

No. 19-514

**In The
Supreme Court of the United States**

—————◆—————
NIKKO A. JENKINS,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

—————◆—————
**On Petition For Writ Of Certiorari
To The Nebraska Supreme Court**

—————◆—————
BRIEF IN OPPOSITION

—————◆—————
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**CAPITAL CASE
QUESTIONS PRESENTED**

1. Whether the sentencing court and the Nebraska Supreme Court violated the Eighth Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's Due Process Clause by considering all of the mitigating evidence presented by the Petitioner, including his history of solitary confinement for prison misconduct and its impact on him, and ultimately concluded that the Petitioner's solitary confinement history was not a nonstatutory mitigating factor.
2. Whether the Sixth Amendment right to a jury was violated by Nebraska's capital sentencing statutory procedure requiring (1) a jury to find aggravating circumstances beyond a reasonable doubt unless a jury is waived, and if at least one aggravating circumstance was found, (2) a panel of three judges determines the sentence after receiving mitigating evidence to decide whether mitigating circumstances existed which approached or exceeded the weight of the aggravating circumstances, and whether a death sentence is excessive or disproportionate to the penalty imposed in similar cases.

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STATEMENT OF THE CASE

A. Factual Background of Crimes

The Petitioner Nikko A. Jenkins is a career criminal who was released from prison on July 30, 2013, after having served the maximum time for which he had been sentenced for robberies and the use of weapons to commit robberies. Jenkins went on an eight-day crime spree in Omaha after his release from prison, during which he murdered four people in three separate incidents from August 11, 2013 to August 19, 2013, by shooting his victims during the commission of robberies. Jenkins was adjudged guilty of four counts of first degree murder when his no contest pleas were accepted after competency proceedings established Jenkins' competence to enter his pleas.

B. Death Penalty Phase

The case moved on to the death penalty phase, which was delayed for nearly three years by a combination of the Nebraska Legislature's failed effort to repeal the death penalty and extensive additional competency proceedings during which Jenkins underwent lengthy mental health and competency evaluations by court-appointed state mental health experts while in custody pending sentencing. There is a standing issue in this Court for Jenkins' petition concerning the Sixth Amendment Second Question because, as noted by the Nebraska Supreme Court, "Jenkins waived a jury and expressly stated that he would 'rather have the judges' for sentencing.'" (Pet. App. 49a)

The Respondent State of Nebraska disagrees with much of Jenkins' attempt to pick and choose evidence and then rely upon disputed mental health opinions from a voluminous 3 ½ year trial court record. Jenkins' petition generally disregards or misstates the contrary credibility findings by the trial court and the Nebraska Supreme Court in its de novo review of Jenkins' appeal from his death sentences. Jenkins' effort in this regard begins at the first sentence of his petition with the inaccurate statement in his Questions Presented that Jenkins was "severely mentally ill since the age of eight". The Respondent refers this Court to the Nebraska Supreme Court's opinion which accurately states the judicial findings of both the trial court and the Supreme Court, in contrast to Jenkins' attempt to spin the record into something it is not. (Pet. App. 1-69a)

This is a fact-bound case with a smorgasbord of contrasting mental health opinions, all received in evidence and considered by both the trial court and Supreme Court in their death sentence decisions. Ultimately, the Nebraska Supreme Court, like the trial court, concluded:

There is no doubt that Jenkins exhibited abnormal behaviors. But a number of experts believed that he was malingering. A test revealed scores indicative of feigning a mental disorder. . . . The record contains credible expert testimony that Jenkins has been feigning mental illness. We are not persuaded that Jenkins suffers from a serious mental illness.

(Pet. App. 53-54a) (See also, Pet. App. 69a: Nebraska Supreme Court gave “weight to the expert evidence reflecting that Jenkins suffered from a personality disorder and was feigning mental illness” when the “[e]vidence touching on these matters was abundant and highly conflicting.”).

This Court is referred to the mental health evaluation and history report provided to the trial court by court-appointed expert mental health evaluators who had approximately four months to observe and analyze Jenkins, interact with him, and critically analyze his mental health history. (Resp. App. 1) The report attaches a summary of Jenkins’ prior history of various mental health diagnoses, analyzes them critically in context, and provides a three-page conclusion of Jenkins as someone with an antisocial, narcissistic, and borderline personality after Jenkins has feigned major mental illness. (*Id.*)

By contrast, Jenkins’ petition relies upon the non-judicial report of a Nebraska legislative committee and its appointed Ombudsman, both political entities, in the background time of the Nebraska Legislature’s effort to repeal the death penalty in 2015. As explained by the Nebraska Supreme Court and the trial court, the Nebraska Legislature’s effort to repeal the death penalty was rejected by 61% of Nebraska’s voters in the 2016 general election after a citizen referendum petition. (Pet. App. 57-58a, 41-42a) Although the Ombudsman’s and Legislature’s reports were received in evidence and considered by the trial court and the

Nebraska Supreme Court, they did not persuade the trial court or Nebraska Supreme Court that Jenkins suffered from a major mental disorder.



REASONS FOR DENYING THE PETITION

QUESTION PRESENTED #1

- 1. Jenkins' petition misstates the record and judicial conclusions of the Nebraska Supreme Court and trial court in a fact-bound appeal.**

Jenkins' first question presented, as phrased in his petition, is based upon his mischaracterization that the sentencing court and the Nebraska Supreme Court "refused to consider the effects of solitary confinement as mitigating evidence" and that such refusal violated the Eighth Amendment. (Pet. i, Pet. 15-16) One need look no further than the sentencing court's order and the Nebraska Supreme Court's opinion to know that Jenkins simply mischaracterizes and misstates the lower court's decisions, analysis, and the case record.

The Respondent refers this Court to its above Statement of the Case for an appreciation that this is a fact-bound case with a considerable amount of contrasting medical expert opinions, none of which were as extensive, detailed, current, or accurate as the eventual mental health report and opinions of the trial court's appointed experts. (See, Resp. App. 1) This Court is advised that Jenkins' history of prison misconduct during his prior prison sentences was repeated, extensive, ongoing, and involved assaults and violent

threats, including death threats, against other inmates and prison staff. The prison misconduct record consisted of 214 pages that was received as trial court exhibit 123.

The sentencing court's order includes the following statements on mitigation involving Jenkins' solitary confinement history when he served his prior prison sentences:

- The three-judge panel is required to consider any evidence in mitigation.
- The Defendant presented substantial evidence of the Defendant's personal and mental health history from the time he was eight years old, through his years of incarceration, to the present.
- [T]he defense contended that the defendant's current mental health and how it has been effected by his treatment (or lack thereof) during his incarceration, is a powerful non-statutory mitigating circumstance.
- The Defense asserts that there is overwhelming evidence that the Defendant is severely mentally ill . . . and that his mental health has deteriorated due in large part to his being subjected to long term solitary confinement by the State of Nebraska.
- The record of this case illustrates significant divergence of opinion offered by mental health professionals whether Jenkins suffers from a mental illness, or if he is feigning mental illness.

- In essence, the Panel has to determine which group of experts is more credible.
- This Panel agrees with the experts of the State. Dr. Cimpl Bohn and her team were given great weight as they had spent considerable time with the Defendant to support their opinions and these opinions were accepted by this panel. [See, report Resp. App. 1]
- The evidence before this Panel was that the Defendant was placed in solitary confinement for the protection of others and himself. Defendant's solitary confinement was the result of his extensive history of misconduct in the State Penitentiary. As a result, this Panel finds that there is insufficient evidence to support this non-statutory mitigator.

(Pet. App. 91-95a)

The Nebraska Supreme Court's opinion similarly noted both its and the trial court's consideration of Jenkins' prison solitary confinement history evidence as a nonstatutory mitigator:

- Our review of the record shows that contrary to Jenkins' assertion, the sentencing panel considered the impact of solitary confinement.
- The sentencing panel recognized Jenkins' "extensive history of misconduct in the State Penitentiary"; however, it found insufficient evidence to support solitary confinement as a nonstatutory mitigator. We see no error.

- Unfortunately, solitary confinement can be a “necessary evil”. [Nebraska Supreme Court quoted Justice Kennedy’s concurring opinion comment on solitary confinement in *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015).]
- Here, Jenkins’ own actions led to his disciplinary segregation.

(Pet. App. 68-69a)

2. Consideration of proffered mitigating evidence does not constitutionally establish a mitigating factor.

This is not a case where Nebraska’s “statute, or a judicial gloss on a statute, prevents [a sentencer] from giving meaningful effect to mitigating evidence that may justify the imposition of a life sentence rather than a death sentence.” *Brewer v. Quarterman*, 550 U.S. 286, 289 (2007).

Jenkins’ petition, after misstating the record as well as the sentencing court’s and Nebraska Supreme Court’s findings and conclusions, erroneously argues that his presentation of mitigation evidence proved and established a mitigating factor under the Eighth Amendment. His argument essentially repeals the ability of states to establish mitigating factors or determine whether mitigating factors have been established. The argument that the presentation of some evidence in support of mitigation thereby establishes a mitigating factor under the Eighth Amendment in capital cases has no support. All that is constitutionally

required is that a capital defendant is allowed to present mitigating evidence and that the sentencing entity be allowed to meaningfully consider it for purposes of mitigation, which is what happened in Jenkins' case. See, *id.*

QUESTION PRESENTED #2

1. ***Hurst v. Florida* did not require a jury to determine mitigating circumstances, balancing of aggravating factors, and death sentence determination.**

Jenkins' petition relies upon a misreading of *Hurst v. Florida*, 136 S. Ct. 616 (2016), to argue that the Sixth Amendment requires a jury in a capital case, in addition to finding aggravating factors, to also make the determination of mitigating factors, the balancing function of aggravating and mitigating factors, and the ultimate death sentence determination.

Hurst applied the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), to Florida's capital sentencing scheme. *Apprendi* held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum" is an element that "must be submitted to a jury, and proved beyond a reasonable doubt". Arizona's capital sentencing scheme of only judges doing capital sentencing was in violation of the Sixth Amendment per *Ring*. Thus, *Hurst* held that Florida's capital sentencing scheme also violated the Sixth Amendment right to a jury because "Florida's sentencing scheme, which

required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.” *Hurst*, 136 S. Ct. at 624. Justice Sotomayor, the opinion author of *Hurst*, subsequently explained the *Hurst* holding as, “In *Hurst v. Florida*, (citations omitted), however, we held that process, ‘which required the judge alone to find the existence of an aggravating circumstance,’ to be unconstitutional.” *Truehill v. Fla.*, 138 S. Ct. 3, 4 (2017) (Sotomayor, J., dissent from denial of certiorari).

2. Jenkins’ assertions of other state schemes appears to be inaccurate.

Although the Respondent does not claim, unlike Jenkins’ petition, to have conducted a comprehensive analysis of all other states’ sentencing schemes, the Respondent has sufficiently analyzed other states’ statutes to conclude that Jenkins’ petition appears inaccurate in its attempt to portray Nebraska as an “outlier” state. (Pet. 26) With a footnote citation to state statutes, Jenkins claims that with the exception of Montana, “every other state in the nation that has a death penalty now requires a jury to make all the necessary findings for its imposition.” (Pet. 26) In fact, many states do not require a jury, but rather, provide for or require judge sentencing in cases, like Jenkins’ case, where the defendant pleaded guilty or waived a jury trial at the guilt phase.¹

¹ Colorado, Colo. Rev. Stat. § 18-1.3-1201(1)(a) (2018) (“If a trial jury was waived or if the defendant pled guilty, the hearing

3. No mature split of highest state courts.

Jenkins’ petition inaccurately claims that the Supreme Courts of Florida, Delaware, Colorado, and Arizona have all held that the Sixth Amendment requires a jury to make all findings necessary to the imposition of death, “including the existence of mitigating circumstances and whether the aggravating factors outweigh the mitigating factors.” (Pet. 26)

shall be conducted before the trial judge.”); Georgia, Ga. Code Ann. § 17-10-32 (2018) (requiring the judge to perform the eligibility and selection decisions when the defendant pleads guilty); Indiana, Ind. Code § 35-50-2-9(f) (2018) (“If the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing.”); Kansas, Kan. Stat. Ann. § 21-6617(b) (2018) (“If the . . . trial jury has been waived, the sentencing proceeding shall be conducted by the court.”); Kentucky, Compare Ky. Rev. Stat. § 532.025(1)(a) (2018), with § 532.025(1)(b) (distinguishing between procedures in cases where the jury is the trier of fact); Missouri, Mo. Rev. Stat. § 565.030.2 (2018) (“[T]he trial shall proceed in two stages before the same trier.”); Montana, Mont. Code Ann. §§ 46-18-301 to -306 (2017) (providing for sentencing by the trier of fact or the court if the defendant pleads guilty to a capital crime and admits to the existence of one of the aggravating circumstances); Oklahoma, Okla. Stat. tit. 21, § 21-701.10(B) (2018) (“If the jury trial has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court.”); South Carolina, S.C. Code Ann. § 16-3-20(B) (2015) (“If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing hearing must be conducted before the judge.”); South Dakota, S.D. Codified Laws § 23A-27A-6 (2018) (when the defendant pleads guilty or waives a jury trial); Wyoming, Wyo. Stat. Ann. §§ 6-2-102(a)(i-ii) (2017) (requiring judicial sentencing in the case of a bench trial or if the defendant pleads guilty).

Florida

The Florida Supreme Court in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), cited by Jenkins, held per this Court's *Hurst* decision that the Sixth Amendment requires a jury for the finding of aggravating factors for a death sentence. But, contrary to Jenkins' argument, the Florida Supreme Court concluded that a combination of Florida state statutes, the Florida Constitution, and Florida's state history, not the Sixth Amendment, were the basis for juries to conduct the weighing decision of aggravating and mitigating factors and make the ultimate death sentence decision. *Id.*

Colorado

Jenkins inaccurately cites *Woldt v. People*, 64 P.3d 256 (Colo. 2003), in support of his argument. *Woldt* concluded that Colorado's then-existing death penalty sentencing statutes violated the Sixth Amendment when a three-judge panel, not a jury, "was required, in step one, to find at least one statutory aggravating factor beyond a reasonable doubt." *Woldt* further noted that Justice O'Connor had correctly characterized Colorado's then-existing death penalty statutes as constitutionally suspect in *Ring v. Arizona*. In short, *Woldt* did not go so far as to hold more than what it did – Colorado's scheme for judicial findings of aggravating factors violated the Sixth Amendment in 2003.

Of interest, Colorado's death penalty scheme, as since amended, now appears to provide for the death penalty sentencing phase hearing to be conducted

before the trial judge “[i]f a trial jury was waived or if the defendant pled guilty.” See, Colo. Rev. Stat. § 18-1.3-1201(1)(a) (2018). The Petitioner Jenkins also waived a trial jury and pled no contest.

Arizona

Jenkins cites the Arizona Supreme Court’s decision in *State v. Ring*, 65 P.3d 915 (2003), in support of his Sixth Amendment argument. His argument fails because Arizona’s subsequent legislation, not the Sixth Amendment, was the basis for the change in Arizona’s capital sentencing procedure:

On August 1, 2002, the legislature passed and Governor Hull signed into law Senate Bill (“S.B.”) 1001, containing several revisions intended to conform Arizona law to the *Ring II* mandate. S.B. 1001, 45th Leg., 5th Spec. Sess. (Ariz.2002). Under Arizona’s amended sentencing procedure, the jury serving during the guilt phase of the trial also serves as the trier of fact during the sentencing phase. A.R.S. § 13–703.01.C–D (Supp.2002). Specifically, the jury will find and consider the effect of aggravating and mitigating circumstances and decide whether the defendant should receive a sentence of death. Id. § 13–703.01.D.

State v. Ring, 65 P.3d at 926.

Delaware

The Delaware Supreme Court decision in *Rauf v. State*, 145 A.3d 430 (Del. 2016), was as represented in Jenkins' petition, thus making Delaware the "outlier state" in concluding that the *Hurst* opinion required a jury under the Sixth Amendment for all aspects of imposing a death sentence. The State of Delaware appears to be content with its Supreme Court's decision. By contrast, Nebraska does not concede that the State of Delaware determines the scope of the Sixth Amendment for capital cases in Nebraska or for the states of Missouri, Indiana, Alabama, and Illinois who, like Nebraska, have ruled that a jury is required only for the finding of aggravating factors. (See, Pet. 31-34) Certiorari should not be granted when only one outlier state has expanded the Sixth Amendment for death penalty sentencing in its state.

4. Poor vehicle for questions presented and no standing.

Jenkins' misstatement of the record, misstatements of the findings and decisions of the sentencing court and the Nebraska Supreme Court, and mischaracterization of decisions by other state supreme courts do not cause one to have much confidence in Jenkins' argument that this is an "excellent vehicle." It is not. Rather, it is a heavily fact-bound case involving a battle of numerous mental health experts with an ultimate death penalty decision that involved the rejection of the defense effort to portray Jenkins as suffering

from a major mental disorder. Jenkins also attempts to get excess mileage out of *Hurst v. Florida* in his petition's vehicle.

Finally, Jenkins has the potential problem of lack of jurisdictional standing for his Sixth Amendment jury argument. The Nebraska Supreme Court observed that, "Because Jenkins waived a jury and expressly stated he would 'rather have the judges' for sentencing, we doubt he has standing to attack the constitutionality of Nebraska's procedure on the grounds he asserts." (Pet. App. 49a)

◆

CONCLUSION

The Respondent State of Nebraska requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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