, 474 U.S. 52, 57-59 (1985), the clearly established Federal Law. In that circumstance the Federal Habeas Court can determine the principles necessary to grant relief; i.e., de novo review, citing to Panetti, supra.

In Lafler the "not expressly addressed" meant the state court did not apply the correct federal constitutional standard as decided by the U.S. Supreme Court. But in Premo "not expressly addressed" meant the state court conclusion did not explain how the correct federal constitutional standard COULD HAVE been applied.

There are (at least) two other Appeals Court decisions which show this conflict and the need to address it. First, the Petitioner's Federal District Court ruling and the Eighth Circuit's affirmance of it are in conflict with

Barnes v. Joyner, 751 F.3d 229 (4th Cir. 2014). The majority in Barnes found the state court's ruling on a jury misconduct claim did not provide the presumption of prejudice required by the U.S. Supreme Court's holding in Remmer v. U.S.. The majority then cites to Panetti; Id. at 246; but does not specifically say they are performing de novo review. The dissenting opinion of Judge Agee, however, argues that the majority did NOT apply the deference AEDPA requires and cites to Harrington; Id. at 253-255. This is like Lafler.

Second, the 9th Circuit Court of Appeals describes a limit to Panetti's de novo review in Murdoch v. Castro, 609 F.3d 983, 991 (9th Cir. 2010). The Court said: "... when there is a principled reason for the state court to distinguish between the case before it and Supreme Court precident, the state court's decision will not be an unreasonable application of clearly established supreme court law." Note that the Court did NOT say, "when the state court provides a principled reason..." This suggests that the federal habeas courts can "correct" a state court's reasoning even when the state court has not been silent on the claim. This stretches Premo.

The Petitioner's case presents the Court with an example of a Federal Habeas Court taking a State Court decision that is NOT silent about the federal constitutional claim and (silently) corrects errors under the guise of gap-filling. The Petitioner's claim is that under pervasive prejudicial publicity the State Court cannot rely on jurors assurances that they can be impartial under the holdings in Patton v. Yount and Murphy v. Florida. Yet that is what the State Court affirmatively did. The Federal Habeas Court simply said the State Court decision was "reasonable" as filling a gap. That this was "gap-filling" by the Federal Court is shown by it then assuming a "presumption of correctness" to its "gap-filling" which the Petitioner had failed to rebut, citing Johnson, supra.

But the Petitioner's case provides the counterpoint to Johnson v. Williams, supra. In Johnson, the state courts did NOT expressly address the federal claim at issue. In the Petitioner's case, the Nebraska Supreme Court addressed the fair trial/impartial jury claim. The State Court decision accepted the jurors claims of impartiality (from the "magic question") as dispositive of the federal constitutional claim. The 9th Circuit Court of Appeals applied de novo review to Johnson's claim. The Petitioner's federal habeas corpus court refused to provide de novo review under Panetti. The U.S. Supreme Court reversed the Court of Appeals in Johnson by filling in the gap with a reasonable argument that could have supported the state court's decision; see, Johnson, supra, 568 U.S. at 304-305. The Petitioner's federal habeas corpus courts have not filled any "gap" with anything but the word, "reasonable," and then applied a "presumption of correctness" from Harrington to it.

The Petitioner's case should not have been evaluated under the Harrington standard for this claim. The Federal District Court and the Eighth Circuit Court of Appeals have extended Harrington's rebuttable presumption even to cases where the State Courts' reasoning was NOT silent, but instead, was contrary to U.S. Supreme Court holdings. Neither the State Courts nor the Federal Habeas Courts have stated any principled reason why the U.S. Supreme Court holdings in Murphy v. Florida, supra, Patton v. Yount, supra, and Morgan v. Illinois, supra, would not apply to the Petitioner's case. The Federal District Court filling a non-existant "gap" in the State Courts' decision with the word, "reasonable," leaves the Petitioner with nothing to measure or argue against in an appeal. It is by definition an arbitrary decision.

Applying the de novo review under Panetti that the Petitioner's claim was entitled to would result in applying the juror bias standard from McDonough Power Equipment v. Greenwood to the newspaper juror's voir dire responses

and actions demonstrate the newspaper juror's prejudice and the voir dire's inadequacy to reveal it. This conclusion shows the Petitioner's 6th Amendment right to an impartial jury was violated; see, Morgan v. Illinois, supra, 504 U.S. at 729 (Part of the guaranty of a Defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors). To deny the Petitioner relief at that point would require holding the State to proof beyond a reasonable doubt that none of the other jurors had been equally prejudiced, under Chapman v. California's harmless error standard. The Court cannot simply accept the jurors' assurances after Judge Witthoff's outburst.

A COA should have issued for this federal constitutional claim because it meets the threshold set out in Miller-El v. Cockeral, 537 U.S. 322, 327 (2003)(That jurists of reason could disagree with the Federal District Court's resolution; i.e., that the issue should have been resolved in a different manner.). The voir dire and the newspaper incident cannot be separated. The holding in McDonough Power Equipment leads reasonable jurists to conclude that the newspaper jurist was prejudiced and that the voir dire had not been adequate to reveal that prejudice. This is the substantial showing that the 6th Amendment right to a voir dire that revealed that prejudice was violated; contrary to Morgan v. Illinois, supra.

The issue should have been resolved in a different manner whether it requires a different result or not. The State Court should have applied the holdings in Murphy v. Florida and Patton v. Yount, or at least explained why this case can be distinguished from them. Likewise, the Federal District Court should either have not accepted the State Court's conclusion or, under the "gap-filling" from Harrington, should have provided a reasonable argument that filled that gap. Reasonable jurist would not only argue those U.S. Supreme Court holdings

do apply to the Petitioner's claim and would ask why the Courts below have not done so through a de novo review of the claim. The Federal Courts below erred by not issuing the requested COA, as was done in Barnes v. Joyner, supra.

Therefore, the Court should grant the Petition on this question because the Petitioner's case provides the Court with the opportunity to take another step toward resolving the conflict between the Panetti de novo review standard and Harrington's "gap-filling" and presumption of correctness standard. The Petitioner believes this case shows that whenever a federal habeas court intends to apply Harrington in this context, it should be required to (1) identify the "gap" to be filled and (2) that the "reasonable argument or theory that could have supported the state court decision" must be stated to create the presumption of correctness. Where Habeas Corpus is a remedy for "extreme malfunctions" of the judicial process, the Harrington holding should NOT provide a process for using the one-word rubber stamp, "reasonable," to sweep those "extreme malfunctions" under the carpet and make them disappear with the denial of a COA.

The bottom line is: The Nebraska Supreme Court accepted jurors claims of impartiality as dispositive for the unfair jury/inadequate voir dire claim; Jacob II, 253 Neb at 961-63; which was contrary to the holdings in Murphy v. Florida, supra, and Patton v. Yount, supra. The Federal District Court used the Harrington holding to silently "gap-fill" that decision and find it "reasonable," rather than apply the de novo review required under Panetti. A COA should have issued and the Petition should be granted.

II.

A COA should have issued for the Petitioner's Double Jeopardy claims because they deserve encouragement to proceed further, under Miller-El, supra. The U.S. Supreme Court's Double Jeopardy jurisprudence has been described as "badly fractured" by Courts below. There is a conflict between the Federal Circuits because some interpret this Court's decision in Oregon v. Kennedy, 456 U.S. 667 (1982), as having lopped off some protections of the Double Jeopardy Clause by requiring a mistrial. This has also created a split in the States' Courts too.

There is confusion over whether the Kennedy Court's general statement of "intent" to subvert the protections of the Double Jeopardy Clause was now being limited to only an "intent" to goad a mistrial request. While the majority in Kennedy denied they were lopping off any protections of the Double Jeopardy clause; Id., 456 U.S. at 678 n.8; Justice Stevens (concurring, Id. at 681) argued that the holding in Kennedy could be seen as doing just that. The Courts below have since argued whether or not a mistrial (or at least a request) was necessary to invoke the protections of the Double Jeopardy clause against prosecutors' misconduct and deliberate deception.

Not long after Oregon v. Kennedy, this Court was faced with another Double Jeopardy claim in Lockhart v. Nelson, 488 U.S. 33 (1988), in which no mistrial was requested or declared. In Nelson, the Court examined the prosecutor's motive for offering evidence of prior convictions for sentence enhancement. However, one of those prior convictions had been pardoned and should not have been used to enhance Nelson's sentence. The issue was whether or not the Double Jeopardy protection would forbid the State from subjecting Nelson to another sentencing proceeding. The Court found no evidence that the prosecutor was

aware of the pardon (and had offered that conviction to buy time to do a more thorough background search before a second sentencing). Since the standard that had been set out in Oregon v. Kennedy was the prosecutor's "intent to subvert the protections of the Double-Jeopardy clause," the Nelson Court made a pointed footnote saying:

> There is no indication that the prosecutor knew of the pardon and was attempting to deceive the court. We therefore have no occasion to consider what the result would be if the case were otherwise. Cf. Oregon v. Kennedy, [citation omitted].
>
> Dockhart v. Nelson, supra, 488 U.S. at 36 n.2

Was the Court saying that in a proper case with evidence of a prosecutor's deception with the intent to gain an advantage in a second trial, the protections of the Double Jeopardy clause would be invoked? The Petitioner's case ought to be encouraged to proceed further because it contains a great deal of evidence of prosecutorial deception, intentional falsehood, intending to obtain an advantage in a second trial. The Petitioner's case allows the Court to settle the differences between the Courts below by repeating the Double Jeopardy protection broadly stated in Arizona v. Washington, 434 U.S. 497, 508 n.24 & 25 (1978); citing Downum v. U.S., 372 U.S. 734, 736 (1961) and Gori v. U.S., 355 U.S. 184, 188 (1961); that prosecutors cannot use the first trial as a trial run of their case and, through deception or misconduct, intend to gain an advantage in a second trial.

The decision in Oregon v. Kennedy, supra, has split the Federal Appeals Courts. In U.S. v. Wallach, 979 F.2d 912, 916 (2nd Cir. 1992) Judge Bork argued for a limited extension of the Kennedy rule and the Court agreed with him but found the facts insufficient to provide relief even under that extension.

The 2nd Circuit repeated their argument for an extension to Kennedy in U.S. v. Pavloyianis, 996 F.2d 1467, 1473-4 (2nd Cir. 1993).

Other Circuits disagreed; some with discussion of whether an extension of Kennedy was warranted; see U.S. v. Catton, 130 F.3d 805, 807 (7th Cir. 1997), and Jacob v. Clarke, supra. Some denied relief simply because there had been no mistrial request or denial; U.S. v. McAleer, 138 F.3d 852, 855-56 (10th Cir. 1998) and Hawkins v. Alabama, 318 F.3d 1302 (11th Cir. 2003). Seeing Kennedy as placing limits on the Double Jeopardy protection these Courts require a mistrial to be requested or granted to invoke those protections. (I believe this misreads Kennedy, where the Court said it was only "delineat[ing] the bounds" of the narrow exception to the standard mistrial rule; Kennedy, supra, 456 U.S. at 673.) That "badly fractures" Double Jeopardy jurisprudence.

There is also a split between the State Courts over the protections of the Double Jeopardy clause after Kennedy. Many refuse to limit the protection because of Kennedy: People v. Dawson, 397 N.W.2d 277, 282 (Mich.App. 1986), (seeing substantial difficulties with Kennedy); State v. White, 354 S.E.2d 324, 329 (N.C. App. 1987)(Disagreeing with Kennedy); Commonwealth v. Smith, 615 A.2d 321 (Penn. 1992)(resorting to the State Constitution because of Kennedy); State v. Rogan, 984 P.2d 1231, 1250 (Hawaii 1999)(Arguing against Kennedy's specific intent to cause a mistrial); State v. Colton, 663 A.2d 339, 347 (Conn. 1995); Commonwealth v. Lam Hue To, 461 N.E.2d 776, 783-85 (Mass. 1984); and especially State v. McClaugherty, 188 P.3d 1234 (N.M. 2008) because the prosecutor's misconduct that invoked the Double Jeopardy protection was repeated in the Petitioner's case.

Other State Courts refuse to extend Kennedy and still require a mistrial: State v. Cochran, 751 P.2d 1194, 1196 (Wash. 1988)(Must have an "intent" for

a mistrial); Collier v. State, 747 P.2d 225 (Nev. 1987); Ex parte Davis, 957 S.W.2d 9 (Tex.Crim.App. 1997).

Even State Courts which undertook an in-depth analysis of Kennedy and its progeny disagree with each other. Compare, State v. Jorgenson, 10 P.3d 1177 (Ariz. 2000)(knowing and intentional misconduct aimed at preventing an acquittal invokes the Double Jeopardy protection) and State v. Swartz, 541 N.W.2d 533, 538-40 (Iowa. App. 1995)(Finding the decisions of the U.S. Supreme Court on Double Jeopardy "badly fractured" and against the Wallach extension).

The Petitioner's case presents two different Double Jeopardy claims. The first involves the prosecution's preliminary hearing deception about the bullet trajectory and their failure to provide the documents in their discovery response that could have impeached Hopper's hearsay statements and prevented their use in the first trial. The claim is that the prosecutor committed misconduct (the deception and Brady violation) to get and use inadmissible evidence that would force a second trial. This is the claim that reached the Federal Courts and resulted in Jacob v. Clarke, 53 F.3d 178 (1995). The 8th Circuit denied this claim by reading a requirement of a mistrial grant into Oregon v. Kennedy.

The Petitioner's (unaddressed) second Double Jeopardy claim goes further. Once the second trial was certain, the prosecution used deception by publicly, and before the court, claiming they had new evidence that would let them use the dying declarations in the second trial. This was done with the intent of having prejudiced jurors be able to answer the "magic question" in the affirmative. This created an improper advantage for the State because those prejudiced jurors could say they would set aside what they knew and base their decision on the hearsay statements that they now believed would be used in the second trial.

This second (different) claim is based upon the Double Jeopardy protection set out in Arizona v. Washington, supra; Downum, supra, and Gori, supra; that prosecutors cannot use the first trial as a trial run of their case, and through deception or misconduct, intend to gain an unfair advantage in the second trial. It is the Petitioner's assertion that this specific protection of the Double Jeopardy clause was NOT "lopped off" by the holding in Oregon v. Kennedy. The Federal Courts below created the requirement of a mistrial by misreading Kennedy. This second Double Jeopardy claim has not been addressed by the Courts because they repeatedly resort to Jacob v. Clarke (a very different claim) to deny it.

The record evidence of the prosecutors' deceptions and misconduct exceed what has been sufficient to provide relief in other State cases. The relevant evidence is the prosecutions' deception of the public and the trial court with claims of having new evidence to keep the dying declaration story in the press and allow the prejudiced public to be seated as jurors. This is the same evidence as in the inadequate voir dire/unfair trial claim in QUESTION I. The evidence of the newspaper juror's actions show the State succeeded in gaining that advantage.

The prosecution misrepresented the deposition testimony of the Petitioner's Mother to make the false claim that the Petitioner was lying on cross-examination. This is similar to the misconduct in State v. McClaugherty, supra, that resulted in the Double Jeopardy protection being enforced in New Mexico. On cross-examination prosecutor Lipovski had the Petitioner admit that I had told my Mother about taking a trip to London. She then held up the deposition and told the jury, "that wasn't what your Mother said." Appointed counsel asked what she was referring to and Lipovski cited a page number from the

deposition. However, my Mother, Sue Jacob's deposition shows that is NOT what she testified to; it says:

Q: Did you ask him about whether or not he had purchased tickets to go to London -- to England?

A: (by Sue Jacob) We discussed it, yes.

Appointed counsel did not object despite state statute limiting the use of depositions to only impeaching the deponent.

The record shows that I tried to raise the claim that Appointed counsel was ineffective for not objecting and that the prosecutors knowingly used false testimony (citing Napue v. Illinois, 360 U.S. 264 (1959)) but Judge Witthoff would not allow it. I raised it, pro se, on direct appeal and, for the first time ever and never since, the Nebraska Supreme Court refused to address the ineffective assistance of trial counsel claim because it wasn't raised in the trial court below; State v. Jacob, supra, 253 Neb at 959 & 983. On postconviction the State Court found the issue procedurally barred; thus, no state court would ever address this claim even though I properly raised it in every court I had a remedy in. This demonstrates how "extreme malfunctions" of the judicial system get swept under the carpet and how badly the State wants to cover this case up.

The Amended Habeas Petition claims 5 other instances of prosecutorial misconduct (and one other that has disappeared from the record). During closing arguments the prosecution told the jury the Petitioner had gotten to sit through the whole trial and had 5 years to think up his answers. An obvious reference to the retrial and the fact the Petitioner had not testified in the original; a violation of Doyle v, Ohio, 426 U.S. 610 (1976) and Griffin v. California, 380 U.S. 609 (1965). Then, Mr. Meier, the newspaper juror, had a son awaiting

trial during the time of the Petitioner's trial and the State had given him preferential treatment by dropping a charge of "failing to appear." The prosecution did not correct a key witness' testimony about the number of his DWI arrests because the State had given him preferential treatment by dropping DWI charges that occurred before the first trial took place. The prosecution misrepresented the color of the Petitioner's parent's car so they could argue in closing: "Could this have been the car [the Petitioner] used?"

The prosecutor's misconduct also allowed a career criminal to blackmail his way into being paroled from prison. Faulkerson, a 5-time felon, claimed the Petitioner confessed 3 months before the shooting took place in a cell block the Petitioner had never been housed in. The prosecution gave him the jail record information so he could modify his testimony to match the jail records. But being a savvy criminal he understood the consequences for the prosecution and made a threatening phone call; "If you don't get this done I am not going to testify in that murder trial...." His prison jacket contained the (ruled inadmissible) evidence that the warden had called and informed state officials of the phone call. But Faulkerson was paroled the morning BEFORE he testified and denied making any phone call (which the prosecution knew was untrue). Petitioner's postconviction claimed the prison's records would prove the State knew Faulkerson lied about the phone call; a violation of Napue, supra; but Judge Witthoff refused to issue the subpoena that was required to access those records and then sat on the postconviction for 12 years.

Therefore, the factual circumstances of the Petitioner's case, the split between the Federal and State Courts on the boundaries of the Double Jeopardy clause, and this Court's pointed footnote in Lockhart v. Nelson, present the

Court with the opportunity to resolve its "badly fractured" Double Jeopardy jurisprudence. The Petitioner's case deserved encouragement to proceed further and a COA should have issued under the standard in Miller-El, supra. One fact stands out to plainly elaborate that standard; it is this Court's pointed footnote about "deception" by prosecutors to gain an advantage. The Petitioner's case provides the factual basis that was not available in Lockhart. Assuming that such extreme cases are rare, the Court should NOT miss this opportunity; the Petition for a Writ of Certiorari should be granted.

III.

A COA should have issued for the Petitioner's claim that his sentence for Second Degree Murder violates the U.S. Constitution's Due Process guarantees because the jurisdictional aspect of this claim deserves encouragement to proceed further; Miller-El, supra. The jurisdictional aspect of this claim is whether or not a challenge to a judgment based on a criminal statute that is facially unconstitutional can ever be waived. Does a Court ever have jurisdiction when a statute defining the crime charged is facially unconstitutional? Would a Court's judgment based on such a statute always be void?

There is a split between the Federal Circuits, a split between various state courts, and the issue was recently raised in the U.S. Supreme Court in Class v. U.S., 138 S.Ct. 798 (2018), although Class was later decided without resolving that aspect.

The jurisdictional issue is larger than just Federalism, but reaches the relationship between individuals and the socially constructed institutions we call "governments." The Declaration of Independence teaches that "governments" are created by people to secure their rights; not to give some class of "officials" (like judges) unlimited power over the rest of the population.

In Nebraska, for example, felony criminal trials take place in District Courts. Article V, §9 of the State Constitution limits those District Courts' power to "pass such sentence as may be prescribed by law." Consequently, in Nebraska the judgment in a criminal case is the sentence imposed; State v. Moore, 272 Neb. 71, 77 (2006); and there are no common law crimes, all crimes are statutory; State v. Burlison, 255 Neb 190, 194-5 (1998). Under this Court's definition in U.S. v. Cotton, 535 U.S. 625, 630 (2002)("Subject matter jurisdiction" is a Court's statutory or constitutional power to adjudicate a case)

when a Nebraska criminal statute is void as facially unconstitutional, the state District Court lacks the power to impose a judgment (the sentence). Lacking the power to adjudicate state District Courts lack "subject matter jurisdiction." "Subject matter jurisdiction" is an issue that can never be waived; Cotton, supra.

By holding that the Petitioner waived the void murder statute claim the Nebraska (and Federal) Courts failed to honor the state constitutional limitation of judicial authority. C.B.&Q. RR. v. Otoe Cty., 83 U.S. 667 (1872)(State constitutions limit state government powers); City of York v. York Cty. Bd. of Equal., 226 Neb 297 (2003). Failure to honor those limitations violates the 14th Amendment's guarantee of Due Process; C.B.&Q. RR. v. Chicago, 166 U.S. 226, 233 (1887). Will the Federal Courts enforce the 14th Amendment to require the State Courts to remain within the State Constitutional limitations of their power? This touches the core of "Federalism," but the essence of the 14th Amendment's guarantee is "pacta sunt servanda" (pacts must be respected) and the State must keep its promises, otherwise tyranny prevails. As James Madison said in Federalist No. 51: You must first enable the government to control the governed; and in the next place oblige it to control itself.

The Federal Appeals Courts are split on this jurisdictional issue. Those circuits that agree the issue can never be waived cite back to Ex Parte Siebold, 100 U.S. 374 (1880) as did the more recent Montgomery v. Louisiana, 136 S.Ct. 718, 729 (2016). Surprisingly, this includes the 8th Circuit; see, U.S. v. Morgan, 230 F.3d 1067, 1071 (8th Cir. 2000)(Bye concurring: "The majority opinion explicitly recognizes a facial constitutional challenge exception to the procedural default doctrine."); U.S. v. Madera-Lopez, 190 Fed.Appx. 832, 834 (11th Cir. 2006)(An exception exists to waiver where jurisdiction is

asserted in cases which the accused is challenging the constitutionality of the statute ... under which he is charged.); U.S. v. DiSanto, 86 F.3d 1238, 1244 (1st Cir. 1996)("A claim that a statute is unconstitutional or that the court lacked jurisdiction may be raised for the first time on appeal.")

Some Circuits disagree. U.S. v. Baucum, 80 F.3d 539 (D.C. Cir. 1996) (Facial constitutional challenges to presumptively valid criminal statute is not a jurisdictional question that can be raised at any time.); U.S. v. Feliciano, 223 F.3d 102, 125 (2nd Cir. 2000) citing to Baucum, supra.

Some States find the issue cannot be waived: State v. Bruegger, 773 N.W.2d 862, 872 (Iowa 2009)(Where the claim is that the sentence itself is inherently illegal, whether based on the constitution or statute, we believe the claim may be brought at anytime.); Wanke v. Ziebarth Const. Co., 69 Idaho 64, 76, 202 P.2d 384 (1948)(It has never been held in this jurisdiction to be too late to challenge the constitutionality of a statute at any time....)

Other States have decided the issue can be waived: In re Commitment of Johnson, 153 S.W.3d 129, 130-31 (Tex. 2004)(A complaint regarding the constitutionality of a statute is subject to the ordinary rules of procedural default.); Dickinson v. Stone, 251 So.2d 268, 271 (Fla. 1971)(The general rule is that the constitutionality of a statute must be considered first by the trial court.)

Despite Nebraska's constitutional limitations on Courts' power, the Nebraska Supreme Court has manipulated this jurisdictional claim to evade the federal constitutional requirements for defining crimes; State v. Thomas, 268 Neb 570, 587 (Neb. 2004)("A facial challenge to a presumptively valid criminal statute does not raise an issue of subject matter jurisdiction in a criminal prosecution and thus may be waived if not timely asserted.") citing Baucum, supra. Wouldn't the waiver of such an important right be required to be done

Knowingly, willingly, and intentionally, as in Boykin v. Alabama, 395 U.S. 238, 243 (1969)? Regardless, the Nebraska Supreme Court's refusal to stay within their state constitutional boundaries is an exceptional circumstance that permits this Court to examine the claim; see, Mullaney v. Wilbur, 421 U.S. 684, 691 n.11 (An obvious subterfuge to evade consideration of a federal issue is an exceptional circumstance that Nebraska has committed before.)

Only the U.S. Supreme Court can resolve the Federal Constitution's 14th Amendment requirements for State Courts to stay within the limitations of their power to adjudicate in a criminal case. The 14th Amendment is the bulwark against the dark side of "Federalism" and this issue is the pea under the mattress that will not let this Court sleep.

Nebraska's Second Degree Murder Statute is Unconstitutional

State v. Ronald Smith, 282 Neb 720 (2011) changed the elements of Second Degree Murder. Smith held that in order to gain a conviction for Second Degree Murder, the State had to prove beyond a reasonable doubt the "absence of a sudden quarrel" when the trial court had been presented with sufficient* evidence of a sudden quarrel. Following Smith, the distinction between Second Degree Murder and sudden quarrel Manslaughter is the absence or presence of the sudden quarrel. But there is no requirement for the State to present any evidence of a sudden quarrel, even when it exists. The "absence" is then presumed when a defendant exercises their right to remain silent and present no defense; compare Virginia v. Black, 538 U.S. 343, 365 (2003). Thus, the Smith decision makes Second Degree murder in Nebraska facially unconstitutional and contrary to the clearly established federal law for two reasons.

*The Nebraska Supreme Court never says what it takes to be "sufficient." Compare, State v. Cave, 240 Neb 783, 791 (1992) and Ronald Smith, supra, at 735.

In Mullaney v. Wilbur, 421 U.S. 684 (1975) the Court held the State must bear the burden of proving the distinction between murder and manslaughter (crimes with different penalties) and that the distinction cannot be presumed and the burden shifted to the defendant to disprove it. Id., 421 U.S. at 698-99. Ronald Smith does not make the State bear the burden of proving the distinction until the defendant waves his right to not present a defense and actually presents evidence of manslaughter's material element, a "sudden quarrel."

In Kolender v. Lawson, 461 U.S. 352 (1983) the Court held a statute facially unconstitutional if it could not prevent its arbitrary and discriminatory enforcement. See also, Johnson v. U.S., 135 S.Ct. 2551 (2015). In no case is the State required to present any evidence of a sudden quarrel if it wants to obtain a conviction for Second Degree Murder and in no case can the State force the Defendant to present evidence of a material element of manslaughter. Neither the statutory nor the Smith definition of Second Degree Murder in Nebraska are adequate to prevent the State from arbitrarily gaining a conviction for Second Degree Murder when the crime committed is only sudden quarrel manslaughter. Such arbitrariness can be used for invidious purposes; Nebraska's Second Degree murder crime is becoming known as the crime of "Shooting While Black."

Ronald Smith is the fourth change to the elements of Second Degree Murder since Mullaney v. Wilbur, supra. In 1977 the Legislature removed the element of "malice" from Neb.Rev.Stat. §28-304 because, like Maine, Nebraska's 19th century definitions of murder and manslaughter had often presumed "malice" from the evidence of the intentional killing; see, Pruitt v. People, 5 Neb. 377, 384 (1877). But removing "malice" created another problem which showed itself in State v. Cave, 240 Neb 783 (1992) which the State Court evaded until

State v. Myers, 244 Neb 905 (1994).

Myers held that "malice" had always been a necessary element of Second Degree murder, and added it back to the requirements to gain a conviction. Shortly after, however, the Court decided the difference between Second Degree Murder and Sudden Quarrel Manslaughter was the element of "intent," see, State v. Jones, 245 Neb 821 (1994). The Court then decided Myers was wrong and removed "malice" in State v. Burlison, 255 Neb 190 (1998).

Ronald Smith presented another factual problem so the Court overruled Jones, supra, and decided that the difference between the two crimes would now be the absence or presence of the sudden quarrel. (Note that "sudden quarrel" cannot be an affirmative defense because it is still a material element of the 19th century definition of manslaughter that the State must prove; see the pattern jury instructions quoted in Jones, supra, at 827.)

These back and forth changes to the elements of Neb.Rev.Stat. §28-304 are evidence the statutory definition is too vague to fix. In Johnson v. U.S., supra, the Court "acknowledged that the failure of 'persistent efforts ... to establish a standard' can provide evidence of vagueness. ... Here this Court's repeated attempts and repeated failures to craft a principled and objective standard ... confirm its hopeless indeterminacy." Id., 135 S.Ct. at 2258.

Ronald Smith will not be the last change in this whack-a-mole jurisprudence. Smith blows a hole through homicide in Nebraska. A case will arise where one of the parties has presented just enough evidence of a sudden quarrel. An honest jury will find the State has failed to meet its heavy burden of proving beyond a reasonable doubt the "absence" of a sudden quarrel; that jury acquits of second degree murder. Then that jury decides the State has failed to meet

its equally heavy burden of proving beyond a reasonable doubt the "presence" of that sudden quarrel. The jury acquits a defendant they can all agree intentionally killed a person. Nebraska's Legislature should be told to fix this problem before the Nebraska Supreme Court has to whack that mole.

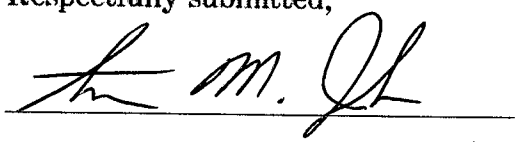
It should go without saying that Ronald Smith's change to the elements of the crime is a substantive change to the law that would have to be retroactively applied to all those serving sentences for Second Degree Murder in Nebraska. Schriro v. Summerlin, 542 U.S. 348, 354 (2004)(Change in the elements is a substantive change to the law.) and Montgomery v. Louisiana, 136 S.Ct. 718, 729 (2016)(Substantive changes to the law required by the Constitution must be applied retroactively in state collateral procedures.) Nebraska refuses to do so; State v. Glass, 298 Neb 598 (2018).

The fact that there are over one hundred offenders in Nebraska serving sentences for Second Degree Murder is no justification for manipulating the jurisdictional issue to evade the merits of the claim that Neb.Rev.Stat. §28-304 is facially unconstitutional. When this Court decided Mullaney v. Wilbur, supra, and held in Hankerson v. North Carolina, 432 U.S. 233 (1977) that it had to be retroactively applied, neither the State of Maine, nor the nation as a whole, descended into chaos. The issue of what "jurisdiction" is and that (even State) Courts must respect the limits placed on their powers is so fundamental to the proper role of government that the issue brought by the Petitioner is adequate to receive encouragement to proceed further and resolve the conflicts between the Courts below. Therefore, a COA should have issued.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: July 30th, 2018