No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

JUAN LUIS LEONOR — PETITIONER
(Your Name)

vs.

SCOTT FRAKES — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

NEBRASKA COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JUAN LUIS LEONOR
(Your Name)

P.O. Box 2500
(Address)

Lincoln, Nebraska 68542-2500
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

In 2017, Montgomery v. Louisiana, 136 S.Ct. 718 (2016), was decided and it was held that "when a new substantive rule of constitutional law controls the outcome of a case, the [Federal] Constitution requires state collateral review courts to give retroactive effect to that rule." Relying on Montgomery, the Petitioner sought state habeas corpus relief alleging that the decision in State v. Ronald-Smith, 282 Neb. 720 (2011), is a substantive rule that controls the outcome of his case because, under Ronald-Smith, Nebraska's statute for murder in the second degree--the statute of his conviction, is unconstitutional, and thus, it applied retroactively to his already final case. The Nebraska appellate courts, relying on State v. Glass, 298 Neb. 598 (2018)(holding that Ronald-Smith was a procedural rule), denied habeas corpus relief.

The questions to this Court are:

1. Is the decision announced in State v. Ronald-Smith, a new susbtantive rule of law that the Federal Constitution requires to be applied retroactively to already final cases before that decision was decided?

2. Is a federal and state defendant, whose conviction is final, permitted by the Federal Constitution and holdings of this Court to attack at any time that the statute of his conviction is unconstitutional without being subjected to waivers or procedural bars? A split exists between Federal and State Courts.

3. Is, after the decision in State v. Ronald-Smith, Nebraska's statute for murder in the second degree compatible with the Constitution's prohibition of vague criminal laws?

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 Nebraska Department of Correctional Services, and his attorney is Mr. Douglas Peterson, Nebraska Attorney General.

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PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[ ] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Discretionary review court appears at Appendix C to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT XIV 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 withit its jurisdiction the equal protection of laws."

Neb. Rev. Stat. § 28-304

(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 1B felony.

Neb. Rev. Stat. § 28-305

(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 2000, following a jury trial, Mr. Leonor was convicted, among other charges, but only relevant here, of two counts of murder in the second degree in violation of Neb. Rev. Stat. § 28-304(1). He was sentenced to 60 years to life. The convictions and sentences were affirmed and became final in 2002. See State v. Leonor, 263 Neb. 86 (2002); App. A, 1.

In 2017, Mr. Leonor brought a state habeas corpus attacking the constitutionality of the statute of his conviction, based on the 2011-decision in State v. Ronald-Smith, 282 Neb. 720 (2011). Ronald-Smith announced a new rule of law that intent is an element of the crime of manslaughter concerning its clause "without malice upon a sudden quarrel," Id., at 734., and when a defendant is charged with murder in the second degree--an intentional crime, and evidence of a sudden quarrel is adduced at trial, a defendant is entitled to have his jury decide whether the intentional crime could have been committed upon a sudden quarrel, thus constituting manslaughter instead of murder in the second degree. Id.

Because Nebraska has a habeas corpus mechanism which prevents defendants from challenging the constitutionality of a statute of conviction on an already final case, Sanders v. Frakes, 295 Neb. 374 (2016)("a final conviction and sentence entered upon an alleged facially unconstitutional statute is not absolutely void, but is voidable only, and may not be attacked in a habeas corpus proceeding."), Mr. Leonor argued that Montgomery v. Lousiana, 136 S.Ct. 718 (2016), provided an exception to Sanders v. Frakes. See App. A, 2.

The state habeas court denied relief without considering Montgomery v. Louisiana. App. B. The Nebraska Court of Appeals granted review, and while

Mr. Leonor's appeal was pending, the Nebraska Supreme Court decided State v. Glass, 298 Neb. 598 (2018). In State v. Glass, it was decided that the rule announced in Ronald-Smith was neither "constitutional," Glass, 298 Neb. at 609., nor substantive, but "procedural" in nature. Id. at 610. Thus, the Glass Court held that Ronald-Smith did not apply with retroactivity to cases final prior to that decision. Id.

On March 27, 2018, the Nebraska Court of Appeals held that Mr. Leonor was not entitled to habeas corpus relief based on the decision in State v. Glass. App. A, 6.

Next, Mr. Leonor sought discretionary review to the Nebraska Supreme Court arguing that State v. Glass did not apply to him or that it was decided incorrectly. In specific, Mr. Leonor advanced that in Ronald-Smith the elements of the crimes of manslaughter and murder in the second degree were modified and that based on Ronald-Smith he was arguing that the statute of his conviction was unconstitutional. That, under this approach, the decision in Ronald-Smith was a substantive rule that applied to his final case. That, the argument brought in Glass was totally the opposite of Mr. Leonor's challenges and relief asked for based on Ronald-Smith. App. D, 3-5.

On June 1, 2018, the Nebraska Supreme court denied discretionary review. App. C.

REASONS FOR GRANTING THE PETITION

The rule announced by the Nebraska Supreme Court in State v. Ronald-Smith, 282 Neb. 720 (2011), is a substantive rule of constitutional law that controls the outcome of Mr. Leonor's case, and thus, applies with retroactive effect to his case. Montgomery v. Louisiana, 136 S.Ct. 718, 729 (2016)("when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.").

STATE V. RONALD-SMITH IS A RULE OF CONSTITUTIONAL LAW

The Nebraska Supreme Court admits its decision in "State v. Ronald-Smith announced a new manslaughter rule," but insists that it is not a "new constitutional rule." See State v. Glass, 298 Neb. 598, 509 (2018). That view contradicts this Court's rationale that "[t]he source of a new rule is the **Constitution** itself, not any judicial power to create new rules of law." Danforth v. Minnesota, 552 U.S. 264, 271 (2008)(emphasis added). Thus, the rule announced in Ronald-Smith is a constitutional rule in nature.

STATE V. RONALD-SMITH WAS NOT THE FIRST INTERPRETATION REGARDING THE INTERPLAY BETWEEN NEBRASKA STATUTES FOR MURDER IN THE SECOND DEGREE AND SUDDEN QUARREL MANSLAUGHTER

"The statutes defining the elements of ... [murder in the second degree and sudden quarrel manslaughter] have remained unchanged since 1977." See, State v. Ronald-Smith, 282 Neb. at 725. "A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation." Id.; Neb. Rev. Stat. § 28-304(1).

As for manslaughter, "A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another

unintentionally while in the commission of an unlawful act." See Neb. Rev. Stat. § 28-305(1); State v. Ronald-Smith, 282 Neb. at 725. "The first clause of the statute defines manslaughter as a killing "without malice," and the remainder of the sentence describes two ways in which the offense of manslaughter can be committed. Logically and semantically, the phrase "without malice" applies to both categories of manslaughter." Id. at 731.

In State v. Pettit, 233 Neb. 436 (1989), the Nebraska Supreme Court interpreted the first category of manslaughter and held that to sustain "a conviction for killing another, without malice, "upon a sudden quarrel," the state, by evidence beyond a reasonable doubt, must prove that the defendant intended to kill, and did kill, another." Id. at 450.

In 1994, however, the holding that manslaughter was an intentional crime was overruled in State v. Jones, 245 Neb. 821 (1994), in which it was held that "there is no requirement of an intention to kill in committing manslaugter. The distinction between second degree murder and manslaughter upon a sudden quarrel is the presence or absence of an intent to kill." Id. at 830.

Next, in 2011, Jones was overruled and Pettit was reaffirmed in State v. Ronald-Smith, 282 Neb. at 734: "We therefore overrule this holding in Jones and reaffirm the holding[] of Pettit ... that an intentional killing committed without malice upon a "sudden quarrel," ... constitutes the offense of manslaughter." Id.

STATE V. RONALD-SMITH IS A SUBSTANTIVE RULE THAT APPLIES RETROACTIVELY TO CASES THAT BECAME FINAL BEFORE IT WAS DECIDED

"New substantive rules generally apply retroactively." Schriro v. Summerlin, 542 U.S. 348, 351 (2004). "A substantive rule is a rule that

"modifies the elements of an offense." Id. at 354. At the time Mr. Leonor's conviction became final in 2002, Nebraska law held that the difference between murder in the second degree and sudden quarrel manslaughter was the presence or absence of intent. i.e., in order to commit sudden quarrel manslaughter, the element of intent was not required. The decision of Ronald-Smith, however, modified that element of sudden quarrel. That is, now, to commit sudden quarrel manslaughter the element of intent is required. Id.

Also, the decision in Ronald-Smith modified the elements of murder in the second degree regarding the interplay between murder in the second degree and sudden quarrel manslaughter. In Ronald-Smith, "the jury was prevented from considering the crucial issue--whether the killing, although intentional, was the result of a sudden quarrel. The existence of sudden quarrel was an additional element the jury needed to consider, but the instruction prevented it from doing so." See State v. Hinrichsen, 292 Neb. 611, 634 (2016)(emphasis added). Thus, the element of "absence of sudden quarrel," which is not even written in Neb. Rev. Stat. § 28-304(1), became an additional element of murder in the second degree that a jury must consider in order to find a defendant guilty of murder or manslaughter. See State v. Hinrichsen, 292 Neb. at 620-621: "The jury was instructed that the elements of second degree murder were that the killings occurred (1) intentionally (2) without premeditation and (3) not upon a sudden quarrel. ... The jury instructions given properly enumerated each statutory element of ... [second degree murder]." Id.

Therefore, in the context explained above, Ronald-Smith is a substantive rule of law.

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Also, substantive rules include "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense," Montgomery v. Louisiana, 135 S.Ct. at 728., and "if it alters the range of conduct or the class of persons that the law punishes."

"Second degree murder is a Class 1B felony, punishable by imprisonment for a minimum term of 20 years and a maximum term of life." State v. Ronald-Smith, 282 Neb. at 725; Neb. Rev. Stat. § 28-304(2); Neb. Rev. Stat. § 28-105(1). "Manslaughter is a Class III felony, punishable by a maximum term of imprisonment of 20 years, a $ 25, 000 fine, or both." State v. Ronald-Smith, 282 Neb. at 725; Neb. Rev. Stat. § 28-305(2); Neb. Rev. Stat. § 28-105(1).

Before Ronald-Smith was decided, every defendant convicted of murder in the second degree could be sentenced to the maximum term of life for the intentional crime. After Ronald-Smith, if the intentional crime is committed upon a sudden quarrel a defendant cannot be punished to more than 20 years imprisonment. See e.g., Welch v. United States, 136 S.Ct. 1257, 1265 (2016), (finding Johnson v. United States, 135 S.Ct. 2551 (2015), was a substantive rule because, "[b]efore Johnson, the Act applied to any person possessed a firearm after three violent convictions, even if one or more of these convictions fell under only the residual clause. An offender in that situation faced 15 years to life in prison. After Johnson, the same person engaging in the same conduct is no longer subject to the Act and faces at most 10 years in prison."). Just as in Johnson, the rule announced in Ronald-Smith, applies retroactively because it prohibited a certain category of punishment

and altered the range of conduct or the class of persons that the law punishes: i.e., a life sentence for murder, for a class of defendants whose offense was only manslaughter. See e.g., Montgomery v. Louisiana, 136 S.Ct. at 734. Thus, Ronald-Smith is a substantive rule.

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Mr. Leonor was denied state habeas corpus relief based on the decision in State v. Glass, which held that the decision in Ronald-Smith was only a procedural rule. App. A, 5-6. State v. Glass, however, is in conflict with Montgomery v. Louisiana. In State v. Glass, the Nebraska Supreme Court did recognize Montgomery v. Louisiana and its mandate that substantive rules of constitutional law generally apply retroactively to cases already final prior to the new rule, while new procedural rules do not. Glass, 298 Neb. at 607-608. The Glass Court concluded that Ronald-Smith was a procedural rule because there it held that "it is improper for a jury to consider second degree murder without simultaneously considering sudden quarrel manslaughter," thus constituting "a change to the acceptable method for the jury to deliberate ... regulat[ing] only the manner of determining the defendant's culpability."" Glass, 298 Neb. at 610.

A similar appraoch was presented by the State of Louisiana in Montgomery. There, Louisian argued that the rule announced in Miller v. Alabama, 132 S.Ct. 2455 (2012), "required sentencing courts to take children's age into account before condemning them to die in prison." Id. at 734. This Court took into account that "procedural component." Id. However, this Court rightly explained that "there are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls

within the category of persons whom the law may no longer punish." Montgomery v. Louisiana, 136 S.Ct. at 735 (citation omitted).

State v. Glass recognizes a procedural component, same as in Montgomery. However, the Court in Glass failed to recognize that its procedural component was the product of a substantive change in the law. As argued above, the Ronald-Smith decision modified the elements of murder in the second degree and sudden quarrel manslaughter and altered the range of conduct or the class of persons that the law punishes. Thus, State v. Glass is in conflict with Montgomery v. Louisiana. Mr. Leonor, on petition for further review to the Nebraska Supreme Court, advanced this argument to no avail. App. D, 3-5; App. C.

Therefore, it was error of the Nebraska Supreme Court to apply State v. Glass to Mr. Leonor's case.

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Further, the decision in Ronald-Smith is a substantive rule simply because, based on that decision, Mr. Leonor is attacking the constitutionality of the statute of his conviction. App. A, 2. "[A]n attack to the judgments on the ground that they have been convicted under unconstitutional statutes[,]" is a reason "substantive rules must have retroactive effect regardless of when the defendant's conviction became final." Montgomery v. Louisiana, 135 S.Ct. at 730 (citing Ex parte Siebold, 100 U.S. 374 (1880)). "In Siebold, ... the petitioners attacked the judgments on the ground that they had been convicted under unconstitutional statutes. The Court explained that if "this position is well taken, it affects the foundation of the whole proceedings." Montgomery, 135 S.Ct. at 730.

Under the Siebold/Montgomery teaching, if Mr. Leonor's position that the statute of his conviction is unconstitutional, as he claims it is, then the foundation of the whole proceedings involving his convictions and sentences, are affected. Thus, the decision in Ronald-Smith is a substantive decision that controls the outcome of Mr. Leonor's case.

Also, under the Siebold/Montgomery teaching, State v. Glass results being incompatible with that teaching. In State v. Glass, the defendant argued that Ronald-Smith was a substantive rule, and thus, retroactive on collateral review, because he was entitled to the jury instruction promised in Ronald-Smith. Thus, by reading the State v. Glass' decision, it appears conceivable that the analysis of retroactivity applied by the Glass Court focused specifically on the nature of the claim brought before the Glass Court: that is, whether the defendant was entitled to the jury instruction promised by Ronald-Smith, which the Glass Court treated as a "procedural component." State v. Glass, 298 Neb. at 600 (Glass appeals ... that the jury instructions given in his case denied him due process and did not comply with this Court's holding in State v. [Ronald-] Smith, ... which he contends apply retroactively to his case on collateral review."); Id. at 610 (Glass complained that it "was improper for [his] jury to consider second degree murder without simultaneously considering sudden quarrel manslaughter," determining that to be "a change to the acceptable method for the jury to deliberate and is a procedural change" regulat[ing] only the manner of determining the defendant's culpability.").

Thus, the argument raised in State v. Glass--the entitlement to the Ronald-Smith's jury instruction, a procedural component, differs from the

argument and relief asked for by Mr. Leonor that Ronald-Smith's modification of the elements of murder in the second degree and manslaughter upon a sudden quarrel, the substantive change, makes the statute of his conviction unconstitutional. App. A, 3-4; App. D, 3. For this reason, State v. Glass does not apply to Mr. Leonor's case.

THE ATTACK TO THE CONSTITUTIONALITY OF A STATUTE OF CONVICTION SHOULD BE PERMITTED AT ANY TIME

Any defendant shall be allowed to attack the constitutionality of the statute of his conviction at any time, without the restrictions of waiver or procedural bars. Waivers or procedural bars in real sense do not benefit anyone. If, at whatever time the statute is held to be unconstitutional, then whoever was convicted and sentenced under that statute, before or after the conviction was final, will most likely end up receiving relief. See Montgomery v. Louisiana, 136 S.Ct. at 731 ("A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional. There is no grandfather clause that permits states to enforce punishments the Constitution forbids.").

Likewise, if the statute is held not to be unconstitutional, it only establishes that a defendant convicted and sentenced upon that statute was constitutionally convicted and sentenced. Hardly, an attack to that statute will reoccur, unless, however, the law changes.

Then, why wait until more defendants get convicted and sentenced under an unconstitutional statute? The more defendants sentenced under an unconstitutional statute, the more resources a state or federal government will

spend in obtaining the convictions and then in undoing them.

Mr. Leonor asserts that the Constitution, be it under the First, Second, Fifth, or Fourteenth Amendments, or under its Clauses, demands that a statute of conviction be tested at any time to make sure it is in line with its guarantees. The Constitution does not tolerate the reasoning that a statute of conviction, even if it is unconstitutional, it is constitutional if its constitutionality is not challenged properly under certain procedural methods.

There is, however, a split between Federal Court of Appeals, and State Courts, as to whether a statute of conviction can be attack under constitutional boundaries at any time, as will be shown below.

CASES ALLOWING TO RAISE THE CONSTITUTIONALITY OF THE STATUTE OF CONVICTION AT ANY TIME

Ex parte Siebold, 100 U.S. 374 (1880); United States v. Madera-Lopez, 190 Fed. Appx. 832, 834 (11th Cir. 2006)("exception exists to waiver where jurisdiction is asserted in cases in which the accused is challenging the constitutionality of the statute, usually on Fifth Amendment grounds, under which he is charged."); U.S. v. Morgan, 230 F.3d 1067, 1071 (8th Cir. 2000)(Bye, Circuit Judge, specially concurring)("the majority opinion explicitly recognizes a facial constitutional challenge exception to the procedural default doctrine.") (citing Ex parte Siebold); 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 any time."); 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 after codification, where the

challenge is not based on defect of title."); Davis v. City of Jackson, 240 So. 3d 381, 383 (Miss. 2018)("Standing is a jurisdictional issue, and thus, it may be raised by ... any party at any time, and the standard of review is de novo."); People v. Bryant, 128 Ill 2d 448, 539 N.E. 2d 1221 (Ill. 2018)(" a constitutional challenge to a statute can be raised at any time."); State ex rel-Skinkis v. Treffert, 90 Wis. 2d 528, 538-39 (Wis. Ct. App. 1979)("Petitioner's challenge to statute of conviction, as "void for facial vagueness, is an issue of subject matter jurisdiction which cannot be waived[.]").

COURTS THAT ALLOW AN ATTACK TO THE CONSTITUTIONALITY OF A STATUTE OF CONVICTION ON DIRECT APPEAL EVEN THOUGH THE DEFENDANT DID NOT TIMELY ASSERT IT IN THE TRIAL COURT

U.S. v. Walker, 59 F.3d 1196, 1198 (11th Cir. 1995)("Petitioner waived attack to statute at trial court; attack reviewed on direct appeal under plain error rule."); U.S. v. McKenzie, 99 F.3d 813 (7th Cir. 1996)(same); 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."); U.S. v. Reed, 141 F.3d 644, 651 (6th Cir. 1998)("Challenges to the constitutionality of a criminal statute are reviewed de novo.); Trushin v. State, 425 So. 2d 1126, 1129-30 (Florida 1982)("The facial validity of a statute, including an assertion that the statute is infirm because of overbreadth, can be raised for the first time on appeal, even though prudence dictates that it be presented at the trial court level to assure that it will not be considered waived."); Lehman v. Pennsylvania State Police, 576 Pa. 365, 382, A. 2d 265, 276 (2003)("Exception to rule requiring issue to be raised before administrative agency in order to preserve issue for appellate review

applies only to facial challenge to statute's constitutionality."); Curry v. State, 186 S.W 39, 42 (Tex 2005)("Appellate Courts will address questions involving the constitutionality of the statute upon which a defendant's conviction is based, even when such issues are raised for the first time on appeal.")

COURTS THAT CONSIDER A CHALLENGE TO THE CONSTITUTIONALITY OF A STATUTE OF CONVICTION, SUA SPONTE

Johnson v. United States, 135 S.Ct. 2551 (2015)(This Court granted certiorari on a specific question, but later "asked the parties to present reargument addressing the compatibility of the residual clause with the Constitution's prohibition of vague criminal laws."); Davis v. City of Jackson, 240 So. 3d 381, 383 (Miss. 2018)("Standing is jurisdictional issue, and thus, it may be raised by the Supreme Court sua sponte ... and the standard of review is de novo.").

Johnson and Davis are the example of why courts, federal and state, should not wait until a defendant presents the challenge to the statute of his conviction to a court if the court knows the statute is unconstitutional. In fact, courts are the guardians of the Constitution, and to that they had taken an oath. If the Constitution tells them the statute is unconstitutional, they should not allow a conviction and sentence to proceed because when that happens, courts knowingly allow a defendant to be sentenced under a law that does not exist.

COURTS THAT FLATLY DECLINE TO REVIEW AT ALL AN ATTACK TO CONSTITUTIONALITY OF A STATUTE OF CONVICTION THAT WAS NOT PRESERVED AT TRIAL LEVEL

United States v. Baucum, 80 F.3d 539 (U.S. App. D.C. 1996)("Facial cons-

titutional challenges to presumpteviely valid criminal statute is not a jurisdictional question that can be raised at any time."); U.S. v. Feliciano, 223 F.3d 102 (2nd Cir. 2000)(citing Baucum); Dickinson v. Stone, 251 So. 2d 268, 271 (Fla. 1971)("[T]he general rule [is] that the constitutionality of a statute be considered first by the trial court."); In re Commitment of Johnson, 153 S.W. 3d 129 (Tex. 2004)("A complaint regarding the constitutionality of a statute is subject to the ordinary rules of procedural default."); 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.")(cited Baucum).

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Certiorari is prayed for to address the long term split that has been between federal and state courts on whether a defendant can attack the constitutionality of the statute of his conviction at any time. The U.S. Constitution and holdings of this Court do require that the constitutionality of a statute of conviction can be attacked at any time.

NEBRASKA'S STATUTE FOR MURDER IN THE SECOND DEGREE IS UNCONSTITUTIONAL UNDER THE CONSTITUTION'S PROHIBITION OF VAGUE CRIMINAL LAWS

The Fifth and Fourteenth Amendments provide "that no person shall be deprived of life, liberty, or property, without due process of law. Our cases establish that the government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." Welch v. United States, 136 S.Ct. 1257 (2016).

The state habeas court had found Mr. Leonor's petition frivolous because "it was a second attempt to raise" the challenge to the constitutionality of the statute of his conviction, but the Nebraska Court of Appeals on appeal, however, found that Mr. Leonor's petition was not frivolous but meritless because of the decision in State v. Glass (finding that State v. Ronald-Smith did not apply retroactively to final cases). App. A, 6; and Id. at 7 (the Nebraska Court of Appeals states that Mr. Leonor's state habeas petition was a ruling on the merits). Thus, the Nebraska Courts had denied relief on the merits, which makes Mr. Leonor's challenge to the constitutionality of the statute of his conviction proper before this Court.

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

Pursuant to Ronald-Smith, it is required that if enough evidence of sudden quarrel is revealed at trial, the trial court must give the jury a murder in the second degree instruction to include that the state has the duty to prove the absence of sudden quarrel. State v. Hinrichsen, 292 Neb. at 634 (the "existence of sudden quarrel [is] an additional element the jury need[s] to consider[.]"); see also Id. at 620-621 (finding proper the murder in the second degree jury instruction including the additional element of

"absence of sudden quarrel."). This practice, however, does not prevent arbitrary enforcement. This is so, because the state has not constitutional obligation to do anything concerning "the absence of sudden quarrel," because the "absence of sudden quarrel" is not a material element of Neb. Rev. Stat. § 28-304(1). See Patterson v. New York, 432 U.S. 197, 210 (1977)(Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged).

The prosecution can arbitrarily choose to not present any evidence of sudden quarrel in a second degree murder case, which, in order for a defendant to get the jury instruction promised in Ronald-Smith, he is forced to give up his right to remain silent and produce evidence of "the presence of sudden quarrel," the **material element** of manslaughter. See Neb. Rev. Stat. § 28-305(1). In that regard, the burden of producing evidence of a **material element** which rests on the prosecution, unconstitutionally shifts to the defendant to achieve a just result of a conviction for manslaughter only, because the "presence of a sudden quarrel" cannot be under these circumstances an affirmative defense.

Ronald-Smith's decision places Nebraska squarely within the condemnation of Mullaney v. Wilbur, 421 U.S. 684 (1975). That is, requiring the "absence of a sudden quarrel" as an additional element does not prevent arbitrary enforcement because "absence" can be proven with no evidence. As argued above, a prosecutor can arbitrarily elect to no present any evidence of a sudden quarrel, even in a case where it exists, seeking to obtain a conviction for second degree murder. Without more evidence, a jury is entitled to

view this lack of evidence of a sudden quarrel as proof beyond a reasonable doubt of the element of a sudden quarrel. To permit this presumption and requiring the defendants to negate the material element is what this Court in Mullaney condemned. Mullaney, 421 U.S. at 720. Even worse, there is no fair warning of how much evidence a defendant must prepare to prove a defense under this unconstitutional practice. A defendant has a constitutional right to a complete defense.

Consider, for example, Ronald-Smith where it was held that there was insufficient evidence of a sudden quarrel without stating what standard of proof the court applies. See Ronald-Smith, 282 Neb. at 734-736. The defendant in Ronald-Smith was told that it was error his jury was not given the opportunity to consider whether his conviction was manslaughter and not murder based on evidence of a sudden quarrel. Id. Yet, as stated above, he was also told that the evidence presented at trial was insufficient to constitute a sudden quarrel. Id. at 735. However, he was not told how much evidence of the sudden quarrel was required, the State was not required to prove the absence of sudden quarrel and it is unknown whether there was evidence of a sudden quarrel that the State may not have presented, and worse, the defendant was not given the opportunity to present evidence of the sudden quarrel. Of course, without an ascertainable standard provided by the Nebraska Legislature, the Ronald-Smith Court could not have invented one.

This leads to the arbitrariness problem in that, without an ascertainable standard, courts and prosecutors can arbitrarily choose who or when a

defendant qualifies for a conviction on manslaughter upon a sudden quarrel instead of murder in the second degree. In other words, to a sentence of a maximum to life in prison or a maximum of 20 years in prison. This Constitutes vagueness in violation of the 5th and 14th Amendments to the U.S. Constitution. See Giacco v. Pennsylvania, 382 U.S. 399, 402-403 (1996) (Statute vague because it leaves "judges and jurors too much discretion."); Kolender v. Lawson, 461 U.S. 352, 358 (1983)(vague statutes "permit a standardless sweep [that] allows policeman, prosecutors, and judges to pursue their predilections."); Johnson v. United States, 135 S.Ct. at 2557 (condemned how the federal residual clause which was struck down as vague, left "grave uncertainty about how to estimate the risk posed by a crime, tying the judicial assessment of risk to a judicially imagined ordinary cases of a crime, not to real-world facts or statutory elements." The Court advanced, "How does one go about deciding what kind of conduct the ordinary cases" involves? A statistical analysis of the state reporter? a survey? Expert evidence? Google? Gut instinct?")(internal quotations omitted).

For the reasons argued above and before the Nebraska Courts, Nebraska's statute for murder in the second degree is unconstitutionally vague on its face.

CONCLUSION

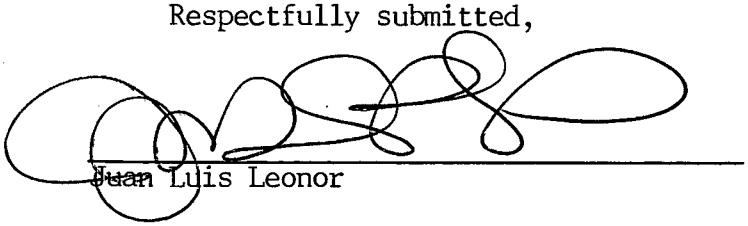
This Court should grant certiorari not only to clarify that the decision in State v. Ronald-Smith qualifies as a substantive rule, but also to clarify that a defendant can bring an attack to the constitutionality of the statute of his conviction at any time thereby fixing the SPLIT between

federal courts and state courts, and to clarify that under Ronald-Smith, Nebraska's statute for murder in the second degree violates the Constitution s prohibition of vague criminal laws. This case affects every defendant in Nebraska that has been charged or will be charged with murder in the second degree because this Court will determine whether they have been or will be sentenced constitutionally.

The judgment of the Nebraska Courts should be reversed and remand with directions to discharge Mr. Leonor on the charges for murder in the second degree, or as this Court may deem equal and just as the Federal Constitution demands. The judgment of the Nebraska Court of Appeals was erroneous.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Juan Luis Leonor

DATE: 7-23-18