

IN THE SUPREME COURT OF THE UNITED STATES

JOHN L. LOTTER,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

**On Petition for Writ of Certiorari
To the Nebraska Supreme Court**

BRIEF IN OPPOSITION

Douglas J. Peterson
Attorney General of Nebraska

James D. Smith
Solicitor General
Counsel of Record
Office of the Attorney General
2115 State Capitol
Lincoln, Nebraska 68509-8920
james.smith@nebraska.gov
(402) 471-2682
Counsel for Respondent

Capital Case

QUESTIONS PRESENTED

1. Whether Nebraska's current capital sentencing statutory procedure requiring a jury to find aggravating circumstances should be reviewed for compliance with the Eighth Amendment when the petitioner's death sentence became final 20 years ago under a different statutory procedure, prior to *Ring v. Arizona*, 536 U.S. 584 (2002), by which a panel of three judges found aggravating circumstances beyond a reasonable doubt.
2. Whether *Hurst v. Florida*, 136 S.Ct. 616 (2016), announced a new substantive constitutional rule that is to be applied retroactively on collateral review to petitioner's 20 year old final death sentence that was ordered by a panel of three judges who found aggravating circumstances beyond a reasonable doubt.

TABLE OF CONTENTS

Question Presented.....	i
Table of Contents	ii
Table of Authorities	iii
Statement of the Case	1
Reasons for Denying the Petition	5
1. Rule 10: No Circuit split that Hurst v. Florida is not retroactive to cases on collateral review nor is there any state court federal question conflict	5
2. Lotter's same Hurst-based constitutional claims were denied certiorari a year ago upon review of federal habeas denial.....	6
3. Lotter's Eighth Amendment claim was procedurally defaulted in the Nebraska Supreme Court	7
Conclusion	8
Certificate of Compliance	
Proof of Service.....	

TABLE OF AUTHORITIES

Cases

<i>Danforth v. Minnesota</i> , 552 U.S. 264 (2008)	8
<i>Hurst v. Florida</i> , 136 S.Ct. 616 (2016)	2, 4, 5, 7
<i>Lotter v. Britten</i> , 2017 WL 744554 (D. Neb. 2017)	5
<i>Lotter v. Britten</i> , 2017 WL 5015176 (8th Cir. 2017).....	5
<i>Lotter v. Houston</i> , 771 F.Supp.2d 1074 (D.Neb. 2011)	3, 4
<i>Montgomery v. Louisiana</i> , 136 S. Ct. 718 (2016)	8
<i>Rauf v. State</i> , 145 A.3d 430 (Del. 2016)	7
<i>Ring v. Arizona</i> , 536 U.S. 584 (2002)	2
<i>State v. Lotter</i> , 586 N.W.2d 591 (Neb. 1998)	3

STATEMENT OF THE CASE

A. *Factual Background*

The Petitioner John L. Lotter was convicted by a jury of three counts of first degree murder in Nebraska state court and sentenced to death on each count by a three-judge panel in February 1996. Lotter's murder convictions and capital sentences were affirmed on direct appeal and became final in 1999. *State v. Lotter*, 586 N.W.2d 591 (Neb. 1998), opinion modified on denial of reh'g, 587 N.W.2d 673 (Neb. 1999), cert. den. 526 U.S. 1162 (1999). Over the next 20 years, Lotter has pursued a variety of unsuccessful Nebraska state and federal court collateral challenges to his judgment. This is his current one.

The Nebraska Supreme Court postconviction opinion that is the subject of the current certiorari petition briefly summarized that, "Lotter's crimes are well known, and the underlying facts are set forth in our decision on Lotter's direct appeal." (Pet. Appendix A, p128 of opinion and fn. 3) One of the most thorough summaries of the facts of Lotter's convictions, sentences, and procedural history can be found in the Nebraska Federal District Court's opinion denying Lotter's first habeas proceeding. *Lotter v. Houston*, 771 F.Supp.2d 1074 (D.Neb. 2011).

Although Lotter's petition attempts to make Nebraska look like some outlier state under its current death penalty statutory process, Lotter's death sentence was ordered 23 years ago and became final 20 years ago under statutes different from Nebraska's current death penalty process. The Nebraska Supreme Court opinion that is the subject of Lotter's current petition made this latter fact clear. (*Id.*, opinion pp128 and 130-131) As an aside and although apparently irrelevant to this case in its current procedural posture, Nebraska disputes Lotter's assertion that Nebraska is currently alone in leaving death penalty sentencing determinations "exclusively" in the hands of judges. Nebraska's current death penalty process, which was not the process in effect when Lotter was sentenced to death pre-*Ring*, now requires a jury to find aggravating factors beyond a reasonable doubt per jury instructions.

B. Procedural History of Lotter's Final Judgment and Collateral Attacks

Two things are worthy of particular mention in the recent history of Lotter's state and federal court collateral attack efforts over the past twenty years. First, Lotter's Eighth Amendment and *Hurst v. Florida* based Sixth and Fourteenth Amendment claims were all made in a federal habeas proceeding that was dismissed by the Nebraska federal district court, then affirmed on appeal by the Eighth Circuit, and ultimately denied certiorari after

Lotter made the same underlying *Hurst*-based arguments in his unsuccessful effort to obtain federal habeas relief from his death sentences. See, *Lotter v. Britten*, 2017 WL 744554 (D. Neb. 2017) (unpublished decision); *Lotter v. Britten*, 2017 WL 5015176 (8th Cir. 2017) (unpublished decision); cert. den., 138 S.Ct. 926 (2018). See also, cert. pet. filed in *Lotter v. Frakes*, case no. 17-6602. Lotter merely rephrases the prior questions presented for purposes of the current petition and then makes arguments which again ultimately rely on the assertion that *Hurst v. Florida* announced new substantive or watershed rules of constitutional law that are retroactive on collateral review.

Having lost in his federal habeas effort, Lotter proceeded to make the same claims in Nebraska state court under Nebraska's state postconviction review procedure. The Nebraska Supreme Court's opinion that is the subject of the current petition obviously noticed and commented as follows:

In considering an identical issue raised in Lotter's petition for habeas corpus, the Nebraska federal district court reached the same conclusion. Lotter appealed that decision, but the Eighth Circuit denied his application for a certificate of appealability and the U.S. Supreme Court denied his petition for certiorari.

(Pet. Appendix A, p145 of opinion)

Lotter's petition states that, "the Nebraska Supreme Court did not address his Eighth Amendment argument" which is the subject of Lotter's first

question presented as phrased by Lotter. Lotter fails to mention that the reason the Nebraska Supreme Court did not address his Eighth Amendment argument is because he procedurally defaulted it under Nebraska's postconviction procedure. The Nebraska Supreme Court's opinion explained that Lotter made an Eighth Amendment claim that was labelled as "claim 2" in his Nebraska postconviction case, which was then procedurally defaulted because Lotter did not timely appeal the trial court's denial of claim 2. Necessarily, the Nebraska Supreme Court did not consider it. Nor should this Court.

Finally, the three judge panel that found the aggravating circumstances required for imposition of Lotter's death sentence in 1996 found that the aggravating circumstances had been established beyond a reasonable doubt. (Pet. Appendix C, p3925,lines9-10, p3926,lines 5-17, p3928,lines6-14)

REASONS FOR DENYING THE PETITION

1. **Rule 10: No Circuit split that *Hurst v. Florida* is not retroactive to cases on collateral review nor is there any state court federal question conflict.**

Lotter's cert petition depends upon the preliminary question of whether *Hurst v. Florida*, 136 S.Ct. 616 (2016), established a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court.

The Nebraska Supreme Court opinion correctly stated and cited the case authority showing that there is no Circuit split on the issue of whether *Hurst* is retroactive to cases on collateral review. All Circuits that have considered the issue so far have agreed that *Hurst* is not retroactive, assuming *Hurst* even announced a new constitutional rule. All states but one that have considered the issue also agree. The Nebraska Supreme Court noted and cited the supporting case authority in its opinion's footnotes as follows:

We observe that several federal circuit courts of appeal have found that *Hurst* does not apply retroactively to cases on collateral review. Other federal courts agree. Most state courts have reached the same conclusion.

(Pet. Appendix A, p145-146 of opinion, fn67-72)

Lotter cites and relies upon the Delaware decision in *Rauf v. State*, 145 A.3d 430 (Del. 2016), that gave retroactive effect upon its consideration of *Hurst*. But *Rauf* can be explained as Delaware "giving retroactive effect to a

broader set of new constitutional rules than *Teague* itself required” because “States are free to make new procedural rules retroactive on state collateral review.” *Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016), citing *Danforth v. Minnesota*, 552 U.S. 264 (2008).

There is no Rule 10 conflict among the Circuit Courts nor is there any “state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals” per Rule 10(b). Delaware’s decision to give broader retroactive effect or to make its own new procedural rules is something it could do without running afoul of federal constitutional requirements.

2. Lotter’s same *Hurst*-based constitutional claims were denied certiorari a year ago upon review of federal habeas denial.

As noted in the Statement of the Case and as pointed out by the Nebraska Supreme Court, Lotter’s prior federal habeas effort was denied by the federal courts with certiorari denied by this Court a year ago. Rephrasing the questions presented for his current petition does not change the contents of the package of Lotter’s same *Hurst*-based constitutional claims concerning his 20 year old final sentences.

Lotter's arguments about Nebraska's current sentencing procedure could warrant analysis if Lotter had been sentenced under Nebraska's current procedure, which now requires a jury to make aggravating circumstance findings beyond a reasonable doubt before a defendant can be sentenced to death. But, Lotter was not sentenced under Nebraska's current procedure. Lotter's arguments about the constitutionality of Nebraska current sentencing procedure are misplaced and irrelevant to Lotter's case.

3. Lotter's Eighth Amendment claim was procedurally defaulted in the Nebraska Supreme Court.

As explained in the next to the last paragraph of the Statement of the Case, Lotter procedurally defaulted any Eighth Amendment claim in his postconviction appeal to the Nebraska Supreme Court. By reason of his procedural default, his claim is not preserved for review. Additionally, Lotter's Eighth Amendment claim was also made and rejected in his prior federal habeas proceeding. Lotter provides no explanation why certiorari should be granted to consider his procedurally defaulted federal claim in state court that was also previously rejected by the federal courts in Lotter's prior federal habeas proceeding.

CONCLUSION

For the above reasons, the Respondent requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

DOUGLAS J. PETERSON
Attorney General of Nebraska

James D. Smith
Counsel of Record
Solicitor General
2115 State Capitol
Lincoln, NE 68509-8920
james.smith@nebraska.gov
Tel: (402) 471-2682
Attorneys for Respondent