

No. 20-5562

SUPREME COURT OF THE UNITED STATES

JEFFREY HESSLER,

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
Senior Assistant Attorney 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

QUESTION PRESENTED

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 13 year-old final death sentence that was ordered by a panel of three judges after a jury found aggravating circumstances beyond a reasonable doubt.

TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Table of Authorities iii

Statement of the Case 1

Argument: Reasons For Denying The Petition 2

 1. No Rule 10 conflict among courts 2

 2. No merit: Nebraska Supreme Court decision was correct 3

 3. Three prior certiorari denials by this Court concerning the
 Hurst jury constitutional issue for Nebraska’s death penalty
 Scheme..... 4

 4. Petitioner’s pending federal habeas petition concerning the same
 question makes his certiorari petition premature 5

Conclusion 5

Certificate of Service..... 6

TABLE OF AUTHORITIES

Cases

<i>Hessler v. Frakes</i> , D.Neb. case #8:14-cv-00357	2
<i>Hurst v. Florida</i> , 136 S.Ct. 616 (2016)	i, 3
<i>Jenkins v. Nebraska</i> , 140 S. Ct. 2704 (2020)	4
<i>Lotter v. Frakes</i> , 138 S. Ct. 926 (2018)	4
<i>Lotter v. Nebraska</i> , 139 S. Ct. 2716 (2019)	4
<i>McKinney v. Arizona</i> , 140 S. Ct. 702 (2020)	3
<i>State v. Hessler</i> , 741 N.W.2d 406 (Neb. 2007)	1
<i>Truehill v. Florida</i> , 138 S. Ct. 3 (2017)	3

STATEMENT OF THE CASE

The Petitioner's certiorari petition is somewhat confusing concerning the procedural history of his first-degree murder conviction and death penalty sentence. For clarity, the Petitioner's certiorari petition concerns the Nebraska Supreme Court's rejection of the Petitioner's third state court collateral attack postconviction proceeding concerning his 2007 final first-degree murder death sentence. (Pet. App. A)

The Petitioner Jeffery Hessler was convicted by a jury of first-degree murder in 2004 for the kidnapping and murder of 15-year-old Heather Guerrero after abducting Heather on her morning paper route, raping her, and shooting Heather when she "freaked out" and would not keep Hessler's rape a secret. Hessler had a prior conviction for the sexual assault of another papergirl prior to his rape and murder of Heather Guerrero. See, (Pet. App. J, p8), *State v. Hessler*, 741 N.W.2d 406 (Neb. 2007).

The same jury that found Hessler guilty of first-degree murder also found beyond a reasonable doubt the existence of three statutory aggravating circumstances that made Hessler eligible for the death penalty under Nebraska law. *Id.* (Pet. App. J, p10)

Hessler's current certiorari petition raises the same constitutional issues that were rejected on the merits by the Nebraska Supreme Court in his direct

appeal thirteen years ago. *Id.* (Pet. App. J, p18) Hessler’s certiorari petition also omitted the fact that he has a pending federal habeas petition in the United States District Court for the District of Nebraska that raises the same issue he raises by his certiorari petition. See, *Hessler v. Frakes*, D.Neb. case # 8:14-cv-00357, filing no. 33. Hessler’s pending federal habeas petition has been stayed pending the finality of the outcome of the current third state court collateral attack postconviction proceeding, *Id.*, at filing no. 17. In other words, Hessler’s constitutional claims that are the subject of his current certiorari petition have not yet been decided by Nebraska’s federal district court in Hessler’s pending federal habeas proceeding because of his current certiorari petition. *Id.*, at filing nos. 39 and 40.

ARGUMENT: REASONS FOR DENYING THE PETITION

1. No Rule 10 conflict among courts.

There is no Rule 10(b) conflict among the Circuit Courts nor has any “state court of last resort 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”. Hessler’s certiorari petition cites no authority of any such conflict.

2. No merit: Nebraska Supreme Court decision was correct.

The Nebraska Supreme Court's decision was correct and in accordance with *McKinney v. Arizona*, 140 S. Ct. 702, 707 (2020), which held:

Under *Ring* and *Hurst*, a jury must find the aggravating circumstance that makes the defendant death eligible. But importantly, in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range. . . .

In short, *Ring* and *Hurst* did not require jury weighing of aggravating and mitigating circumstances, and *Ring* and *Hurst* did not overrule *Clemons* so as to prohibit appellate reweighing of aggravating and mitigating circumstances.

Justice Sotomayor, who was the author of the *Hurst* opinion, similarly explained the *Hurst* holding in her opinion dissenting from the denial of certiorari in the *Truehill v. Florida*, 138 S. Ct. 3, 4 (2017), by stating that, “In *Hurst v. Florida*, however, we held that process, ‘which required the judge alone to find the existence of an aggravating circumstance,’ to be unconstitutional.”

Because the Petitioner's death sentence was imposed after a jury found the existing of three aggravating circumstances, *Hurst* did not announce a new constitutional rule for the Petitioner's case, much less one that would involve the additional question of applicability on collateral review. Rather, the constitutional rule requiring a jury to find the existence of an aggravating

circumstance was followed for the Petitioner's death sentence when his death sentence was affirmed on direct appeal in 2007. The fact that Hessler made his current constitutional challenges to the role of a jury in Nebraska's death penalty scheme (i.e., jury decides only the existence of aggravating factors to make a defendant death eligible) in his direct appeal means that the Petitioner is procedurally barred from making the same challenges again, thirteen years later, in his third collateral attack postconviction proceeding.

3. Three prior certiorari denials by this Court concerning the *Hurst* jury constitutional issue for Nebraska's death penalty scheme.

This Court has already denied certiorari in three prior cases in the past two years that made the same or similar *Hurst* jury constitutional claims challenging Nebraska's death penalty procedures, one of which was on direct appeal and two of which were on collateral reviews:

- *Jenkins v. Nebraska*, 140 S. Ct. 2704 (2020) (No. 19-514, cert. den. on direct appeal).
- *Lotter v. Frakes*, 138 S. Ct. 926 (2018) (No. 17-6602, cert. den. on collateral review).
- *Lotter v. Nebraska*, 139 S. Ct. 2716 (2019) (No. 18-8415, cert. den. on collateral review).

4. Petitioner's pending federal habeas petition concerning the same question makes his certiorari petition premature.

As explained at the end of the Statement of the Case in this brief, there is a pending stayed federal habeas proceeding in the United States District Court for the District Court of Nebraska involving the same constitutional claims made by the Petitioner Hessler that he makes in his certiorari petition. Thus, Hessler will be able to pursue federal judicial review through lower federal courts of his constitutional claims concerning his death penalty sentence. This Court can and should allow the federal habeas process to be completed without the need to grant certiorari at this point.

CONCLUSION

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

Respectfully submitted,

DOUGLAS J. PETERSON
Attorney General of Nebraska

*/s/ **James D. Smith***
Counsel of Record
Senior Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509-8920
james.smith@nebraska.gov
(402) 471-2682

Counsel for Respondent