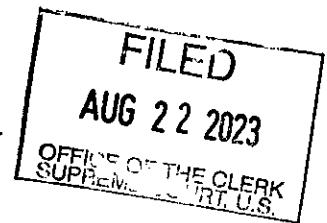


ORIGINAL

NO. 23-5544



IN THE

SUPREME COURT OF THE UNITED STATES

JUAN LUIS LEONOR, Petitioner

VS.

STATE OF NEBRASKA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

THE NEBRASKA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Constitution prohibits a state court from denying consideration of a state-statutory-interpretation federal claim brought after petitioner's convictions became final, when (1) the state highest court's determination rests on Federal Law, but (2) the state highest court's determination is in conflict with decisions of this Court and with a decision of a Federal court of appeals, and the state statutory-interpretation (a) had undone a judicial legislation, (b) produced a substantive decision, (c) its result was dictated by precedent, and (d) it brought no change of law in petitioner's case?
2. Whether Nebraska can keep petitioner incarcerated when, based on a state statutory interpretation after his convictions became final, it was revealed that his convictions and sentences are prohibited by the Due Process Clause of the 14th Amendment?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page

RELATED CASES

- State v. Leonor, No. S-00-1318, Nebraska Supreme Court. Direct review Judgment entered on February 1, 2002.
- State v. Leonor, Doc. 149, Page 834, CR 10-9042117, District Court for the Douglas County, Nebraska. Postconviction relief Judgment entered on April 6, 2012.
- State v. Leonor, No. S-23-0153, Nebraska Supreme Court. Postconviction review Judgment entered on June 20, 2023.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR A WRIT OF CERTIORARI

Petitioner, Juan Luis Leonor, respectfully prays that a writ of certiorari issue to review the judgment of the Nebraska Supreme Court.

OPINIONS BELOW

The opinion of the Nebraska Supreme Court is a summary opinion that appears at Appendix A, Pet. App. 1a, and is not reported. The opinion of the state district court denying postconviction relief appears at Appendix B, Pet. App. 2a-5a, and is not reported.

JURISDICTION

The Nebraska Supreme Court entered its judgment on June 20, 2023. Pet. App. 1a. This Petition is timely filed under Supreme Court Rule 13. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. "No State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1.
2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, Cl. 2.
3. "The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no

person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others except as expressly directed or permitted in this Constitution." Neb. Const. Art. II, Sec. 1 (1).

4. "A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation. ... Murder in the second degree is a Class IB felony." Neb. Rev. Stat. § 28-304(1) & (2) (Reissue 1995 & 2016).
5. "A person commits manslaughter if he or she kills another without malice upon a sudden quarrel...." "Manslaughter is a Class IIA felony." Neb. Rev. Stat. § 28-305(1) & (2)(Reissue 1995 & 2016).
6. "For purposes of the Nebraska Criminal code ... the following penalties ... are authorized upon conviction: ... Class IB felony[:] Maximum--life imprisonment[,] Minimum--twenty years imprisonment[;] ... Class IIA felony[:] Maximum--twenty years imprisonment[,] Minimum--none[.]" Neb. Rev. Stat. § 28-105(1)(Reissue 1995 & 2016).

STATEMENT OF THE CASE

This case involves Mr. Leonor's contention that his convictions are prohibited by the Due Process Clause of the 14th Amendment. Mr. Leonor supports his contention on State v. Ronald-Smith, 282 Neb. 720 (Neb. 2011), a decision that interpreted Nebraska law after his convictions became final. Mr. Leonor argued to the state courts that, under Ronald-Smith, the State has not proven and cannot prove his convictions beyond a reasonable doubt. The Nebraska Supreme Court denied review of Mr. Leonor's due process claim because, in State v. Glass,

298 Neb. 598 (Neb. 2018), a decision that employed Federal Law for its result, it had already held that Ronald-Smith announced a new rule of criminal procedure that does not apply retroactively on collateral review. A thorough version of the case is hereby given below.

In 2002, Mr. Leonor was convicted by a jury of, among others but only of relevance here, two counts of aiding and abetting second degree murder and two related counts of use of a weapon to commit a felony. See State v. Leonor, 263 Neb. 86, 92 (Neb. 2002)(Docket 149 Page 834). For the murder convictions, Mr. Leonor was sentenced to two consecutive terms of 20 years to life imprisonment, and for the use of weapon convictions, he was sentenced to two consecutive terms of 5 to 10 years imprisonment. Id. Mr. Leonor's convictions were affirmed on February 1, 2002. Id.

Nebraska defines second degree murder as an intentional killing without premeditation. Neb. Rev. Stat. § 28-304(1). Although the State's evidence in Mr. Leonor's case did prove that the killing had been intentional, it also established that the intentional killing had been the result of a sudden quarrel provocation. Nebraska defines a sudden quarrel provocation as follows:

A "sudden quarrel" is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control. It does not necessarily mean an exchange of angry words or an altercation contemporaneous with an unlawful killing and does not require physical struggle or other combative corporal contact between the defendant and the victim. The question is whether there existed reasonable and adequate provocation to excite one's passion and obscure and disturb one's power of reasoning to the extent that one acted rashly and from passion, without due deliberation and reflection, rather than from judgment."

See State v. Trice, 286 Neb. 183, 190 (Neb. 2013).

A summarized picture of the State's evidence shows that the victims

were members of a gang named "Lomas," and were rivals with a gang named "Surenos" of which Mr. Leonor and his codefendant, David Gonzales, were members. The night of November 22, 1999, the victims were driving in their vehicle and Mr. Leonor and Gonzales were driving in Mr. Leonor's vehicle. Then, at a street intersection in Omaha, Nebraska, the victims had an encounter with Mr. Leonor and Gonzales upon which "they all looked at each other[.]" See Leonor, 263 Neb. at 95 (testimony of State's witness Jose Hernandez). At this point, the victims threw "a Lomas gang sign at" Mr. Leonor and Gonzales. Id. (testimony of State's witness Gerardo Ortiz).

Suddenly, led by the victims' provocation, Mr. Leonor got "in front of the [victims'] car to block [their] way. When [the victims] tried to reverse Leonor reversed and got right beside [them]. Gonzales then shot his gun at the [victims]. Leonor next raced the [victims'] car down the street until it crashed." Id. at 95-96 (testimony of Jose Hernandez).

Also, the State's evidence established that Mr. Leonor and Gonzales "did what they did" because of the victims' provocation of throwing rival gang signs at them. Appendix J, Pet. App. 64a (Mr. Leonor is referred as "Malo" and Gonzales is referred as "Creeper"). And, resting on this evidence given above, the Nebraska Supreme Court affirmed Mr. Leonor's convictions:

We determine that the evidence was sufficient to support the guilty verdicts. The evidence showed that Leonor ... and Gonzales had shot someone who had thrown a Lomas gang sign at them; ... They began to follow the victims' car aggressively and chased the victims' car, shooting at it, until the victims' car hit a pole.

See Leonor, 263 Neb. at 97.

Even though the State's evidence in Mr. Leonor's case established that the intentional killing was the result of a sudden quarrel provocation, Nebraska

law, at that time, recognized a killing upon a sudden quarrel provocation only as unintentional manslaughter under Neb. Rev. Stat. § 28-305(1). This statement of law was actually ratified in State v. Jones, 245 Neb. 821 (Neb. 1994). In Jones, the Nebraska Supreme Court held that "[t]he distinction between second degree murder and manslaughter upon a sudden quarrel is the presence or absence of an intention to kill." Id. at 830.

In 2011, nine years after Mr. Leonor's convictions became final, however, Jones's statement of law came to an end in State v. Ronald-Smith, supra. In Ronald-Smith, the Nebraska Supreme Court found that Jones, to the extent that it held that sudden quarrel manslaughter was not an intentional crime, had been a judicial legislation. In that respect, the Nebraska Supreme Court admitted that, "[i]n Jones, [it] essentially rewrote § 28-305(1)[.]" Ronald-Smith, 282 Neb. at 732. As a result, Jones was overruled. See Ronald-Smith, 282 Neb. at 734.

The overruling of Jones, led the Nebraska Supreme Court in Ronald-Smith to determine that the Nebraska Legislature's intent has been that, an intentional killing as the result of a sudden quarrel provocation, constitutes manslaughter. Id. at 732. For this reason, the Nebraska Supreme Court concluded that in a second degree murder case where there exists evidence of provocation, a jury must be allowed to consider simultaneously whether "the killing was intentional but provoked by a sudden quarrel, and therefore constituted manslaughter." Id. at 734; see also State v. William-Smith, 284 Neb. 636, 656 (Neb. 2012).

In 2012, in a timely fashion, Mr. Leonor sought postconviction relief relying, in part, on the holding in Ronald-Smith. Appendix D, Pet. App. 10a-25a. In this postconviction proceeding, Mr. Leonor argued, as Claim Three,

that his Due Process right under the 14th Amendment was denied because "the jury was not allowed to consider whether the intent claimed by the State was the result of a sudden quarrel and would then" constitute manslaughter. Pet. App. 11a-13a, 16a, 18a, 20a. Also, Mr. Leonor argued, as Claim Ten, that "the State failed to prove beyond a reasonable doubt that [he] committed intentional second degree murder [in the absence of a sudden quarrel provocation], in violation of the U.S. ... Constitution." Pet. App. 12a, 21a-23a.

Shortly after, postconviction was denied. Pet. App. 2a-5a. The state district court reasoned that Mr. Leonor's claims were procedurally barred because they "were clearly "knowable" to him at the time of his direct appeal or two prior postconviction motions." Pet. App. 3a. In other words, the district court found that Mr. Leonor's Ronald-Smith due process claims were known to him even if Ronald-Smith did not exist at the time that Mr. Leonor's direct appeal was had in 2002, and at the time his two prior postconviction motions were brought in 2003 and 2008, respectively. Pet. App. 2a-3a.

Mr. Leonor appealed the denial of postconviction relief on his Ronald-Smith due process claims, to the Nebraska Supreme Court. Initially, Mr. Leonor's attempt to appeal was frustrated by official negligence, which caused him to miss the deadline to file an appeal. This official negligence consequently led Mr. Leonor to engage in a lengthy litigation trying to reopen the time to appeal. Appendix E, Pet. App. 26a-29a (BACKGROUND). On February 10, 2023, finally Mr. Leonor's opportunity to appeal was reopened. Appendix F, Pet. App. 30a-32a. And, on February 28, 2023, the appeal was docketed in the Nebraska Supreme Court. Appendix G, Pet. App. 33a.

On appeal to the Nebraska Supreme Court, Mr. Leonor raised the same Ronald-

Smith due process claims that he raised before the district court. Appendix I, Pet. App. 37a, 44a-48a. As far as Claim Ten goes, Mr. Leonor argued that he was seeking the invalidation of the convictions for second degree murder, as insufficient, in violation of the 14th Amendment to the U.S. Constitution." Pet. App. 47a. And as far as Claim Three goes, Mr. Leonor argued that his Due Process right under the 14th Amendment was denied, and thus, he was seeking "a new trial because ... "the jury was not allowed to consider whether the intent claimed by the State was the result of a sudden quarrel[.]"" Pet. App. 48a.

Also, Mr. Leonor argued to the Nebraska Supreme Court that the reason given by the district court in denying postconviction relief, was error. In that regard, Mr. Leonor advanced that in William-Smith, 284 Neb. at 654-655, it was held that Ronald-Smith brought a change in decisional law. For this reason, Mr. Leonor submitted that the district court's position could no longer stand because Ronald-Smith's "clarification of the law had not been available to [him] at the time that he had his direct appeal and at the time that he filed his two prior postconviction motions." Pet. App. 44a-45a.

Additionally, Mr. Leonor argued to the Nebraska Supreme Court that its holding in State v. Glass, supra, did not apply to this Ronald-Smith due process claims. [Glass was decided while Mr. Leonor had been engaged in the official negligence litigation seeking to reopen his appeal. In Glass, the Nebraska Supreme Court held that Ronald-Smith announced a new rule of criminal procedure that does not apply retroactively on collateral review. Glass, 298 Neb. at 610. In holding so, the Nebraska Supreme Court employed the Federal retroactivity analysis under Teague v. Lane, 489 U.S. 288 (1989) and progeny. See Glass, 298 Neb. at 607-608.].

First, Mr. Leonor argued that Glass did not apply because, under Fiore v. White, 531 U.S. 225 (2001), and the Due Process Clause of the 14th Amendment, "Ronald-Smith merely interpreted the law as it was at the time that [his] convictions became final." Pet. App. 50a-52a.

Second, Mr. Leonor alleged that Glass did not apply because the rule that Ronald-Smith announced had been dictated by precedent and been required by the Due Process Clause. Pet. App. 55a-56a.

And third, Mr. Leonor alleged that Glass did not apply because, under Teague and its progeny, Ronald-Smith is a substantive decision that applies retroactively on collateral review. Pet. App. 56a-61a.

On June 2, 2023, the State filed a motion for summary affirmance. Appendix C, Pet. App. 6a-9a. In its motion, the State urged the Nebraska Supreme Court to dispose of Mr. Leonor's appeal without review because Glass prevented him from obtaining "relief under [Ronald-]Smith[.]" Pet. App. 8a (Assignment of Error 1).

On June 6, 2023, Mr. Leonor submitted a written response opposing the State's motion for summary affirmance. Appendix H, Pet. App. 34a-36a. In his written response, Mr. Leonor asked the Nebraska Supreme Court to deny the State's motion because, in that appeal, he was raising question of first impression that were "not addressed in" Glass. Specifically, the questions involved that the "retroactivity of Ronald-Smith is not at issue," and that "even if Ronald-Smith was at issue," it is a substantive decision. Pet. App. 34a.

On June 20, 2023, the Nebraska Supreme entered an order granting the State's motion for summary affirmance, and as a result, it found "no error in the district court's denial of Leonor's motion for postconviction relief." Pet.

App. 1a. To be sure, Glass was the sole issue upon which the Nebraska Supreme Court denied consideration of Mr. Leonor's Ronald-Smith due process claims. As Mr. Leonor has elaborated above, the Nebraska Supreme Court granted the State's motion for summary affirmance, and the State's sole argument was the Glass prevented Mr. Leonor from obtaining relief under Ronald-Smith.

Now, Mr. Leonor brings this petition for a writ of certiorari seeking this Court's discretionary power to reverse the judgment of the Nebraska Supreme Court for the reasons that follow.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This case presents the compelling reasons for this Court to exercise its discretionary power.

To begin with, the Due Process Clause of the 14th Amendment prohibits Mr. Leonor's convictions because, under Ronald-Smith, the State has not proven, and cannot prove, beyond a reasonable doubt, that his conduct violated an element of second degree murder. Consistent with that, the Nebraska Supreme Court's decision to not consider Mr. Leonor's due process claims is erroneous. It is erroneous because, Glass, the case that the Nebraska Supreme Court used to deny consideration of Mr. Leonor's due process claims, not only is in conflict with decisions of this Court and in conflict with a decision of the Seventh Circuit, but also it does not apply in Mr. Leonor's case.

Also, this case involves a purely federal question. That is, Glass, itself, applied federal law for its result, and with that same force of federal law it

was applied in Mr. Leonor's case. This Court has held that "whether a state law determination is characterized as "entirely dependent on," "resting primarily on," or "influenced by" a question of federal law, the result is the same: state law determination is not independent of federal law and thus poses no bar to [this Court's] jurisdiction." See Foster v. chatman, 578 U.S. 488, 499, n. 4 (2016).

Moreover, besides that this case faces no procedural defaults and no time bars from the state courts, it also raises subsidiary questions that, given the circumstances of this case, do require of this Court's intervention to settle them. Every subsidiary question and every argument herein is of national importance. For, by this Court settling the questions herein, many similar situated petitioners will be affected, not only from Nebraska, but also from every State in the Nation where Federal Law is applied to questions of retroactivity regarding state statutory interpretations of criminal law.

A state court should not be allowed to flout the Due Process Clause of 14th Amendment and the Supremacy Clause by providing a lesser remedy than what otherwise Federal Law would provide.

I. THE NEBRASKA SUPREME COURT'S DECISION TO NOT CONSIDER
MR. LEONOR'S DUE PROCESS CLAIMS VIOLATED THE DUE PROCESS
CLAUSE OF THE 14TH AMENDMENT AND THE SUPREMACY CLAUSE.
ART. VI, CL. 2, OF THE UNITED STATES CONSTITUTION

This Court has held that "[s]tate law may provide relief beyond the demands of federal due process, but under no circumstances may it confine petitioners to a lesser remedy[.]" See Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 102 (1993).

Later, in Danforth v. Minnesota, 552 U.S. 264 (2008), this Court held that

Harper and other decisions "support [this Court's] conclusion that the remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law. Federal law simply "sets certain minimum requirements that states must meet but may exceed in providing appropriate relief.'" Danforth, 552 U.S. at 287-288.

Consistent with the above, the first question that Mr. Leonor presents is whether Danforth/Herper apply when a state court chooses to provide its citizens a remedy for a violation of the Federal Constitution that is guided purely by Federal Law. Especially, where, as here, the minimum requirements of federal law were not met by the Nebraska Supreme Court in choosing not to consider Mr. Leonor's federal claim.

A. THE NEBRASKA SUPREME COURT'S HOLDING IN Glass IS IN CONFLICT WITH DECISIONS OF THIS COURT BECAUSE UNDER FEDERAL LAW RONALD-SMITH IS A SUBSTANTIVE DECISION

In Glass, under the guidance of Teague v. Lane, 489 U.S. 288 (1989) and its progeny, the Nebraska Supreme Court considered whether its decision in Ronald-Smith announced a substantive rule. Glass, 298 Neb. at 607-608. After discussing the retroactivity principles of Teague and its progeny, the Nebraska Supreme Court moved on to hold that, because Ronald-Smith was not based "on a newly constitutional right[,]" Glass, 298 Neb. at 609-610 (emphasis added), and "a new rule applies retroactively on collateral review only if it is ... a constitutional substantive rule[,]" Id. at 609 (emphasis added), then Ronald-Smith did not announce a substantive rule. Id. at 609-610.

The decision in Glass holding that Ronald-Smith did not announce a substantive rule because its rule was not a constitutional rule, is in conflict with decisions of this Court for three reasons: (1) a substantive decision may be

based on a nonconstitutional rule, (2) Glass's decision is ambiguous; and (3) Ronald-Smith actually announced a "constitutional" rule.

1. A Substantive Decision May Be Based On A Nonconstitutional Rule

This Court has held that a substantive decision "includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the state's power to punish." Welch v. United States, 578 U.S. 120, 129 (2016). It is undisputed that Ronald-Smith falls under the former one. See Glass, 298 Neb. at 609 (Ronald-Smith "was based upon [the] interpretation of [a] criminal statute....").

A decision that narrows the scope of a criminal statute by interpreting its terms, is better known as an statutory interpretation case. And in Welch, this Court clarified that no case "from this Court treats statutory interpretation cases as a special class of decisions that are substantive because they implement the intent of Congress." Id. 578 U.S. at 134. In other words, whether statutory interpretation cases narrow the scope of a criminal statute--which involves a nonconstitutional rule, or place conduct or persons covered by the statute beyond the state's power to punish--which involves a constitutional rule, they "are substantive if and when they meet the normal criteria for a substantive rule: when they alte[r] the range of conduct or the class of persons that the law punishes." Id.

The best examples of a statutory interpretation case that is a substantive decision even though it involves no constitutional rule, are these Court's decisions in Bousley v. United States, 523 U.S. 614 (1998) and Jones v. Hendrix, 143 S.Ct. 1857 (2023).

"In Bousley, the Court was asked to determine what retroactive effect should be given to its decision in" Bailey v. United States, 516 U.S. 137 (1995). See Welch, 578 U.S. at 133. In short, this Court in Bousley found that "as a matter of statutory interpretation ... Bailey was substantive, as it was a decision "holding that a substantive federal criminal statute does not reach certain conduct."" Welch, 578 U.S. at 133 (citing, in part, Bousley, 523 U.S. at 620).

The initial question brought up in Bousley was whether Bailey announced a new constitutional rule of criminal procedure. Bousley, 523 U.S. at 619-620. This Court disposed of that question by holding that Bailey did not announce a constitutional rule, that the "only constitutional" issue was whether "petitioner's guilty plea was not knowing and intelligent." Id (citation omitted). And as far as that was a concern, this Court added that "[t]here [was] surely nothing new about [that] principle...." Id (citation omitted).

Therefore, Bousley is an example that a mere statutory interpretation case that narrows the scope of a criminal statute is a substantive decision, even if it announced no constitutional rule.

Similarly, in Hendrix, a most recent case, the question raised there was whether the statutory interpretation in Rehaif v. United States, 139 S.Ct. 2191 (2019), could have served as the basis to obtain collateral review under the habeas corpus provision 28 U.S.C. § 2241. See Hendrix, 143 S.Ct. at 1863. The petitioner's concern in Hendrix was that, because Rehaif was a substantive decision but it did not announced a constitutional rule, he could not have brought his Rehaif claim under 28 U.S.C. § 2255(h)(2), being that this section required that a second or successive § 2255 motion must present "a new rule of constitu-

tional law." See Hendrix, *supra*. This Court agreed that Rehaif's statutory interpretation, although it was a substantive decision, it in effect brought no constitutional rule, and thus, Section 2255(h)(2) provided no remedy for petitioner. Hendrix, *supra*.

Therefore, Hendrix is also an example that a statutory interpretation case that narrows the scope of a criminal statute is a substantive decision, even if it announced no constitutional rule.

For the reasons given above, the decision in Glass that, under Federal Law, the statutory interpretation in Ronald-Smith can be substantive only if it had announced a **constitutional** rule, is in conflict with holdings of this Court.

2. The Decision In Glass That Ronald-Smith Could Not Have Been A Substantive Decision Because It Did Not Announce A Constitutional Rule Is, At Best, Ambiguous

The decision in Glass, that Ronald-Smith could not have been a substantive decision because it did not announce a "constitutional" rule is, at best, ambiguous.

It is ambiguous because, after the Nebraska Supreme Court had held that Ronald-Smith was not a substantive decision because it did not announce a constitutional rule, the Nebraska Supreme Court still found that Ronald-Smith was a rule of criminal procedure. Glass, 298 Neb. at 610. But, under Teague and its progeny, a procedural rule is actually grounded as a "constitutional" rule, and the Nebraska Supreme Court did acknowledge this in Glass. See Glass, 298 Neb. at 608 ("New constitutional rules of criminal procedure ... generally do not apply retroactively.")(citing Montgomery v. Louisiana, 577 U.S. 190 (2016)).

This ambiguity violates the very principle in Danforth/Herper. Stated differently, while it is true that a state court may "exceed [federal law] in

providing appropriate relief," see Danforth 552 U.S. at 288, it may not do so, however, to provide a lesser remedy. See Harper, 509 U.S. at 102. Here, the Nebraska Supreme Court cannot claim that it exceeded federal law to provide appropriate relief by holding that Ronald-Smith was a procedural rule even though it was not a constitutional rule, and at the same time holding that it was not a substantive decision because it was not a constitutional rule. Within this result, the Nebraska Supreme Court in Glass applied federal law to what was more convenient and not for what federal law was meant to be.

For the reasons given above, the decision in Glass that, under Federal Law, the statutory interpretation in Ronald-Smith can be substantive only if it had announced a constitutional rule, is ambiguous and in conflict with holdings of this Court.

3. The Decision In Ronald-Smith Actually Announced A "Constitutional" Rule

The rule announced in Ronald-Smith is a "constitutional" rule because it invalidated particular conduct or persons covered by the statutes it interpreted, that was beyond the State's power to punish. A decision of this nature, this Court has held, is a "constitutional determination[.]" Welch, 578 U.S. at 129 (emphasis added).

Ronald-Smith's decision falls within decisions that place particular conduct or persons beyond the State's power to punish because it invalidated an interpretation of law that had been a judicial legislation. A judicial legislation is an unconstitutional law because it "expand[s] a criminal statute's scope [and] would risk offending ... due process and separation-of-powers principles[.]" See United States v. Davis, 139 S.Ct. 2319, 2333 (2019). For this reason, "[r]es-

pect for due process and the separation of powers suggest that a court may not, in order to save Congress the trouble of having to write a new law, construe a criminal statute to penalize conduct it does not clearly proscribe." Id.

Moreover, this Court has held that "when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is by definition, unlawful." Montgomery, 577 U.S. at 201. Unlawful means that the law is "unconstitutional and void" upon which a tribunal lacked jurisdiction of the cause. Id. at 203 (quoting Ex parte Siebold, 100 U.S. 371, 376-377 (1880), and citing Penry v. Lynaugh, 492 U.S. 302, 330 (1989); Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 151 (1970) ("Broadly speaking, the original sphere for collateral attack on a conviction was where the tribunal lacked jurisdiction either in the usual sense ... or because the sentence was one the court could not lawfully impose." (footnotes omitted))).

The decision in Ronald-Smith falls within those principles given above. That is, Ronald-Smith invalidated the judicial legislation done in State v. Jones, 245 Neb. 821 (Neb. 1994). In Jones, the Nebraska Supreme Court interpreted the interplay between two intentional killings (second degree murder and sudden quarrel manslaughter), and held that sudden quarrel manslaughter was not an intentional killing anymore. Id. at 830.

Initially, the Jones Court acknowledged what the Legislature's intent has been in regard to the two intentional killings. That is, "that the only element that distinguished [them] ... is the element of sudden quarrel, since both are intentional." Id. at 829. The question presented in Jones was the same question presented in Ronald-Smith: what is the Legislature's intent when a defendant

is charged with second degree murder and the evidence shows that the intentional killing was the result of a sudden quarrel provocation; how a jury was going to decide the sudden quarrel element through a step jury instruction. See Jones, 245 Neb. at 828-829; Ronald-Smith, 282 Neb. at 724.

In Jones, the Nebraska Supreme Court answered that question by rewriting the Legislature's intent, and held that "[t]he distinction between second degree murder and manslaughter upon a sudden quarrel [was] the presence or absence of an intention to kill." Jones, 245 Neb. at 830.

In Ronald-Smith, on the other hand, the Nebraska Supreme Court answered that question by first admitting that, in Jones, it had judicially rewritten the intentional killing of sudden quarrel manslaughter. Ronald-Smith, 282 Neb. at 732 (citing Neb. Rev. Stat. § 28-305(1)). Then, the Nebraska Supreme Court reaffirmed that an intentional killing upon a sudden quarrel constitutes manslaughter. Id. And next, the Nebraska Supreme Court held that in a second degree murder case, where there is evidence that a sudden quarrel provocation exists, a jury must be given simultaneously the option to convict of second degree murder or sudden quarrel manslaughter. Id. at 734.

Although the Nebraska Supreme Court has treated Jones's judicial legislation as inconsequential, the truth is that it was a void law. This is so, especially because the Separation of Powers of the Nebraska Constitution, Art. II, § 1 (1), prohibited Jones from judicially legislating a criminal law. See State v. Burlison, 255 Neb. 190, 194 (Neb. 1998) (In Nebraska "all crimes are statutory and no act is criminal unless the Legislature has in express terms declared it to be so."); Ronald-Smith, 282 Neb. at 732 (it is "the province of the Legislative branch, not the judiciary, to define criminal offenses within

constitutional boundaries."). And to be sure, Jones's judicial legislation was also prohibited by the Due Process Clause of the 14th Amendment, as Mr. Leonor argued to the Nebraska Supreme Court. Pet. App. 51a.

It follows that, Ronald-Smith came to undo the unconstitutional and void law in Jones, which had allowed particular conduct or placed persons beyond the State's power to punish. To illustrate, not the Nebraska Legislature, but Jones authorized a punishment of 20 years to life imprisonment under the intentional killing of second degree murder, a Class IB felony, see Neb. Rev. Stat. § 28-304(1)-(2) and Neb. Rev. Stat. § 28-105(1), when the intentional killing had been the result of a sudden quarrel provocation. Under Jones regime, thus, a defendant could not have been charged with sudden quarrel manslaughter when the killing, although intentional, had been the result of a provocation. Sudden quarrel manslaughter is a Class IIA felony, and carries a sentence of no more than 20 years imprisonment. See Neb. Rev. Stat. § 28-305(1)-(2) and § 28-105.

Also, under Jones's regime, even if a defendant was charged with second degree murder, the State was not required to prove beyond a reasonable doubt that the intentional killing had been committed in the absence of a sudden quarrel provocation. As such, a jury could not have considered whether a defendant was no more than a manslaughterer, and a defendant could not have challenged his conviction for second degree murder as insufficient.

Beyond this, Ronald-Smith brought to light that Mr. Leonor had been tried, convicted, and sentenced for the intentional killing committed upon a sudden quarrel provocation, under no law. That is, Jones's judicial legislation was an unconstitutional law. And this Court has held that "[a]n unconstitutional law is void, and is as no law." Montgomery, 577 U.S. at 203 (citation and

original quotations omitted). Put differently, under the void law in Jones, there either existed no subject matter jurisdiction over the cause or no legal basis for the trial court to have imposed sentence because the Separation of Powers of Nebraska and the Due Process Clause of the 14th Amendment, prohibited them.

For the reasons given above, Ronald-Smith announced a "constitutional" rule. The decision in Glass, which held otherwise, is therefore in conflict with decisions of this Court.

4. Ronald-Smith Announced A Substantive Decision That Applies Retroactively On Collateral Review

"A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." Welch, 578 U.S. at 129. Ronald-Smith fits squarely within this principle in two ways. That is, Ronald-Smith invalidated a law that authorized criminal punishment beyond what the Nebraska Legislature "in fact has enacted by a valid law[,]" Welch, 578 U.S. at 134, and beyond what the Nebraska Legislature "meant to enact." Id. In either way, Ronald-Smith is a substantive decision because "a court lack[ed] the power to exact a penalty that has not been authorized by any valid criminal statute." Id.

a. Ronald-Smith is A Substantive Decision Because It Invalidated A Judicially Legislated Interpretation Of The Law

As Mr. Leonor advanced in the previous section, ante pp. 15-18, the decision in Ronald-Smith invalidated the judicial legislation in Jones. Jones had allowed particular conduct or placed persons beyond the State's power to punish.

In Jones, the Nebraska Supreme Court had legislated the original intent of the Nebraska Legislature concerning an intentional killing committed as the result

of a sudden quarrel provocation, which is the killing that the State's evidence in Mr. Leonor's case supported. In that regard, the Nebraska Supreme Court held that an intentional killing committed as the result of a sudden quarrel provocation, constituted only the intentional killing of second degree murder. Id. 245 Neb. at 830. Second degree murder is a Class IB felony, see § 28-304(1)-(2), and it is punishable by 20 years to life imprisonment. § 28-105(1).

In Ronald-Smith, the Nebraska Supreme Court found that Jones had been a judicial legislation to the extent that it had rewritten the intentional killing of sudden quarrel manslaughter. Ronald-Smith, 282 Neb. at 732. Then, the Nebraska Supreme Court clarified that an intentional killing committed as the result of a sudden quarrel provocation constitutes, not second degree murder, but manslaughter. Id. Sudden quarrel manslaughter is a Class IIA felony, see § 28-305(10)-(2), and it is punishable by no more than 20 years imprisonment. § 28-105(1).

It follows that, by Ronald-Smith invalidating the judicial legislation in Jones, it revealed that Mr. Leonor had been charged, convicted, and sentenced under no law. That is, Mr. Leonor had been charged, convicted, and sentenced under Jones's statement of law that had not been authorized by the Nebraska Legislature. This means that, Mr. Leonor was charged, convicted, and sentence under a judicial legislation prohibited by the Nebraska Separation of Powers and the Due Process Clause of the 14th Amendment. Thus, Jones's judicial legislation was an unconstitutional law. "An unconstitutional law is void, and is as no law." Montgomery, 577 U.S. at 203.

More simply, Jones's judicial legislation provided no jurisdiction over the cause or no legal basis for the trial court to have imposed a sentence, as

in Mr. Leonor's case, where the evidence establishes that the intentional killing was committed as the result of a sudden quarrel provocation. See *infra*, Section II. Under these circumstances given above, Ronald-Smith is a substantive decision because it invalidated particular conduct and a class of persons that the Constitution never authorized.

Therefore, under Teague and its progeny, Ronald-Smith is a substantive decision that applies retroactively on collateral review to Mr. Leonor's due process claims.

b. Ronald-Smith Is A Substantive Decision Because It Held That Second Degree Murder Did Not Reach An Intentional Killing Committed Upon A Sudden Quarrel Provocation

As explained earlier, under the holding in Jones an intentional killing committed upon a sudden quarrel provocation constituted only second degree murder. Jones, 245 Neb. at 830. In Ronald-Smith, however, the Nebraska Supreme held that an intentional killing committed as the result of a sudden quarrel provocation did not constitute second degree murder, but manslaughter. Ronald-Smith, 282 Neb. at 732.

In other words, in Ronald-Smith, the Nebraska Supreme Court held that the substantive crime of second degree murder did not reach an intentional killing committed upon a sudden quarrel unless the State proves beyond a reasonable doubt that "absence of the sudden quarrel provocation," which is an "additional element" of second degree murder. See State v. Hinrichsen, 292 Neb. 611, 634 (Neb. 2016)(finding that, under Ronald-Smith, sudden quarrel provocation is an "additional element" of second degree murder that "the jury need[s] to consider."); see also State v. Abdulkadir, 286 Neb. 417, 427-428 (Neb. 2013)(finding that Due Process was met because "the second degree murder jury instruction

required the State to disprove beyond a reasonable doubt that [the defendant] killed [the victim] during a sudden quarrel[.]").

And in finding that second degree murder does not reach an intentional killing committed as the result of a sudden quarrel provocation, the Nebraska Supreme Court in Ronald-Smith modified the elements of second degree murder and sudden quarrel manslaughter. For instance, in Ronald-Smith it was clarified that "sudden quarrel manslaughter is an intentional crime[.]" Glass, 298 Neb. at 609. This clarification modified the elements of sudden quarrel manslaughter because sudden quarrel manslaughter went from being an "unintentional" crime, to become an "intentional" crime.

Also, by modifying the elements of sudden quarrel manslaughter, Ronald-Smith also modified the elements of second degree murder, which now carries an "additional element:" the absence of sudden quarrel provocation. See Hinrichsen, *supra*.

This Court has held that a substantive decision is one that holds "that a substantive ... criminal statute does not reach certain conduct." See Welch, 578 U.S. at 133 (quoting Bousley, 523 U.S. at 620)(internal quotations omitted). And that "[a] decision that modifies the elements of an offense is normally substantive rather than procedural." Schriro v. Summerlin, 542 U.S. 348, 354 (2004). This is so, this Court added, because "[n]ew elements alter the range of conduct the statute punishes, rendering some formerly unlawful conduct lawful or viceversa." Id.

As shown above, Ronald-Smith fits within those principles. It did both: it held that a substantive criminal statute does not reach certain conduct, and it modified the elements of an offense. Therefore, Ronald-Smith is a substantive

decision that applies retroactively on collateral review to Mr. Leonor's due process claims.

5. **Even Though Ronald-Smith May Have Announced Also A Procedural Rule, The Substantive Rule Governs**

This Court has held that "[t]here 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 or persons whom the law may no longer punish." Montgomery, 577 U.S. at 210 (citations omitted).

As here, the substantive change in the law in Ronald-Smith requires that it be attended by a procedure in which the jury must "consider second degree murder ... simultaneously ... [with] sudden quarrel manslaughter[.]" Glass, 298 Neb. at 610. This is the procedural rule announced in Ronald-Smith. Yet, this procedural rule does "not, of course, transform substantive rules into procedural ones." Montgomery, 577 U.S. at 210.

Therefore, even though Ronald-Smith may have announced also a procedural rule, the substantive rule still governs.

6. **Because Glass Is In Conflict With Holdings Of This Court, And Ronald-Smith Is A Substantive Decision That Applies Retroactively On Collateral Review, The Nebraska Supreme Court's Decision To Not Consider Mr. Leonor's Due Process Claims Violated The Due Process Clause And The Supremacy Clause**

Under Section I, A, of this petition, Mr. Leonor has advanced compelling reasons for this Court to grant certiorari. Mr. Leonor has shown that Glass, the decision used by the Nebraska Supreme Court to deny consideration of his due process claims, is in conflict with holdings of this Court--to the extent that its application of federal law has provided him with a lesser remedy than what Federal Law otherwise would grant.

Also, Mr. Leonor has shown that Ronald-Smith, the decision upon which he relies upon as the basis for his due process claims, is a substantive decision that applies retroactively on collateral review. And this assertion was fairly presented to the Nebraska Supreme Court. Pet. App. 51a (Ronald-Smith is a substantive decision because it invalidated a judicial legislation), Pet. App. 56a-61a (Ronald-Smith is a substantive decision because it modified the elements).

On the whole, every reason for which the Nebraska Supreme Court used Glass to deny consideration of Mr. Leonor's due process claims, violated the Due Process Clause of the 14th Amendment and the Supremacy Clause Art VI, Cl. 2, of the U.S. Constitution. As a result, the Nebraska Supreme Court erred in denying consideration of Mr. Leonor's due process claims.

Because Ronald-Smith applies with full force to Mr. Leonor's due process claims, this Court should find error in the Nebraska Supreme Court's judgment, and thus proceed to consider Mr. Leonor's due process claims, *infra*, Section II of this petition; or in the alternative, Mr. Leonor asks the Court to reverse the judgment and remand with directions that the state courts shall review his claims; or as the Court, within its discretionary power, may it find is the just and equal result under the Federal Constitution.

B. THE NEBRASKA SUPREME COURT'S HOLDING IN GLASS IS IN CONFLICT WITH DECISIONS OF THIS COURT AND A DECISION OF THE SEVENTH CIRCUIT BECAUSE RONALD-SMITH'S PROCEDURAL RULE WAS DICTATED BY PRECEDENT

This Court has established that "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Teague v. Lane, 489 U.S. 288, 301 (1989).

In Glass, employing Teague and its progeny, the Nebraska Supreme Court held that Ronald-Smith had announced a new procedural rule, and for that reason,

it concluded that Ronald-Smith does not apply retroactively on collateral review. Glass, 298 Neb. at 610. Ronald-Smith's procedural rule essentially requires that a jury must be given the option to "consider second degree murder ... simultaneously ... [with] sudden quarrel manslaughter[.]" Glass, 298 Neb. at 610.

Mr. Leonor argues that Ronald-Smith's procedural rule was dictated by two precedents: County Court of Ulster County, N.Y. v. Allen, 442 U.S. 140 (1979) and Falconer v. Lane, 905 F.2d 1129 (7th Cir. 1990). Both of these precedents, to be sure, were grounded in the Due Process Clause of the 14th Amendment, and also were decided before Mr. Leonor's convictions became final: Allen was decided in 1979, Falconer was decided in 1990, and Mr. Leonor's convictions became final in 2002. See Leonor, *supra*.

1. Ronald-Smith's Procedural Rule Was Dictated By Allen

Under Allen, the procedural rule in Ronald-Smith is known as a "presumptive device." See Allen, 442 U.S. at 156:

Inferences and presumptions are a staple of our adversary system of fact finding. It is often necessary for the trier of fact to determine the existence of an element of the crime--that is, an "ultimate" or "elemental" fact--from the existence of one or more "evidentiary" or "basis" facts. The value of these evidentiary devices, and their validity under the Due Process Clause, vary from case to case, however, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the fact finder's freedom to assess evidence independently. Nonetheless, in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the fact finder's responsibility at trial based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt.

Id (citing In re Winship, 397 U.S. 358, 364 (1970) and Mullaney v. Wilbur, 421 U.S. 684, 702-703, n. 31 (1975)); see also, Id. at 157-158, n. 16.

Ronald-Smith's procedural rule is a presumptive device because, when a defendant is charged with second degree murder and evidence exists that the intentional killing had been the result of sudden quarrel provocation (be it because a defendant presents it, or be it because the State's own evidence brings it), the State must prove beyond a reasonable doubt not only the intent element--which constitutes second degree murder, but also "the fact issue regarding provocation," which is the ultimate or elemental fact.

The Nebraska Supreme Court puts it this way: "where there is evidence that (1) a killing occurred intentionally without premeditation and (2) the defendant was acting under the provocation of the sudden quarrel, a jury must be given the option of convicting of either second degree murder or voluntary manslaughter depending upon its resolution of the fact issue regarding provocation." See State v. William-Smith, 284 Neb. 636, 656 (Neb. 2012).

The "fact issue regarding provocation," as noted in William-Smith, *supra*, is not an affirmative defense but an "ultimate" or "elemental" fact. This is best explained by William-Smith's own language: "where there is evidence," Id (emphasis added), which means where there is evidence presented by the State or the defendant, the result is the same: the "fact issue regarding provocation" is an "additional element" that "the jury need[s] to consider," see Hinrichsen, 292 Neb. at 634 (explaining Ronald-Smith), and must be proven beyond a reasonable doubt by the State. Abdulkadir, 286 Neb. at 427-428 (finding that because "the second degree murder jury instruction required the State to disprove beyond a reasonable doubt that [the defendant] killed [the victim] during a sudden quarrel, ... the instruction satisfied the requirements set out in [William-Smith].").

Therefore, for the reasons given above, the procedural rule announced in

Ronald-Smith is not a new rule because it was dictated by Allen, required under the Due Process Clause of the 14th Amendment, and available before Mr. Leonor's convictions became final. As a result, the decision in Glass holding that Ronald-Smith announced a new procedural rule, is in conflict with holdings of this Court.

2. Ronald-Smith's Procedural Rule Was Dictated By Falconer

In Falconer, the Seventh Circuit found that the Due Process Clause was violated "when the jury instructions were read consecutively, with the elements of murder set forth before the elements of voluntary manslaughter," which permitted the jury to "conclude that the defendant was guilty of murder after applying the elements of that offense without continuing on to decide whether the elements of voluntary manslaughter were also made out, so as to justify returning a verdict on the lesser offense instead." Gilmore v. Taylor, 508 U.S. 333, 340 (1993). This Court, in Gilmore, ratified that Falconer had announced a due process rule.

The rule in Falconer, as ratified by this Court in Gilmore, is not different than the rule announced in Ronald-Smith. As explained earlier, the rule in Ronald-Smith requires that a jury must be given the option to "consider second degree murder ... simultaneously ... [with] sudden quarrel manslaughter[.]" Glass, 298 Neb. at 610.

For this reason given above, therefore, the procedural rule announced in Ronald-Smith is not a new rule because it was dictated by Falconer and ratified by this Court in Gilmore, required under the Due Process Clause of the 14th Amendment, and available before Mr. Leonor's convictions became final. As a result, the decision in Glass holding that Ronald-Smith announced a new proce-

dural rule, is in conflict with holdings of this Court and in conflict with a decision of the Seventh Circuit.

3. Because Glass Is In Conflict With Holdings Of This Court And With A Holding Of The Seventh Circuit, And The Procedural Rule Announced In Ronald-Smith Was Dictated By Precedents, The Nebraska Supreme Court's Decision To Not Consider Mr. Leonor's Due Process Claims Violated The Due Process Clause And The Supremacy Clause

Under Section I, B of this petition, Mr. Leonor has advanced another compelling reason for this Court to grant certiorari. Mr. Leonor has shown that Glass, the decision used by the Nebraska Supreme Court to deny consideration of his due process claims, is in conflict with holdings of this Court and with a holding of the Seventh Circuit, and to that extent, Glass application of federal law has provided him with a lesser remedy than what Federal Law would otherwise grant.

Mr. Leonor has also shown that Ronald-Smith, the decision upon which he relies as the basis for his due process claims, announced a procedural rule that had been dictated by precedent. Under this circumstance, the retroactivity of Ronald-Smith is not at issue. This assertion was fairly presented to the Nebraska Supreme Court, though, Mr. Leonor argued only that the rule in Ronald-Smith was dictated by Allen, *supra*. Pet. App. 52a-56a.

In sum, every reason for which the Nebraska Supreme Court used Glass to deny consideration of Mr. Leonor's due process claims, violated the Due Process Clause of the 14th Amendment and the Supremacy Clause Art. VI, cl. 2, of the U.S. Constitution. As a result, the Nebraska Supreme Court erred in denying consideration of Mr. Leonor's due process claims.

Because Ronald-Smith applies with full force to Mr. Leonor's due process claims, this Court should find error in the Nebraska Supreme Court's judgment,

and thus proceed to consider Mr. Leonor's due process claims, *infra*, Section II of this petition; or in the alternative, Mr. Leonor asks the Court to reverse the judgment and remand with directions that the state courts shall review his claims; or as the Court, within its discretionary power, may it find is the just and equal result under the Federal Constitution.

C. THE NEBRASKA SUPREME COURT'S HOLDING IN GLASS IS IN CONFLICT WITH DECISIONS OF THIS COURT BECAUSE RONALD-SMITH DID NOT CHANGE THE LAW

In Fiore v. White, 531 U.S. 225 (2001), this Court held that where a statute of conviction "--as interpreted by the later state supreme court decision--made clear that [petitioner's] conduct did not violate an element of the statute, his conviction [does] not satisfy the strictures of the Due Process Clause." See Bunkley v. Florida, 538 U.S. 835, 840 (2003)(citing Fiore, 531 U.S. at 228).

The question that Mr. Leonor poses here is whether Fiore extends to the circumstances in which the statutory interpretation in Ronald-Smith, although it had not been a first time interpretation of the statute, it however (1) had invalidated the previous interpretation as a judicial legislation, and (2) its statement of law was no different than the statement of law in Mr. Leonor's case.

In William-Smith, *supra*, the Nebraska Supreme Court held that its decision in Ronald-Smith "brought a significant change in the law," William-Smith, 284 Neb. at 654. The change in the law came from the overruling of State v. Jones, *supra*. See William-Smith, 284 Neb. at 654 (discussing Jones). As a result, the Nebraska Supreme Court held that Ronald-Smith announced a "new rule." See William-Smith, 284 Neb. at 654-655. Consequently, this conclusion in William-Smith was later affirmed in Glass, 298 Neb. at 609 (citing William-Smith).

Although, in William-Smith, the Nebraska Supreme Court has held that its decision in Ronald-Smith brought a change in the law, this Court, in Bunkley, held that "[t]he proper question under Fiore is not just whether the law changed ... [r]ather, it is when the law changed." Bunkley, 538 U.S. at 841-842 (original emphasis).

Mr. Leonor submits that Fiore applies here because (1) Ronald-Smith changed no law by invalidating a judicial legislation, and (2) Ronald-Smith brought no change in the law to Mr. Leonor's case being that the statement of law given in Ronald-Smith was also applied to the jury in his case.

1. Ronald-Smith Changed No Law By Invalidating A Judicial Legislation

The argument here is straightforward: no change in the law could have occurred in Ronald-Smith from the overruling of Jones because Jones had been a judicial legislation. As the Nebraska Supreme Court admitted, that, in Jones, it had rewritten the crime of sudden quarrel manslaughter. See Ronald-Smith, 282 Neb. at 732.

Jones's judicial legislation was an unconstitutional law because it was prohibited by the Nebraska Separation of Powers, Art. II, § 1 (1), and by the Due Process Clause of the 14th Amendment. This Court has held that "[a]n unconstitutional law is void, and is as no law." Montgomery, 577 U.S. at 203. With that in mind, thus, Jones's judicial legislation could not have formed the legal basis to conclude that Ronald-Smith brought a change in the law, muchless a new rule, as held in Glass. Under these circumstances, Ronald-Smith's statutory interpretation can constitute only a first time interpretation under Fiore.

Because Ronald-Smith changed no law by invalidating a judicial legislation, the decisions in William-Smith and Glass--holding that Ronald-Smith brought a

new rule, are in conflict with holdings of this Court.

2. Ronald-Smith Brought No Change In The Law To Mr. Leonor's Case

This argument is also straightforward: in Ronald-Smith the Nebraska Supreme Court held that sudden quarrel manslaughter is an intentional crime, Glass, 298 Neb. at 609, and also that, as a rule, a jury must be given the option to "consider second degree murder ... simultaneously ... [with] sudden quarrel manslaughter[.]" Id. at 610. This statement of law was no different from the statement of law given to the jury in Mr. Leonor's case.

Mr. Leonor was convicted as an "aider and abettor." See Leonor, 263 Neb. at 97. Under the aiding and abetting jury instruction, the jury was given simultaneously the option to convict Mr. Leonor of either second degree murder or intentional manslaughter. Pet. App. 68a. This statement of law is no different from the one given in Ronald-Smith. The only difference is that Jones's statement of law had made the statement of law in Mr. Leonor's case fruitless. That is, under Jones Mr. Leonor could not have been convicted of intentional manslaughter based on the evidence of sudden quarrel provocation in his case, or for that matter, for any reason, being that, under Jones, sudden quarrel manslaughter was an unintentional crime. Jones, 245 Neb. at 830.

As shown above, Ronald-Smith brought no new law into Mr. Leonor's case. The only effect that Ronald-Smith brought in Mr. Leonor's case is that, through the aiding and abetting jury instruction, the jury can now consider whether Mr. Leonor is guilty of intentional manslaughter based on the State's evidence of sudden quarrel provocation.

Therefore, under Fiore, the decision in Ronald-Smith merely interpreted the law as it was at the time that Mr. Leonor's convictions became final. And

for this reason, the decisions in William-Smith and Glass--which concluded that Ronald-Smith brought a new rule in Mr. Leonor's case, are in conflict with decisions of this Court.

3. Because Glass And William-Smith Are In Conflict With Decisions Of This Court, And Because Ronald-Smith Brought No Change In The Law In Mr. Leonor's Case, The Nebraska Supreme Court's Decision To Not Consider Mr. Leonor's Due Process Claims Violated The Due Process Clause And The Supremacy Clause

Under Section I, C of this petition, Mr. Leonor has advanced another compelling reason for this Court to grant certiorari. Mr. Leonor has shown that Glass, the decision used by the Nebraska Supreme Court to deny consideration of his due process claims, is in conflict with holdings of this Court, and to that extent, Glass application of federal law has provided him with a lesser remedy than what Federal Law would otherwise grant.

Mr. Leonor has shown also that Ronald-Smith, the decision upon which he relies as the basis for his due process claims, brought no change in the law in his case. Under this circumstance, the retroactivity of Ronald-Smith is not at issue. This assertion was fairly presented to the Nebraska Supreme Court. Pet. App. 50a-52a.

In sum, every reason for which the Nebraska Supreme Court used Glass to deny consideration of Mr. Leonor's due process claims, violated the Due Process Clause of the 14th Amendment and the Supremacy Clause Art. VI, Cl. 2, of the U.S. Constitution. As a result, the Nebraska Supreme Court erred in denying consideration of Mr. Leonor's due process claims.

Because Ronald-Smith applies with full force to Mr. Leonor's due process claims, this Court should find error in the Nebraska Supreme Court's judgment and thus proceed to consider Mr. Leonor's due process claims, infra, Section

II of this petition; or in the alternative, Mr. Leonor asks the Court to reverse the judgment and remand with directions that the state courts shall review his claims; or as the Court, within its discretionary power, may it find is the just and equal result under the Federal Constitution.

II. THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT PROHIBITS
MR. LEONOR'S CONVICTIONS FOR SECOND DEGREE MURDER BECAUSE,
UNDER RONALD-SMITH, THE STATE HAS NOT PROVEN AND CANNOT PROVE
BEYOND A REASONABLE DOUBT THE ABSENCE OF SUDDEN QUARREL PROVOCATION

This Court has held that the Due Process Clause of the 14th Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979); In re Winship, 397 U.S. 358 (1970).

Mr. Leonor stands convicted for the intentional killing of second degree murder, a killing that the Due Process Clause forbids. The Due Process Clause forbids it because, under Ronald-Smith, Nebraska cannot convict Mr. Leonor for second degree murder when the killing, although intentional, was the result of a sudden quarrel provocation. Unless, of course, the State has proven beyond a reasonable doubt the absence of sudden quarrel provocation. Here, the State has not, and cannot, prove beyond a reasonable doubt the additional element of the absence of sudden quarrel provocation.

Under Ronald-Smith, "where there is evidence that (1) a killing occurred intentionally without premeditation and (2) the defendant was acting under the provocation of the sudden quarrel, a jury must be given the option of convicting of either second degree murder or voluntary manslaughter depending upon its resolution of the fact issue regarding provocation." William-Smith, 284 Neb. at 656.

The "fact issue regarding provocation," as noted in William-Smith, is an "additional element" of second degree murder that "the jury need[s] to consider," see Hinrichsen, 292 Neb. at 634, and must be proven beyond a reasonable doubt by the State. See Abdulkadir, 286 Neb. at 427-428 (finding that because "the second degree murder jury instruction required the State to disprove beyond a reasonable doubt that [the defendant] killed [the victim] during a sudden quarrel, ... the instruction satisfied the requirements set out in William-Smith.").

The Nebraska Supreme Court defines "sudden quarrel provocation" as:

A "sudden quarrel" is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control. It does not necessarily mean an exchange of angry words or an altercation contemporaneous with an unlawful killing and does not require physical struggle or other combative corporal contact between the defendant and the victim. The question is whether there existed reasonable and adequate provocation to excite one's passion and obscure and disturb one's power of reasoning to the extent that one acted rashly and from passion, without due deliberation and reflection, rather than from judgment."

State v. Trice, 286 Neb. 183, 190 (Neb. 2013).

Mr. Leonor's case fits squarely within Ronald-Smith. That is, the State's own evidence established that the killing had been intentional and as the result of a sudden quarrel provocation. First, the undisputed evidence showed that the victims were members of a gang named "Lomas," and were rivals with Mr. Leonor and his codefendant, David Gonzales, who were members of a gang named "Surenos."

"Since the middle of 1998, there was a marked increase in violence in South Omaha[, Nebraska] involving Lomas and Surenos[.]" Pet. App. 65a. As an example of the extent of violence, the State offered evidence that a mother of one of the Surenos gang members had been shot by Lomas gang members. Pet. App.

66a. Additionally, the State offered evidence that gang members "do violent crimes such as homicides or drive-by shootings." Pet. App. 67a.

The night of November 22, 1999, the victims were driving in their vehicle and Mr. Leonor and Gonzales were driving in Mr. Leonor's vehicle. Then, at a street intersection, the victims had an encounter with Mr. Leonor and Gonzales upon which "they all looked at each other[.]" See Leonor, 263 Neb. at 95 (testimony of State's witness Jose Hernandez). At this point, the victims threw "a Lomas gang sign at" Mr. Leonor and Gonzales. Id (testimony of State's witness Gerardo Ortiz). Because of the victims' provocation of throwing rival gang signs at Mr. Leonor and Gonzales, the State's evidence added, is the reason that Mr. Leonor and Gonzales "did what they did." Pet. App. 64a (Mr. Leonor is referred as "Malo" and Gonzales is referred as "Creeler.").

Suddenly, led by the victims' provocation, Mr. Leonor got "in front of the [victims'] car to block [their] way. When [the victims] tried to reverse Leonor reversed and got right beside [them]. Gonzales then shot his gun at the [victims]. Leonor next raced the [victims'] car down the street until it crashed." Leonor, 263 Neb. at 95-96 (testimony of Jose Hernandez).

In affirming Mr. Leonor's convictions, the Nebraska Supreme Court rested on the evidence mentioned above:

We determine that the evidence was sufficient to support the guilty verdicts. The evidence showed that Leonor ... and Gonzales had shot someone who had thrown a Lomas gang sign at them; ... They began to follow the victims' car aggressively and chased the victims' car, shooting at it, until the victims' car hit a pole.

Id. at 97.

In sum, the evidence presented by the State showed that the killing, although intentional, had been the result of a sudden quarrel provocation. For

instance, the State's own evidence established that the victims' provoked Mr. Leonor and Gonzales. The State's own evidence established also that the provocation, the shooting, and the car chased until the victims' car crashed, all was in one line of event in which there had been no pause or time for reflection.

Moreover, the State's own evidence established that Mr. Leonor and Gonzales had acted from passion. That is, given the circumstances in which there was an ongoing warfare between Mr. Leonor's gang and the victims' gang, once the victims provoked Mr. Leonor and Gonzales by the throwing of rival gang signs, in the real world that meant that the victims wanted war. In other words, the victims' provocation meant that they could have shot, killed, or harmed Mr. Leonor and Gonzales, but they had beat the victims to the punch. Although the State's evidence did not show whether the victims had a gun, again, given the circumstances in which there was an ongoing warfare between the victims' gang and Mr. Leonor's gang, Mr. Leonor and Gonzales were not going to wait and see whether the victims had a gun with them. For, "it is common knowledge that gang members have guns, that gang members use guns." See State v. Foster, 286 Neb. 826, 850 (Neb. 2013).

Usually, where there is evidence that the intentional killing was the result of a sudden quarrel provocation, although slight and unclear, the Nebraska Supreme Court remands for a new trial. See Trice, 286 Neb. at 190:

Here, the record presents an unclear, confusing picture as to exactly what happened at the party. Witnesses' accounts of what happened varied from person to person, including details of the fight; who it involved; and, notably, the actions and whereabouts of Trice during the fight. Although the witnesses' stories differ, there is at least some evidence indicating that Trice might have acted upon a sudden quarrel.

Id.

Here, in Mr. Leonor's case, the State's own evidence establishing that the intentional killing had been committed upon a sudden quarrel provocation, is solid. This means that, the State cannot prove the absence of a sudden quarrel provocation beyond a reasonable doubt. Especially, where, as here, as shown above, the Nebraska Supreme Court affirmed Mr. Leonor's convictions based on the evidence that established that the killing had been intentional because of a sudden quarrel provocation. Leonor, 263 Neb. 97.

Under those circumstances, the Due Process Clause prohibits Mr. Leonor's convictions for second degree murder, as insufficient, which entitles Mr. Leonor to an absolute discharge from custody. Pet. App. 37a, 47a (Claim Ten).

In the alternative, Due Process requires that Mr. Leonor be given a new trial because the State has not proven beyond a reasonable doubt the absence of the sudden quarrel provocation. Pet. App. 37a, 48a (Claim Three).

In either way, Mr. Leonor's incarceration runs afoul of the Federal Constitution and this Court's clearly established precedent in that the Fourteenth Amendment of the United States Constitution prohibits incarcerating a person when a state court has not and cannot prove each element of the crime charged. Here, Mr. Leonor urges this Court to find so, in particular because the Nebraska Supreme Court has refused to consider Mr. Leonor's claims under the pretext that its decision in Glass supported its refusal.

But as shown above in Section I, A-C, of this petition, the Nebraska Supreme Court's use of Glass to deny consideration of Mr. Leonor's due process claims, was in conflict with decisions of this Court and in violation of the Due Process Clause and the Supremacy Clause. In simpler terms, Ronald-Smith applies with full force to Mr. Leonor's due process claims, be it because it is a substantive

decision, see ante, pp. 19-24, or be it because its procedural rule had been dictated by precedent, see ante, pp. 24-29, or be it because Ronald-Smith effected no change in the law in Mr. Leonor's case, see ante, pp. 29-33.

And more notably, it cannot be ignored that Ronald-Smith had undone the judicial legislation in State v. Jones, supra, as argued above, ante, pp. 15-21. Through Ronald-Smith, Mr. Leonor has learned that he had been charged, tried, convicted, and sentenced under a law that had not been defined by the Nebraska Legislature. That is, the intentional killing as the result of a sudden quarrel provocation, which is the crime that the State's evidence showed that Mr. Leonor committed, had been defined by Jones as only constituting second degree murder.

Through Ronald-Smith, Mr. Leonor has learned that Jones was a judicial legislation. Ronald-Smith, 282 Neb. at 732 (the Nebraska Supreme Court admitted that, in Jones, it had rewritten the intentional killing of sudden quarrel manslaughter). A judicial legislation is an unconstitutional law. "An unconstitutional law is void, and is as no law." Montgomery, 577 U.S. at 203 (citation omitted). More simply, Mr. Leonor has been charged, tried, convicted, and sentenced under no law. The Due Process Clause prohibits this result. See e.g., Ex parte Yarbrough, 110 U.S. 651, 654 (1884) ("If the law which defines the offence and prescribes its punishment is void, the court was without jurisdiction, and the prisoners must be discharged.").

Jones, and not the Legislature, had defined and prescribed the punishment for the offense that the State's evidence showed that Mr. Leonor committed: intentional killing as the result of a sudden quarrel provocation. To that extent, Jones was no law. Therefore, no justifiable legal reason exists to say that Ronald-Smith does not apply in Mr. Leonor's case.

CONCLUSION

For the reasons given above, the Petition for a Writ of Certiorari should be granted, the judgment of the Nebraska Supreme Court reversed, and a remand with directions to discharge Mr. Leonor from custody or grant him a new trial should be ordered to the state courts; or in the alternative, the remand should direct the state courts to consider the merits of Mr. Leonor's due process claims; or as this Court may find it is the just and equal result under the Federal Constitution.

Respectfully submitted on this 21st day of August, 2023.

By,



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