CAPITAL CASE
No. 19-514

IN THE

Supreme Court of the United States

NIKKO A. JENKINS,
Petitioner,
v.

STATE OF NEBRASKA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nebraska

REPLY BRIEF FOR PETITIONER

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Petitioner Nikko Jenkins was sentenced to death by a panel of judges who categorically refused to give any mitigating weight to the fact that, immediately preceding his crimes, he was held in solitary confinement for nearly five years, during which time he exhibited the symptoms of serious mental illness, and was then released directly to the community without any assistance, despite his own pleas that he should be civilly committed because he was a danger to others. The panel of judges refused to consider these facts as mitigation because they concluded that Mr. Jenkins's misconduct led to his solitary confinement. The panel sentenced Mr. Jenkins to death under a state statute that requires, for a sentence of execution, a finding that factors in aggravation outweigh those in mitigation but, alone among the death penalty states, exclusively entrusts that finding to a panel of judges rather than a jury. *See* Neb. Rev. Stat. §§ 29-2519(1); 29-2522; Pet. App. 106a (setting out Nebraska law). The Nebraska Supreme Court affirmed the death sentence.

That decision raises two distinct questions warranting certiorari: (1) whether the Eighth Amendment permits a sentencer to refuse to treat years of solitary confinement and a reckless and precipitous release as mitigation if it concludes that the solitary confinement was deserved; and (2) whether the Sixth Amendment requires a jury to make all findings necessary to render a defendant eligible for the death penalty—here, including whether the aggravating factors outweigh the mitigating factors.

Nebraska's opposition largely fails to join issue with the first question presented, instead asserting that the state court in fact considered Mr. Jenkins's solitary confinement in its assessment of mitigating circumstances. But it does not deny—because it cannot—that the panel categorically refused to give Mr. Jenkins's solitary confinement any weight because it concluded that it was deserved. Nor can it dispute that the Nebraska Supreme Court did the same. Whether a sentencer may constitutionally ignore debilitating solitary confinement of a mentally ill inmate and his reckless release on that basis is a legal question, not, as Nebraska contends, a factual dispute. BIO at 4.

With respect to the second question, Nebraska denies a mature split exists, but only by misrepresenting what the relevant decisions held. In fact, the highest court in every state in which the question could be presented has now pronounced on the question of whether the Sixth Amendment requires a jury to find all the facts necessary to impose the death penalty, including whether the aggravating factors outweigh the mitigating factors—and they are irreconcilably divided on that question. Only this Court can resolve the split. The importance of this question is highlighted by the fact that petitions for certiorari in capital cases from two other states— *Wood v. Missouri*, No. 19A570 (time to file extended until January 31, 2020) and *Castillo v. Nevada*, No. 19A595 (time to file extended until February 3, 2020)—will be filed shortly raising questions closely related to the second question presented here.

Nebraska suggests that this case is not a good vehicle to resolve the second question because Mr.

Jenkins waived his right to have a jury find the existence of aggravating factors. But the right to have a jury find aggravating factors is not the issue before the Court; it is the right to have a jury consider mitigation and whether the aggravating factors outweigh the mitigation. Mr. Jenkins did not waive, and could not possibly have waived, that right, as it does not exist under Nebraska law.

I. THE SENTENCING PANEL VIOLATED THE EIGHTH AMENDMENT BY CATEGORICALLY RULING OUT PETITIONER'S EXTENSIVE SOLITARY CONFINEMENT AS MITIGATION.

Nebraska argues that the state courts sufficiently considered Mr. Jenkins's solitary confinement and reckless release as mitigation because they referenced his solitary confinement in their opinions. BIO at 4-8. But they mentioned it only to explain why they were not considering it. *Referencing* a fact is not the same as *considering it as mitigation*. The courts below expressly refused to give Mr. Jenkins's extensive solitary confinement and abrupt release *any* mitigating weight whatsoever, because they made a seat-of-the-pants judgment that the solitary confinement was appropriately imposed.

The sentencing panel explained:

> 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 as a result of his own actions and threats. Exhibit 123 sets forth 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. 95A (emphasis added).

The Nebraska Supreme Court saw "no error" in this reasoning, and expressly adopted it:

> Jenkins' own actions led to his disciplinary segregation. . . . The sentencing panel acted reasonably in not rewarding such behavior by considering the resulting confinement as a mitigating factor. Upon our de novo review, we reach the same conclusion.

Pet. App. 68a-69a.

Nebraska does not dispute that a "robust body of legal and scientific authority recognize[s] the devastating mental health consequences caused by long-term isolation in solitary confinement." *Palakovic v. Wetzel*, 854 F.3d 209, 225 (3d Cir. 2017); *see generally* Brief for National Disability Rights Network et al. as Amici Curiae. It does not deny that while so confined, Mr. Jenkins exhibited profoundly disturbing self-harming behavior. Nor does it dispute that the panel entirely ignored the fact that the state dismissed Mr. Jenkins's pleas that he *not* be released because he would be a danger to others. The legal question is whether all of that can be categorically disregarded because the sentencing authority believes that the solitary confinement was the result of Mr. Jenkins's misconduct.

The panel gave that evidence *no* mitigating weight. Such categorical disregard of Mr. Jenkins's

powerful mitigation violates this Court's holdings that the sentencer may not "refuse to consider, as *a matter of law*, any relevant mitigating evidence." *Eddings v. Oklahom*a, 455 U.S. 104, 114 (1982) (emphasis in original); *see also* Pet. 15-17 (discussing this Court's jurisprudence under *Lockett v. Ohio*, 438 U.S. 586 (1978)). In essence, the Nebraska judges here applied a novel "contributory negligence" theory, wholly discounting the devastating effects of Mr. Jenkins's solitary confinement and reckless treatment because they concluded the solitary confinement was his fault. On that reasoning, a defendant's post-traumatic stress disorder from a traffic accident could be wholly disregarded as mitigation if the sentencer concluded that the accident was his fault. The Eighth Amendment precludes such categorical disregard. This error alone warrants certiorari.

II. NEBRASKA'S EFFORT TO PAPER OVER A FULLY MATURE SPLIT IN THE STATE COURTS RELIES ON MISSTATEMENTS OF THE STATE COURTS' HOLDINGS.

Mr. Jenkins's petition noted that four states—Nebraska, Missouri, Alabama, and Illinois—had held that the Sixth Amendment requires that a jury find only the existence of an aggravating factor, while four states—Delaware, Florida, Colorado, and Arizona—had held that the Sixth Amendment requires the jury to find *all* the facts necessary to render a defendant eligible for the death penalty, including whether the aggravating factors outweigh the mitigating factors. After the filing of the petition and opposition, on January 23, 2020, the Florida Supreme Court reversed its earlier decision, and now

lines up on the former side of the split. *Florida v. Poole*, No. SC18-245, 2020 WL 370302 (Fla. Jan. 23, 2020). The split is now 5-3 rather than 4-4. But it remains a fully mature split, as no other active death penalty states assign to judges such a role in capital sentencing.

Nebraska concedes that the Delaware Supreme Court's decision conflicts with the decision below, BIO at 13, but claims that the state courts of Colorado, Arizona, and Florida have not held that a jury must also find the existence of mitigating factors and that that the aggravating factors outweigh the mitigating factors. BIO at 10-12. But Nebraska's contention is squarely refuted by the relevant decisions.

1. Colorado

Nebraska contends that the Colorado Supreme Court in *Woldt v. People*, 64 P.3d 256 (Colo. 2003), held that a jury must find only an aggravating factor, and not any other facts necessary to impose a death sentence in that state. BIO at 11. But the court in *Woldt* expressly held that a jury must find not only "step one," the presence of an aggravating factor, but also "step two" and "step three," namely the existence of mitigation and whether the aggravators outweigh the mitigation. *Id.* at 265 (explaining that under the Colorado scheme subject to constitutional challenge "steps one, two, and three were prerequisites to a finding by the three-judge panel that a defendant was eligible for death," that "[s]tep two required the three-judge panel to decide if evidence of mitigating factors existed," and "[i]n step three, the three-judge panel decided whether the mitigating factors outweighed the aggravating factors.").

The court held that its capital sentencing scheme violated the Sixth Amendment because it assigned *all three steps* to judges rather than a jury:

> Because the Sixth Amendment requires that a jury find any facts necessary to make a defendant eligible for the death penalty, and *the first three steps* of section 16–11–103, 6 C.R.S. (2000), required judges to make findings of fact that render a defendant eligible for death, the statute under which Woldt and Martinez received their death sentences is unconstitutional on its face.

Id. at 266-67 (emphasis added). All three steps, the court held, must be decided by a jury. *Id.* Nebraska simply ignores the court's treatment of steps two and three. Contrary to Nebraska's depiction, Colorado expressly held that the Sixth Amendment requires *all* findings prerequisite to a sentence of death—including "whether the mitigating factors outweigh the aggravating factors"—must be made by a jury, not just the presence of aggravating factors. *Id.* at 265.

2. Arizona

Nebraska maintains that state legislative reform, not the Sixth Amendment, was the reason that Arizona's capital sentencing procedure now requires that a jury find not just aggravating factors, but consider mitigation and determine whether the aggravating factors outweigh the mitigation. BIO at 12-13. Again, Nebraska simply misreads the state court opinions. While *State v. Ring*, 65 P.3d 915 (Ariz. 2003) (*Ring III*), noted that state law had been changed, *id.* at 926, the question before the court was

the constitutionality of sentences by trial judges pursuant to the *prior* statute, "under which a judge considered aggravating *and mitigating evidence*," *id.* at 925 (emphasis added). The court squarely held that even where a trial judge's finding of an aggravating factor did not violate *Ring II* (because, for example, it was based on a prior conviction), the defendant may nonetheless be constitutionally entitled to re-sentencing in order to have a jury consider the mitigating evidence and weigh it against the aggravating factors. *Id.* at 943. The court reasoned: "[b]ecause a trier of fact must determine whether mitigating circumstances call for leniency, we will affirm a capital sentence [where a judge made this finding] only if we conclude, beyond a reasonable doubt, that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency." *Id.* at 946.

The Arizona Supreme Court has repeatedly reaffirmed this point, reviewing convictions under the prior statute assigning to judges fact-finding regarding aggravating factors, mitigating circumstances, and the weighing of the two. In *State v. Nordstrom*, 77 P.3d 40 (Ariz. 2003), the court held that, even where "any error with respect to the aggravating factors was harmless beyond a reasonable doubt," resentencing was required because "[a]s we explained in *Ring III*, our harmless error inquiry does not end with the aggravating circumstances." *Id.* at 45. Because it could not conclude that no reasonable jury would have made a different assessment regarding the mitigating circumstances, it ruled that resentencing was required. *Id.*

Similarly, in *State v. Pandeli*, 65 P.3d 950 (Ariz. 2003), the court held that, even where "the State can make a strong argument that no reasonable jury could fail to find" the aggravator, resentencing was required because "[a] different finding of mitigating circumstances could affect the determination whether the mitigating circumstances are sufficiently substantial to call for leniency." *Id.* at 953 (internal quotation marks omitted); *see also State v. Tucker*, 68 P.3d 110, 122-23 (Ariz. 2003) ("Our inquiry must also consider whether reversible error occurred with respect to the mitigating circumstances" and concluding that it could not say "a jury would have assessed the *mitigating evidence* as did the trial judge") (emphasis added).

Thus, Arizona, like Delaware and Colorado, holds that the Sixth Amendment requires a jury to make all findings prerequisite to the imposition of death, not just the presence of an aggravating factor.

3. Florida

As noted above, the Florida Supreme Court recently reversed its earlier decision in *Hurst v. State,* 202 So. 3d 40 (Fla. 2016), and now joins the four state supreme courts on the side of the split that has concluded that a jury need only find the existence of an aggravating factor. *Florida v. Poole*, No. SC18-245, 2020 WL 370302, at *15 (Fla. Jan. 23, 2020). The court's recent reversal of *Hurst v. State* does not resolve the split, but simply changes the count from 4-4 to 5-3.[1]

[1] Nebraska's contention that *Hurst v. State* did not rule otherwise, BIO at 11, is contradicted by *Poole* itself, which expressly "recede[d] from *Hurst v. State* except to the extent it

In short, three state high courts have squarely held that the Sixth Amendment requires the jury to consider all facts necessary under state law to the imposition of a death sentence. Nebraska, and now four others, have held to the contrary. No other state with an active death penalty even allows judges to make these findings. The split is thus fully mature, and only this Court can resolve it.

III. THIS CASE IS A PROPER VEHICLE

Because this case arises on direct appeal and squarely presents the question of what the Sixth Amendment requires a jury to decide, it presents an ideal vehicle for both this question and the Eighth Amendment question about the sentencing judges' categorical disregard of mitigating evidence.

Nebraska contends that Mr. Jenkins may not have standing to raise the argument that he was denied his Sixth Amendment right to have a jury consider the mitigating evidence and weigh it against the aggravating factors because he waived his right to have a jury find an aggravating factor. BIO at 14. But Mr. Jenkins's standing is clear. He waived only

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requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt," *id.* at *15. *Hurst v. State* had held that "the death sentence was imposed on Hurst in violation of the Sixth Amendment right to a jury determination of every critical finding necessary for imposition of the death sentence." *Hurst*, 202 So. 3d at 69, including whether aggravating factors outweigh mitigating factors, *id.* at 53. Because Florida has since statutorily amended its law to join virtually all other death penalty states in assigning to a jury all findings necessary to the imposition of death, Fla. Stat. § 921.141 (2019), the *Poole* decision affects only death sentences under the prior version of Florida's law.

the narrow right that Nebraska law provided: to have a jury determine *only* the "existence of one or more aggravating circumstances." Neb. Rev. Stat. Ann. § 29-2521(1). He did not and could not waive the right at issue here, because under Nebraska law, only a panel of judges, and not a jury, can "receive evidence of mitigation," *id*. § 29-2521(3), and make the weighing determination required under section § 29-2522. Mr. Jenkins could not have waived a right that Nebraska law did not provide.

Nebraska is the only state in the Union with an active death penalty that, in every capital case, assigns to a panel of judges, not a jury, the factual findings regarding mitigation and weighing that are necessary to the imposition of death. Two states, Missouri and Indiana, assign these questions in the first instance to a jury, and give them to judges *only* when the jury has deadlocked. But in assigning these questions to judges in the first instance in every case, Nebraska stands alone.

Nebraska objects that it is not an outlier because other state statutes allow a defendant to *waive* the right to have a jury make all factual findings in capital sentencing—either directly or by pleading guilty. BIO 9-10 & n.1. That is a non sequitur. There is nothing unusual in allowing jury rights to be knowingly and intelligently waived. But Nebraska, alone among active death penalty states, denies the right altogether.

This Court should grant certiorari to resolve the fully mature split, and to hold that Nebraska's outlier sentencing procedure, which gives to a panel of judges the authority to make findings necessary to

impose a sentence of death, violates the Sixth Amendment.

As noted above, the importance of resolving the split is underscored by two petitions about to be filed, both of which have provided notice of their grounds in applications for extensions of time. The petition in *Wood v. Missouri*, No. 19A570, in particular, will raise an almost identical question. *See* Application, *Wood v. Missouri*, No. 19A570 (Dec. 19, 2019). If the Court grants review in *Wood*, its decision will likely affect this case, and vice versa. Both petitioners ask this Court to rule on whether the Constitution requires a jury, and not a judge, to weigh aggravating and mitigating circumstances before imposing the death penalty. Thus, if this Court grants the petition for certiorari in *Wood*, the Court should grant certiorari here as a companion case or hold this petition pending the outcome of that case. Similarly, if the Court grants review in this case, it should either also grant review in *Wood* or hold it pending the outcome in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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