No. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

JOHN L. LOTTER,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

On Petition For A Writ Of Certiorari
To The Nebraska Supreme Court

APPENDIX

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November 28, 2022

STATE OF NEBRASKA, APPELLEE, V. JOHN L. LOTTER, APPELLANT.

___ N.W.2d ___

Filed July 1, 2022. Nos. S-20-363, S-20-366, S-20-367.

1. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.
2. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law which an appellate court reviews independently of the lower court's ruling.
3. **Limitations of Actions.** If the facts in a case are undisputed, the issue as to when the statute of limitations begins to run is a question of law.
4. **Postconviction: Constitutional Law.** Postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations that render the judgment void or voidable.
5. **Postconviction: Constitutional Law: Proof.** A postconviction motion must allege facts which, if proved, constitute a denial or violation of a defendant's rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.
6. ____: ____: ____. Under the Nebraska Postconviction Act, an evidentiary hearing is not required when (1) the motion does not contain factual allegations which, if proved, constitute an infringement of the movant's constitutional rights rendering the judgment void or voidable; (2) the motion alleges only conclusions of fact or law without supporting facts; or (3) the records and files affirmatively show that the defendant is entitled to no relief.
7. **Postconviction.** The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.

8. **Postconviction: Appeal and Error.** It is fundamental that a motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal.
9. ____: ____. When an issue could have been raised on direct appeal, it is procedurally barred from postconviction relief, no matter how the issues may be phrased or rephrased.
10. **Postconviction: Pleadings.** The effect of Neb. Rev. Stat. § 29-3001(3) (Reissue 2016) is to require that all available grounds for postconviction relief must be stated in the initial postconviction motion and, once that motion has been judicially determined, any subsequent postconviction motion regarding the same conviction and sentence may be dismissed by the district court unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing the prior motion.
11. ____: ____. A defendant is entitled to bring a successive postconviction motion only when the face of the motion affirmatively shows that the issues raised therein could not have been raised in prior motions.
12. **Postconviction: Limitations of Actions: Sentences: Death Penalty.** The 1-year limitation period set out in Neb. Rev. Stat. § 29-3001(4) (Reissue 2016) governs all postconviction motions, including successive motions and those challenging a death sentence.
13. **Postconviction.** For purposes of Neb. Rev. Stat. § 29-3001(4)(b) (Reissue 2016), the factual predicate for a postconviction claim is properly understood as the important objective facts that support the claim.
14. **Postconviction: Time.** The 1-year period in Neb. Rev. Stat. § 29-3001(4)(b) (Reissue 2016) begins to run when the objective facts underlying the claim could reasonably be discovered, and that date is distinct from discovering that those facts are actionable.
15. ____: ____. The inquiry for purposes of Neb. Rev. Stat. § 29-3001(4)(b) (Reissue 2016) concerns when the important objective facts could reasonably have been discovered, not when the claimant should have discovered the legal significance of those facts.
16. **Mental Competency.** The factual predicate for an intellectual disability claim under *Atkins v. Virginia,* 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 335 (2002), does not depend on either a formal clinical diagnosis or a particular intelligence quotient score.
17. ____. The important objective facts supporting a claim of intellectual disability under *Atkins v. Virginia,* 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 335 (2002), include facts relating to subaverage intellectual functioning, deficits in adaptive functioning, and the onset of these deficits during the developmental period.

18. **Mental Competency: Presumptions.** The plain language of Neb. Rev. Stat. § 28-105.01(3) (Cum. Supp. 2020) does not establish a strict cutoff score of 70 on an intelligence quotient test; rather, it creates an evidentiary presumption in favor of finding intellectual disability when the defendant has an intelligence quotient score of 70 or below on a reliably administered test.
19. **Mental Competency: Evidence: Appeal and Error.** Nebraska appellate courts have not construed Neb. Rev. Stat. § 28-105.01(3) (Cum. Supp. 2020) in a way that would prohibit those with a score above 70 on an intelligence quotient test from presenting other evidence that would support a finding of intellectual disability.
20. **Constitutional Law: Sentences.** Generally, state courts considering a matter on collateral review must give retroactive effect to new substantive rules of federal constitutional law. Substantive rules of federal constitutional law include rules forbidding criminal punishment of certain primary conduct, as well as rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.
21. **Postconviction: Constitutional Law: Time.** Neither *Hall v. Florida*, 572 U.S. 701, 134 S. Ct. 1986, 188 L. Ed. 1007 (2014), nor *Moore v. Texas*, ___ U.S. ___, 137 S. Ct. 1039, 197 L. Ed. 2d 416 (2017), announced a new substantive rule of constitutional law that must be applied retroactively to cases on postconviction collateral review.
22. **Postconviction: Death Penalty: Time.** The holding in *Sawyer v. Whitley*, 505 U.S. 333, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992), does not require a state court to excuse procedural defaults in postconviction cases or prevent a state court from enforcing its procedural or time bar rules when presented with a challenge to imposition of the death penalty on postconviction collateral review.
23. **Postconviction: Time: Appeal and Error.** Generally, when the timeliness of a postconviction motion is at issue, the defendant must raise all applicable arguments in the district court to preserve them for appellate review.
24. **Statutes: Legislature: Intent.** When construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
25. **Statutes: Appeal and Error.** The rules of statutory interpretation require an appellate court to give effect to the entire language of a statute, and to reconcile different provisions of the statutes so they are consistent, harmonious, and sensible.
26. **Death Penalty: Sentences: Mental Competency: Statutes: Legislature: Pleadings.** Neb. Rev. Stat. § 28-105.01(2) (Cum. Supp. 2020) establishes a statutory right prohibiting imposition of the death

penalty on any person with an intellectual disability. To enforce that statutory right, the Legislature enacted a specific statutory procedure to allow a defendant facing the death penalty to file a verified motion and request a hearing to determine intellectual disability, before any sentencing determination is made.

27. **Statutes: Legislature: Intent: Words and Phrases.** As a general principle of statutory construction, use of the phrase "notwithstanding any other provision of law" in a statute signals legislative intent to override other provisions of law that conflict with the statute.
28. **Postconviction: Limitations of Actions: Words and Phrases.** The phrase "notwithstanding any other provision of law" in Neb. Rev. Stat. § 28-105.01 (Cum. Supp. 2020) neither impacts nor overrides the procedural and time limitations applicable to postconviction motions under the Nebraska Postconviction Act.
29. **Death Penalty: Legislature: Initiative and Referendum.** The Legislature's repeal of the death penalty in 2015 Neb. Laws, L.B. 268, never went into effect, because upon the filing of a referendum petition appearing to have a sufficient number of signatures, operation of the legislative act was suspended so long as the verification and certification process ultimately determines that the petition had the required number of valid signatures.
30. **Death Penalty: Sentences: Initiative and Referendum.** Because 2015 Neb. Laws, L.B. 268, was suspended and never went into effect, any death sentences in effect at the time were unchanged.

Appeal from the District Court for Richardson County: Vicky L. Johnson, Judge. Affirmed.

Timothy S. Noerrlinger, of Naylor & Rappl, and Rebecca E. Woodman, pro hac vice, for appellant.

Douglas J. Peterson, Attorney General, and James D. Smith, Senior Assistant Attorney General, for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ.

Stacy, J.

In this successive motion for postconviction relief, John L. Lotter presents two claims challenging the constitutionality

of his death sentences. His first claim alleges the sentences were effectively vacated, and then unconstitutionally "reimposed," as a result of the legislative process surrounding L.B. 268—a bill passed by the Nebraska Legislature in 2015[1] and repealed by public referendum thereafter. We refer to this as Lotter's "L.B. 268 claim." His second claim alleges that he was diagnosed as intellectually disabled in 2018 and, therefore, is ineligible for imposition of the death penalty under the U.S. Supreme Court's holding in *Atkins v. Virginia*.[2] We refer to this as Lotter's "*Atkins* claim."

The district court denied postconviction relief on both of Lotter's claims without conducting an evidentiary hearing. It determined the L.B. 268 claim was meritless under settled precedent. It did not reach the merits of the *Atkins* claim because it determined the claim was both procedurally barred and time barred under Nebraska postconviction law.

Lotter appeals, arguing he was entitled to an evidentiary hearing on both claims. We affirm.

I. BACKGROUND

In 1995, a jury convicted Lotter of three counts of first degree murder, three counts of use of a weapon to commit a felony, and one count of burglary.[3] He was sentenced to death for each murder conviction and to terms of incarceration on the convictions for burglary and use of a weapon.[4] On direct appeal, the burglary conviction was vacated and all other convictions and sentences were affirmed.[5] Lotter's criminal

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[1] See 2015 Neb. Laws, L.B. 268.

[2] *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

[3] See *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified on denial of rehearing* 255 Neb. 889, 587 N.W.2d 673 (1999), *cert. denied* 526 U.S. 1162, 119 S. Ct. 2056, 144 L. Ed. 2d 222.

[4] *Id.*

[5] *Id.*

judgments became final on June 7, 1999, when the U.S. Supreme Court denied his petition for writ of certiorari.[6]

Between 1999 and 2017, Lotter filed four motions for postconviction relief, all of which were found to be meritless.[7] In addition, Lotter filed an unsuccessful motion for postconviction DNA testing in 2001,[8] and unsuccessful petitions for federal habeas corpus relief in 2011[9] and 2017.[10] None of Lotter's prior postconviction motions alleged a claim that he is intellectually disabled under *Atkins*.

On March 27, 2018, Lotter filed, in each of his three criminal cases, the operative motions for postconviction relief at issue in this appeal. The verified motions were identical, and the district court consolidated them and generally referred to them collectively as Lotter's fifth postconviction motion. For ease of reference, we do the same.

As stated, Lotter's fifth postconviction motion alleges two grounds for relief. Lotter's L.B. 268 claim alleges that in 2015, when the Legislature passed L.B. 268 abolishing the death penalty, it effectively vacated his death sentences and imposed life sentences. Lotter alleges that when L.B. 268 was subsequently repealed by public referendum, it resulted in "re-imposition" of his death sentences, which violated his

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[6] *Id*.

[7] See, *State v. Lotter*, 301 Neb. 125, 917 N.W.2d 850 (2018) (affirming denial of postconviction motions filed in 2017); *State v. Lotter*, case Nos. S-12-837 through S-12-839 (2013) (summarily affirming denial of postconviction motions filed in 2012); *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009) (affirming denial of postconviction motions filed in 2007); *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003), (superseded by statute as stated in *State v. Harris*, 292 Neb. 186, 871 N.W.2d 762 (2015); affirming denial of amended postconviction motions filed in 1999; and affirming denials of motions for new trial and petitions for writ of error coram nobis filed in 1999).

[8] *State v. Lotter*, 266 Neb. 758, 669 N.W.2d 438 (2003).

[9] *Lotter v. Houston*, 771 F. Supp. 2d 1074 (D. Neb. 2011).

[10] *Lotter v. Britten*, No. 4:04CV3187, 2017 WL 744554 (D. Neb. Feb. 24, 2017).

constitutional right to due process, violated his constitutional right to be free from cruel and unusual punishment, and amounted to an unconstitutional bill of attainder.

Lotter's *Atkins* claim alleges that in March 2018, his attorney retained Ricardo Weinstein, Ph.D., to determine whether Lotter is intellectually disabled. After evaluating Lotter's intellectual and adaptive functioning, Weinstein issued a report concluding that Lotter "qualifies for the diagnosis of Intellectual Developmental Disability (formerly Mental Retardation)." On March 27, 2018, Lotter amended his fifth postconviction motion to add a claim that he is constitutionally ineligible for imposition of the death penalty under *Atkins*.[11] A copy of Weinstein's report was attached as an exhibit to the operative motion.

In February 2020, the court held what was characterized as a records hearing[12] on Lotter's fifth postconviction motion. Thereafter, the court entered an order denying postconviction relief on both claims without conducting an evidentiary hearing. In rejecting Lotter's L.B. 268 claim, the district court relied on several recent postconviction opinions from this court rejecting nearly identical claims as meritless.[13] Based on that precedent, the court concluded as a matter of law that Lotter's L.B. 268 claim did not entitle him to postconviction relief.

The court did not address the merits of Lotter's *Atkins* claim, because it determined the claim was both procedurally

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[11] *Atkins, supra* note 2.

[12] See *State v. Glover*, 276 Neb. 622, 756 N.W.2d 157 (2008) (recognizing district court has discretion to hold records hearing to receive existing files and records before deciding whether to grant or deny evidentiary hearing on motion for postconviction relief).

[13] See, *State v. Torres*, 304 Neb. 753, 936 N.W.2d 730 (2020), *cert. denied* ___ U.S. ___, 141 S. Ct. 295, 208 L. Ed. 2d 50; *State v. Mata*, 304 Neb. 326, 934 N.W.2d 475 (2019), *cert. denied* ___ U.S. ___, 141 S. Ct. 167, 207 L. Ed. 2d 1101 (2020); *State v. Jenkins*, 303 Neb. 676, 931 N.W.2d 851 (2019), *cert. denied* ___ U.S. ___, 140 S. Ct. 2704, 206 L. Ed. 2d 844 (2020).

barred and time barred under Nebraska postconviction law. The court found the claim was procedurally barred because Lotter had not raised it in any of his postconviction motions filed after 2002, when *Atkins* announced the constitutional rule that criminals who are intellectually disabled are ineligible for imposition of the death penalty.

The court found that Lotter's *Atkins* claim was time barred under Neb. Rev. Stat. § 29-3001(4) (Reissue 2016), because it had not been filed within 1 year from any of the five triggering events identified in that statute. More specifically, the court rejected Lotter's argument that his *Atkins* claim was timely under § 29-3001(4)(b), reasoning that Lotter could have, with reasonable diligence, discovered the factual predicate for his *Atkins* claim more than 1 year before he filed the fifth postconviction motion. The court also rejected Lotter's argument that his *Atkins* claim was timely under § 29-3001(4)(d), which requires that a postconviction claim be filed within 1 year from "[t]he date on which a constitutional claim asserted was initially recognized by the Supreme Court of the United States or the Nebraska Supreme Court . . . ." The court reasoned that Lotter's claim was based on the constitutional right first announced nearly 20 years ago in *Atkins*, and it rejected Lotter's contention that his claim was based on a new constitutional right recognized in the 2017 case of *Moore v. Texas (Moore I)*,[14] a case we discuss later in our analysis.

After concluding that neither of the claims presented in Lotter's fifth postconviction motion entitled him to relief, the court denied the motion without an evidentiary hearing. Lotter filed this timely appeal.

II. ASSIGNMENT OF ERROR

Lotter assigns, consolidated and restated, that the district court erred by not granting an evidentiary hearing on both of the claims alleged in his fifth successive motion for postconviction relief.

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[14] *Moore v. Texas*, ___ U.S. ___, 137 S. Ct. 1039, 197 L. Ed. 2d 416 (2017).

III. STANDARD OF REVIEW

[1] In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.[15]

[2,3] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law which an appellate court reviews independently of the lower court's ruling.[16] Similarly, if the facts in a case are undisputed, the issue as to when the statute of limitations begins to run is a question of law.[17]

IV. ANALYSIS

To address Lotter's assignments of error, we begin by reviewing the legal standards, both substantive and procedural, which govern proceedings under the Nebraska Postconviction Act.[18]

1. Standards Governing Postconviction Relief

[4,5] In Nebraska, postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations that render the judgment void or voidable.[19] Under the postconviction statutes, defendants in custody under sentence "may file a verified motion, in the court which imposed such sentence, stating the grounds relied upon and asking the court to vacate or set aside the sentence."[20] Such a motion must allege facts which, if proved, constitute a

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[15] *State v. Torres*, 300 Neb. 694, 915 N.W.2d 596 (2018).

[16] *Mata, supra* note 13.

[17] *Torres, supra* note 15.

[18] See Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 2016).

[19] *State v. Combs*, 308 Neb. 587, 955 N.W.2d 322 (2021).

[20] § 29-3001(1).

denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.[21]

[6] The Nebraska Postconviction Act requires a court to grant a prompt hearing on a motion for postconviction relief "[u]nless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief . . . ."[22] Under this standard, an evidentiary hearing is not required when (1) the motion does not contain factual allegations which, if proved, constitute an infringement of the movant's constitutional rights rendering the judgment void or voidable; (2) the motion alleges only conclusions of fact or law without supporting facts; or (3) the records and files affirmatively show that the defendant is entitled to no relief.[23]

In addition to the substantive rules governing postconviction relief, there are procedural rules which can bar postconviction relief regardless of the merits of a particular claim. Here, the district court determined that Lotter's *Atkins* claim was both procedurally barred and time barred under Nebraska law. We recite the general principles governing procedural bars and time bars in the next two sections of this opinion, and apply those principles later in our analysis.

(a) Procedural Limitations on Postconviction Relief

[7-9] The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.[24] Therefore, it is fundamental that a motion for postconviction relief cannot be used to secure review of issues

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[21] *State v. Martinez*, 302 Neb. 526, 924 N.W.2d 295 (2019); *State v. Taylor*, 300 Neb. 629, 915 N.W.2d 568 (2018).

[22] § 29-3001(2).

[23] See, *State v. Munoz*, 309 Neb. 285, 959 N.W.2d 806 (2021); *State v. Malone*, 308 Neb. 929, 957 N.W.2d 892 (2021), *modified on denial of rehearing* 309 Neb. 399, 959 N.W.2d 818.

[24] *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009).

which were known to the defendant and could have been litigated on direct appeal.[25] We have explained that when an issue could have been raised on direct appeal, it is procedurally barred from postconviction relief,[26] no matter how the issues may be phrased or rephrased.[27]

[10,11] Additionally, the statute governing postconviction relief expressly provides that a "court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner."[28] We have long construed this provision to require that all available grounds for postconviction relief must be stated in the initial postconviction motion and, once that motion has been judicially determined, any subsequent postconviction motion regarding the same conviction and sentence may be dismissed by the district court unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing the prior motion.[29] Stated differently, a defendant is entitled to bring a successive postconviction motion only when the face of the motion affirmatively shows that the issues raised therein could not have been raised in prior motions.[30] In the

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[25] *Id.*

[26] See *Mata, supra* note 13.

[27] See *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991).

[28] § 29-3001(3).

[29] See *State v. Reichel*, 187 Neb. 464, 191 N.W.2d 826 (1971). See, also, *State v. Watkins*, 284 Neb. 742, 746, 825 N.W.2d 403, 406 (2012) (holding "court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion"); *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999).

[30] See *Lotter, supra* note 24, 278 Neb. at 477, 771 N.W.2d at 561 (finding Lotter's constitutional claim based on allegation of perjured trial testimony was procedurally barred because "Lotter fails to allege that this evidence was unavailable before any of the numerous challenges already made to his convictions and sentences"). See, also, *State v. Jackson*, 296 Neb. 31, 892 N.W.2d 67 (2017); *State v. Marshall*, 272 Neb. 924, 725 N.W.2d 834 (2007); *State v. Ortiz*, 266 Neb. 959, 670 N.W.2d 788 (2003).

absence of such affirmative allegations, there is "no justification for allowing a prisoner to continue litigation endlessly by piecemeal post conviction attacks on his conviction and sentence."[31] A prisoner cannot wait to see if some postconviction claims will succeed and, when they do not, dust off other claims and subsequently attempt to litigate them.[32]

(b) Time Limitations on Postconviction Claims

In 2011, the Legislature amended the Nebraska Postconviction Act to establish a 1-year limitations period for filing postconviction motions.[33] Section 29-3001(4) of the act provides:

> (4) A one-year period of limitation shall apply to the filing of a verified motion for postconviction relief. The one-year limitation period shall run from the later of:
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> (a) The date the judgment of conviction became final by the conclusion of a direct appeal or the expiration of the time for filing a direct appeal;
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> (b) The date on which the factual predicate of the constitutional claim or claims alleged could have been discovered through the exercise of due diligence;
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> (c) The date on which an impediment created by state action, in violation of the Constitution of the United States or the Constitution of Nebraska or any law of this state, is removed, if the prisoner was prevented from filing a verified motion by such state action;
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> (d) The date on which a constitutional claim asserted was initially recognized by the Supreme Court of the United States or the Nebraska Supreme Court, if the newly recognized right has been made applicable retroactively to cases on postconviction collateral review; or
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> (e) August 27, 2011.

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[31] *Reichel, supra* note 29, 187 Neb. at 467, 191 N.W.2d at 828.

[32] See *Ryan, supra* note 29.

[33] See 2011 Neb. Laws, L.B. 137, § 1, now codified at § 29-3001(4).

[12] The 1-year limitation period set out in § 29-3001(4) governs all postconviction motions, including successive motions[34] and those challenging a death sentence.[35]

With this substantive and procedural framework in mind, we address Lotter's assignments of error. Because Lotter's primary arguments on appeal pertain to his *Atkins* claim, we address that claim first.

2. Lotter's *Atkins* Claim

Lotter argues the district court erred by failing to grant him an evidentiary hearing on his *Atkins* claim. As stated, the district court denied an evidentiary hearing on Lotter's *Atkins* claim after determining it was both procedurally barred and time barred under Nebraska law.

To avoid being procedurally barred, the face of Lotter's fifth postconviction motion must affirmatively show that his *Atkins* claim could not have been raised in any of his prior postconviction motions.[36] And to avoid being time barred under § 29-3001(4), Lotter's *Atkins* claim must have been filed within 1 year from one of the triggering events in that statute.

As we read Lotter's fifth postconviction motion, he asserts three reasons why his *Atkins* claim is not procedurally barred or time barred. The first two are somewhat interrelated, in that he argues the face of his fifth successive motion affirmatively shows he could not have raised an *Atkins* claim in any of his prior postconviction motions because (1) the factual predicate for his claim did not exist until he was diagnosed as intellectually disabled in March 2018[37] and/or (2) he could not have known he had a viable *Atkins* claim until the U.S. Supreme released its opinion in *Moore I*.[38] Alternatively, Lotter's

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[34] See *Torres, supra* note 15.

[35] See, e.g., *id*.; *Mata, supra* note 13; *Lotter, supra* note 7.

[36] See *Lotter, supra* note 24. See, also, *Jackson, supra* note 30; *Marshall, supra* note 30; *Ortiz, supra* note 30.

[37] See § 29-3001(4)(b).

[38] See § 29-3001(4)(d). See, also, *Moore I, supra* note 14.

motion asserts that because he has been diagnosed as intellectually disabled, he can overcome Nebraska's procedural and time bars by asserting a claim of "'actual innocence'" under the U.S. Supreme Court's holding in *Sawyer v. Whitley.*[39]

For the sake of completeness, we also note that Lotter's appellate briefing presents an issue which was not expressly alleged in his fifth postconviction motion: He asserts that the language of Neb. Rev. Stat. § 28-105.01(2) (Cum. Supp. 2020), which states, "Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person with an intellectual disability," effectively exempts an *Atkins* claim from all of the procedural and time limitations set out in the Nebraska Postconviction Act, and allows such a claim to be raised at any time.

To analyze Lotter's arguments, we begin with a review of the U.S. Supreme Court cases recognizing and refining the constitutional rule that forbids imposing the death penalty on those who are intellectually disabled. We then review Nebraska's statute and case law defining intellectual disability for purposes of imposing the death penalty.

(a) U.S. Supreme Court Precedent

In the 2002 case of *Atkins*,[40] the U.S. Supreme Court first held that imposing the death penalty on "mentally retarded criminals" amounts to cruel and unusual punishment prohibited by the Eighth Amendment. The clinical term "mental retardation" has since been changed to "intellectual disability,"[41]

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[39] *Sawyer v. Whitley*, 505 U.S. 333, 339, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992).

[40] *Atkins, supra* note 2, 536 U.S. at 321.

[41] See, *Hall v. Florida*, 572 U.S. 701, 704, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014) (citing "Rosa's Law, 124 Stat. 2643," which changed entries in U.S. Code from "'mental retardation'" to "'intellectual disability'"); Robert L. Schalock et al., *The Renaming of* Mental Retardation*: Understanding the Change to the Term* Intellectual Disability, 45 Intellectual and Developmental Disabilities 116 (2007); American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 33 (5th ed. 2013).

and this opinion uses the current clinical term unless quoting directly from earlier opinions.

The majority in *Atkins* acknowledged that just a decade earlier, in its 1989 opinion in *Penry v. Lynaugh*,[42] it found "insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment." But *Atkins* observed that in the years following *Penry*, Congress and at least 18 state legislatures, including Nebraska's, had enacted laws generally "prohibiting the execution of mentally retarded persons."[43] The *Atkins* majority viewed that as a national legislative consensus that "death is not a suitable punishment for a mentally retarded criminal."[44] The majority concluded that imposing the death penalty on this class of offenders did not further the goals of deterrence or retribution underpinning the death penalty, and it found "no reason to disagree with the judgment of 'the legislatures that have recently addressed the matter.'"[45] *Atkins* therefore announced a new constitutional rule which categorically forbids imposing the death penalty on persons who are intellectually disabled.

However, the majority in *Atkins* did not adopt a specific test for determining which offenders are intellectually disabled, observing there was not yet a "national consensus" on that question.[46] Instead, *Atkins* expressly left to the states "'the task of developing appropriate ways to enforce the constitutional restriction.'"[47] But the *Atkins* majority emphasized that when states are defining intellectual disability, they

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[42] *Penry v. Lynaugh*, 492 U.S. 302, 335, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), abrogated, *Atkins, supra* note 2.

[43] *Atkins, supra* note 2, 536 U.S. at 315.

[44] *Id.*, 536 U.S. at 321.

[45] *Id.*

[46] See *id.*, 536 U.S. at 317.

[47] *Id.*

should be guided by current "clinical definitions of mental retardation."[48] *Atkins* cited to clinical definitions promulgated by the American Psychiatric Association in its "Diagnostic and Statistical Manual of Mental Disorders" and the American Association of Mental Retardation (subsequently named "American Association on Intellectual and Developmental Disabilities"),[49] which *Atkins* summarized as defining "mental retardation [to] require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that manifest before age 18."[50]

In the decades since *Atkins* was decided, the U.S. Supreme Court has issued three opinions considering challenges to the sufficiency of a state's definition of "intellectual disability" under the constitutional rule announced in *Atkins*.[51] In each post-*Atkins* case, the Court measured the state's definition of intellectual disability against the current clinical definitions and the medical community's diagnostic framework, which it has consistently described as having three criteria: "[1] significantly subaverage intellectual functioning, [2] deficits in adaptive functioning[,] and [3] onset of these deficits during the developmental period."[52] Because Lotter relies on at

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[48] *Id.*, 536 U.S. at 318.

[49] *Id.*, 536 U.S. at 308, n.3.

[50] *Id.*, 536 U.S. at 318.

[51] *Moore v. Texas*, ___ U.S. ___, 139 S. Ct. 666, 203 L. Ed. 2d 1 (2019); *Moore I, supra* note 14; *Hall, supra* note 41.

[52] *Hall, supra* note 41, 572 U.S. at 710. Accord *Moore I, supra* note 14, 137 S. Ct. at 1045 (describing "the generally accepted, uncontroversial intellectual-disability diagnostic definition" as having "three core elements: (1) intellectual-functioning deficits . . . ; (2) adaptive deficits . . . ; and (3) the onset of these deficits while still a minor"); *Moore, supra* note 51, 139 S. Ct. at 668 ("[t]o make a finding of intellectual disability, a court must see: (1) deficits in intellectual functioning—primarily a test-related criterion . . . ; (2) adaptive deficits, 'assessed using both clinical evaluation and individualized . . . measures,' . . . ; and (3) the onset of these deficits while the defendant was still a minor").

least one of these post-*Atkins* cases to argue that his intellectual disability claim could not have been filed sooner than 2018, we summarize those cases before addressing his arguments.

In the 2014 case of *Hall v. Florida*,[53] the Court examined Florida's statutory definition of intellectual disability, which appeared on its face to incorporate the diagnostic framework referenced in *Atkins*. But the Florida Supreme Court had construed the statutory definition to impose a strict intelligence quotient (IQ) cutoff score of 70, and, under that construction, defendants with an IQ above 70 were prohibited from presenting other evidence of intellectual disability, including evidence of adaptive deficits. *Hall* found that Florida's definition of intellectual disability, as interpreted by its courts, was unconstitutional to the extent it considered an IQ score to be final and conclusive evidence of a defendant's intellectual capacity. Such a construction, *Hall* explained, was not "informed by the views of medical experts,"[54] because the medical community does not support a fixed IQ cutoff, and instead "understand[s] that an IQ test score represents a range rather than a fixed number."[55] *Hall* instructed that when using IQ test scores "to asses a defendant's eligibility for the death penalty, a State must afford these test scores the same studied skepticism that those who design and use the tests do"[56] and therefore must take into account an IQ test's "'standard error of measurement'" or "SEM" range.[57] And when a defendant's IQ

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[53] *Hall, supra* note 41, 572 U.S. at 711 (noting Florida statute defined intellectual disability as "'significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18'" and defined "'significantly subaverage general intellectual functioning'" as "'performance that is two or more standard deviations from the mean score on a standardized intelligence test'").

[54] *Id*., 572 U.S. at 721.

[55] *Id*., 572 U.S. at 723.

[56] *Id*.

[57] *Id*., 572 U.S. at 722.

score falls within the test's acknowledged margin of error, the defendant must be allowed to present additional evidence of intellectual disability, including testimony regarding adaptive deficits. The *Hall* majority stated that the "legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework."[58] The majority in *Hall* stopped short of holding that a state's definition of intellectual disability will not satisfy the principles of *Atkins* unless it complies in all respects with the current diagnostic criteria employed by psychiatric professionals, but it again emphasized that courts may "not disregard these informed assessments."[59]

In the 2017 case of *Moore I*, the U.S. Supreme Court considered the sufficiency of the definition used by the Texas Court of Criminal Appeals (Texas CCA) to find the defendant was not intellectually disabled.[60] The Supreme Court was critical of the definition applied by the Texas CCA, because it departed from the accepted clinical standards discussed in *Atkins* and *Hall*.[61] Among other shortcomings, the Texas definition relied on outdated lay perceptions and lay stereotypes to determine who was intellectually disabled. And when assessing deficits in adaptive functioning, the definition deviated from prevailing clinical standards by overemphasizing adaptive strengths. Based on these and other shortcomings, the Supreme Court held that the definition of intellectual disability relied upon by the Texas CCA created an unacceptable risk that the death penalty would be imposed on persons with intellectual disabilities, in violation of *Atkins*. *Moore I* therefore vacated the defendant's death sentence and remanded the matter for further proceedings in accordance with the opinion.

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[58] *Id.*, 572 U.S. at 721.

[59] *Id.*

[60] *Moore I, supra* note 14.

[61] *Id.*, 137 S. Ct. at 1044 (admonishing that courts do not have "leave to diminish the force of the medical community's consensus" when construing statutory definitions of intellectual disability).

On remand, the Texas CCA reevaluated the evidence and again concluded the defendant did not meet the definition of an intellectually disabled person. The U.S. Supreme Court reversed that decision in *Moore v. Texas* (*Moore II*),[62] reasoning that on remand, the Texas CCA may have used different language, but much of its analysis suffered from the same shortcomings identified in *Moore I.* The Supreme Court therefore not only reversed the judgment of the Texas CCA, but affirmatively held that the defendant had shown he was a person with an intellectual disability and thus was ineligible for imposition of the death penalty under *Atkins*.

(b) Nebraska's Definition of Intellectual Disability

In 1998, while Lotter's case was pending on direct appeal, the Nebraska Legislature amended § 28-105.01 to provide: "Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person with mental retardation."[63] This statute was referenced in *Atkins* to support the Court's finding of a national legislative consensus that "the mentally retarded should be categorically excluded from execution."[64] In 2013, the language of § 28-105.01(2) was amended to use the current clinical term "intellectual disability" instead of "mental retardation."[65] Currently, the relevant provisions of § 28-105.01 provide:

> (2) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person with an intellectual disability;
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> (3) As used in subsection (2) of this section, intellectual disability means significantly subaverage general intellectual functioning existing concurrently with

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[62] *Moore II, supra* note 51.

[63] 1998 Neb. Laws, L.B. 1266, § 2, codified at § 28-105.01(2) (Cum. Supp. 1998).

[64] *Atkins, supra* note 2, 536 U.S. at 318.

[65] See 2013 Neb. Laws, L.B. 23.

> deficits in adaptive behavior. An [IQ] of seventy or below on a reliably administered [IQ] test shall be presumptive evidence of intellectual disability.
>
> (4) If (a) a jury renders a verdict finding the existence of one or more aggravating circumstances . . . the court shall hold a hearing prior to any sentencing determination proceeding . . . upon a verified motion of the defense requesting a ruling that the penalty of death be precluded under subsection (2) of this section. If the court finds, by a preponderance of the evidence, that the defendant is a person with an intellectual disability, the death sentence shall not be imposed.

Our 2010 opinion in *State v. Vela*[66] is the only case to date where we have applied the definition of intellectual disability in § 28-105.01(3). In *Vela*, the defendant was convicted of five counts of first degree murder. After the jury found the existence of aggravating circumstances,[67] the defendant filed a verified motion using the procedure in § 28-105.01(4)(a), seeking a ruling that he was intellectually disabled and therefore ineligible for imposition of the death penalty. After an evidentiary hearing, the district court found the defendant had proved "significantly subaverage general intellectual functioning"[68] because the evidence showed he had a full-scale IQ test score of 75 on a reliably administered test and, adjusted for the SEM, the court considered that a score in a "'range between 75 and 70.'"[69] But the district court found the defendant failed to prove, by a preponderance of the evidence,[70] that he also had significant "deficits in adaptive behavior."[71] The court therefore overruled the motion, after

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[66] *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010).

[67] See Neb. Rev. Stat. § 29-2520 (Cum. Supp. 2020).

[68] § 28-105.01(3).

[69] *Vela, supra* note 66, 279 Neb. at 146, 777 N.W.2d at 304.

[70] See § 28-105.01(4).

[71] § 28-105.01(3).

which a three-judge panel imposed a sentence of death on each conviction.

On direct appeal, we found no error in the district court's conclusion that the defendant failed to prove he was intellectually disabled for purposes of § 28-105.01(2). Our analysis focused primarily on the court's finding that the defendant had not proved the second factor of Nebraska's statutory test, relating to deficits in adaptive behavior. *Vela* was decided before *Hall* and both *Moore* cases, but our analysis relied on *Atkins* and appropriately emphasized the need to construe Nebraska's statutory factors in a manner consistent with "current clinical models."[72] *Vela* recognized that "[m]ental retardation is a clinical diagnosis"[73] and that "to reach any meaningful determination of whether a convicted defendant with an IQ in the low 70's is a person with mental retardation" courts must apply the current clinical diagnostic standards.[74]

With this jurisprudential and statutory background in mind, we summarize Lotter's allegations regarding his *Atkins* claim, after which we consider, de novo, whether that claim is procedurally barred or time barred.[75]

(c) Lotter's Allegations of Intellectual Disability

Lotter's fifth successive postconviction motion alleged that in 2018, his attorney retained an expert to evaluate whether Lotter is intellectually disabled. The expert reviewed Lotter's records, conducted interviews, and administered testing to determine Lotter's current intellectual and adaptive functioning. In March 2018, the expert prepared a report concluding that Lotter "qualifies for the diagnosis of Intellectual Developmental Disability." Lotter attached that report to

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[72] *Vela, supra* note 66, 279 Neb. at 149, 777 N.W.2d at 306.

[73] *Id*.

[74] *Id*. at 150, 777 N.W.2d at 306.

[75] See *Mata, supra* note 13.

his fifth postconviction motion. Among other things, the report states that in 2018, Lotter's full-scale IQ was 67, which the expert described as "consistent with mild intellectual disability." In addition to the IQ score, the report states that Lotter "has significant impairments in all three domains of adaptive functioning, including conceptual, social, and practical," and that "Lotter's problems are developmental in nature and were present since childhood." The report also states that when Lotter was approximately 10 years old, testing by his treating psychologist showed a full-scale IQ of 76. The State's briefing on appeal also directs us to historical evidence in the existing record regarding Lotter's IQ, including a defense witness who testified during the sentencing phase that Lotter's full-scale IQ was 92.

(d) Lotter's Arguments

As stated, the district court concluded that Lotter's *Atkins* claim is procedurally barred because it could have been raised in any of his prior postconviction motions after *Atkins* was decided in 2002. Additionally, the court concluded the *Atkins* claim was time barred, rejecting Lotter's arguments it was timely under either § 29-3001(4)(b) or § 29-3001(4)(d).

On appeal, Lotter challenges the district court's conclusion that his *Atkins* claim is procedurally barred and time barred. He also argues that the procedural and time bars in the Nebraska Postconviction Act do not apply to an *Atkins* claim. We address each of Lotter's arguments in turn.

(i) Lotter's Claim Not Timely Under § 29-3001(4)(b)

[13-15] Under § 29-3001(4)(b), a postconviction claim is timely if it is filed within 1 year of the date "on which the factual predicate of the constitutional claim or claims alleged could have been discovered through the exercise of due diligence." The factual predicate for a postconviction claim is properly understood as the "important objective facts" that

support the claim.[76] We have explained that the 1-year period in § 29-3001(4)(b) begins to run when the objective facts underlying the claim could reasonably be discovered, and that date is "distinct from discovering that those facts are actionable."[77] In other words, the inquiry for purposes of § 29-3001(4)(b) concerns when the important objective facts could reasonably have been discovered, not when the claimant should have discovered the legal significance of those facts.[78]

Lotter argues the factual predicate of his *Atkins* claim could not reasonably have been discovered until March 2018, when testing showed he had a full-scale IQ of 67 and an expert diagnosed him as intellectually disabled. For the same reason, Lotter argues he could not have raised an *Atkins* claim in any of his prior postconviction motions, and thus the claim should not be procedurally barred. We disagree.

[16,17] The factual predicate for an intellectual disability claim under *Atkins* does not depend on either a formal clinical diagnosis or a particular IQ score. Instead, the important objective facts supporting a claim of intellectual disability are those relating to the clinical diagnostic factors discussed in *Atkins* and the factors set out in § 28-105.01. As such, the factual predicate of an *Atkins* claim necessarily includes facts relating to subaverage intellectual functioning,[79] deficits in adaptive functioning,[80] and the "onset of these deficits during the developmental period."[81]

Our review of the existing record in this case belies Lotter's argument that he could not, with reasonable diligence, have discovered the important objective facts supporting an

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[76] See *State v. Mamer*, 289 Neb. 92, 99, 853 N.W.2d 517, 524 (2014).

[77] See *id.*

[78] See *id.*

[79] See, *Atkins, supra* note 2; *Vela, supra* note 66. See, also, § 28-105.01(3).

[80] *Id*.

[81] See *Hall, supra* note 41, 572 U.S. at 710.

Atkins claim before 2018. In Lotter's direct appeal in 1998, we discussed the following expert testimony:

> Lotter has several mental disorders that have been ongoing since birth, that Lotter had those disorders at the time the crimes were committed, and that Lotter would continue to have those disorders. [A medical expert] described Lotter as "extremely dysfunctional" and stated that Lotter's mental disorders impaired his ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.[82]

During Lotter's trial, the medical expert also testified there was a "high probability" that Lotter has "organic damage in the brain." The record also shows that in 1981, at the age of 10, Lotter received a full-scale IQ test score of 76. While such a score, even after being adjusted for the SEM, would still be above 70, and thus would not support the statutory presumption of intellectual disability under § 28-105.01(3), Lotter is simply wrong to suggest that an adjusted IQ score in the low 70s could not support a finding of intellectual disability in Nebraska.[83]

[18,19] The plain language of § 28-105.01(3) does not establish a strict cutoff IQ score of 70; rather, it creates an evidentiary presumption in favor of finding intellectual disability when the defendant has an IQ score of 70 or below on a reliably administered test. Moreover, unlike the Florida Supreme Court in *Hall*, this court has not construed § 28-105.01 in

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[82] *Lotter, supra* note 3, 255 Neb. at 516, 586 N.W.2d at 632.

[83] See, e.g., *Atkins, supra* note 2, 536 U.S. at 309 n.5 (noting IQ between 70 and 75 "is typically considered the cutoff IQ score for the intellectual function prong of the [intellectual disability] definition"); *Vela, supra* note 66, 279 Neb. at 150, 777 N.W.2d at 307 (noting expert testimony that under clinical standard "'"it is possible to diagnose mental retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior"'").

a way that would prohibit those with an IQ score above 70 from presenting other evidence that would support a finding of intellectual disability.[84] Instead, as *Vela* recognized, Nebraska courts apply current clinical standards to the evidence in order to "reach [a] meaningful determination of whether a convicted defendant with an IQ in the low 70's is a person with mental retardation."[85]

Moreover, Lotter's 2018 diagnosis of intellectual disability was based on evidence provided to the expert regarding significant deficits in adaptive functioning that had existed throughout Lotter's childhood and young adult life. In other words, Lotter has been aware of the objective facts relative to his deficits in adaptive functioning since his childhood. Similar evidence of deficits in adaptive functioning was adduced during Lotter's trial more than 20 years ago. And we cannot ignore the fact that Lotter's current postconviction counsel, during the records hearing in this case, expressly advised the district court:

> I want to make this clear for the record. There actually was an effort to raise an intellectual disability claim after Atkins came down in this case. I don't know if [the State's counsel] is familiar with those proceedings, but it occurred in the context of the federal habeas proceedings. And there was a request to remand to the district court for — or to the state court for an Atkins determination. That ball was dropped. There were no evaluations done at that time and . . . counsel abandoned the effort.

As such, we agree with the district court that Lotter could have discovered, through the exercise of due diligence, the factual predicate to support a constitutional claim of intellectual

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[84] See *Vela, supra* note 66.

[85] *Id.* at 150, 777 N.W.2d at 306.

disability under *Atkins* long before March 2018.[86] We therefore agree that Lotter's *Atkins* claim is not timely under § 29-3001(4)(b). And for the same reason, we also agree with the district court that Lotter's *Atkins* claim is procedurally barred, because he failed to raise it in his first postconviction motion after *Atkins* first announced the constitutional rule that those with an intellectual disability are ineligible for the death penalty.[87]

(ii) Lotter's Claim Not Timely Under § 29-3001(4)(d)

Lotter argues that his *Atkins* claim is timely under § 29-3001(4)(d) because it was filed within 1 year after *Moore I* was decided, and he contends *Moore I* recognized a new constitutional rule which applies retroactively.

Under § 29-3001(4)(d), a postconviction claim is timely if filed within 1 year of the "date on which a constitutional

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[86] See, e.g., *In re Jones*, 998 F.3d 187 (5th Cir. 2021) (holding defendant pointed to no factual predicate discovered in prior 1-year period that could not have been discovered earlier through exercise of due diligence to support intellectual disability claim); *In re Bowles*, 935 F.3d 1210, 1221 (11th Cir. 2019) (rejecting claim that factual predicate for claim of intellectual disability could not have been discovered previously through exercise of due diligence, reasoning, "[i]f, as he claims, he is an intellectually disabled person, then that factual predicate has existed for long enough that he could have brought his *Atkins* claims in his first habeas petition"); *State v. Jackson*, 2020 Ohio 4015, 157 N.E.3d 240 (2020) (finding successive postconviction claim based on *Atkins* was procedurally and time barred because defendant did not raise claim on direct appeal in 2002, in first postconviction motion in 2003, or in federal habeas action in 2007, and did not exercise due diligence in discovering facts to support intellectual disability before 2019).

[87] See *Lotter, supra* note 24, 278 Neb. at 477, 771 N.W.2d at 561 (postconviction claim of perjured testimony was procedurally barred because "Lotter fails to allege that this evidence was unavailable before any of the numerous challenges already made to his convictions and sentences"). See, also, *Jackson, supra* note 30; *Marshall, supra* note 30; *Ortiz, supra* note 30.

claim asserted was initially recognized by the Supreme Court of the United States or the Nebraska Supreme Court, if the newly recognized right has been made applicable retroactively to cases on postconviction collateral review." Lotter's argument that his *Atkins* claim was timely under § 29-3001(4)(d) requires us to determine whether *Moore I* recognized a new constitutional right which has been applied retroactively to cases on collateral review.

[20] As a general principle, the U.S. Supreme Court has said that state courts considering a matter on collateral review must give retroactive effect to new substantive rules of federal constitutional law.[88] Substantive rules of federal constitutional law include "'rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.'"[89]

No one disputes that *Atkins* announced a new substantive rule of federal constitutional law when it held that the 8th and 14th Amendments to the U.S. Constitution categorically prohibit imposing the death penalty on the class of offenders who are intellectually disabled.[90] But neither the U.S. Supreme Court nor this court has previously considered whether *Moore I* announced a new substantive rule of constitutional law which must be applied retroactively to cases on collateral review.

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[88] See *Montgomery v. Louisiana*, 577 U.S. 190, 200, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016) (holding that "when a new substantive rule of [federal] constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule"). See, also, *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

[89] *Montgomery, supra* note 88, 577 U.S. at 201, quoting *Penry, supra* note 42.

[90] *Penry, supra* note 42, 492 U.S. at 329 (noting "[i]f we were to hold that the Eighth Amendment [to the U.S. Constitution] prohibits the execution of mentally retarded persons . . . we would be announcing a 'new rule'").

Most state and federal courts to have considered the question have concluded that neither *Hall* nor *Moore I* announced new substantive rules of constitutional law which must be applied retroactively to cases on collateral review.[91] Indeed, one recent case described "a substantial and growing body of case law that has declined to apply *Hall* and *Moore* [*I*] retroactively."[92] Generally speaking, these courts have reasoned that *Hall* and *Moore I* merely adopted new procedures for ensuring states follow the constitutional rule announced in *Atkins*, and did not expand the class of individuals protected by *Atkins*' prohibition against the execution of individuals who are intellectually disabled.[93] For example, in *Phillips v. State*,[94] a case in which the U.S. Supreme Court denied a writ of certiorari, the Florida Supreme Court reasoned that while *Hall* "more precisely defined the procedure that is to be followed in certain cases to determine whether a person facing the death penalty is intellectually disabled," it did not expand the "categorical prohibition on executing the intellectually disabled," and was thus a mere application of the rule announced in

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[91] See, e.g., *In re Richardson*, 802 Fed. Appx. 750 (4th Cir. 2020); *In re Payne*, 722 Fed. Appx. 534 (6th Cir. 2018); *Jackson, supra* note 86. See, also, *Weathers v. Davis*, 915 F.3d 1025 (5th Cir. 2019) (declining to apply *Moore I* retroactively); *Williams v. Kelley*, 858 F.3d 464 (8th Cir. 2017) (holding *Moore I* did not announce substantive rule of constitutional law that applied retroactively to successive habeas petition); *In re Henry*, 757 F.3d 1151 (11th Cir. 2014) (holding *Hall* did not announce new substantive constitutional rule that must be applied retroactively to cases on collateral review); *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), *cert. denied* ___ U.S. ___, 141 S. Ct. 2676, 210 L. Ed. 2d 837 (2021) (holding *Hall* did not apply retroactively on state collateral review). But see *White v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018) (without discussing retroactive application of *Hall* or *Moore I*, applied both cases to conclude that Kentucky's definition of intellectual disability was unconstitutional and remanded postconviction case for evidentiary hearing on *Atkins* claim using prevailing medical standards).

[92] *Jackson, supra* note 86 (citing cases).

[93] See cases cited *supra* note 91.

[94] *Phillips, supra* note 91, 299 So. 3d at 1020.

Atkins. The Sixth[95] and Eighth Circuits[96] have adopted similar reasoning with respect to *Moore I*.

[21] We likewise hold that neither *Hall* nor *Moore I* announced a new substantive rule of constitutional law that must be applied retroactively to cases on collateral review. Instead, both *Hall* and *Moore I* applied the substantive constitutional rule initially announced in *Atkins* and then refined the appropriate standards states should apply to determine whether an offender is intellectually disabled. Because *Moore I* did not recognize a new constitutional right which has been applied retroactively to cases on collateral review, that case did not trigger the 1-year limitations period under § 29-3001(4)(d).

(iii) Lotter's "Actual Innocence" Argument

Next, Lotter argues that Nebraska's rules governing procedural bars and time limitations in postconviction cases do not apply to his *Atkins* claim because, as someone who has been diagnosed as intellectually disabled, he is "actually innocent" of the death penalty. His argument rests on the U.S. Supreme Court opinion in *Sawyer*.[97] Before addressing Lotter's "actual innocence" argument under *Sawyer*, we provide an overview of the Supreme Court's jurisprudence in this area.

The Supreme Court's "actual innocence" jurisprudence developed in the context of claims for federal habeas corpus relief. In federal habeas cases, the general rule is that "claims forfeited under state law may support federal habeas relief only if the prisoner demonstrates cause for the default and prejudice from the asserted error."[98] But in 1986, the Court stated that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ

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[95] *In re Payne, supra* note 91.

[96] *Williams, supra* note 91.

[97] *Sawyer, supra* note 39.

[98] *House v. Bell*, 547 U.S. 518, 536, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006).

even in the absence of a showing of cause for the procedural default."[99] This is sometimes referred to as the "fundamental miscarriage of justice" exception, and it "is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons."[100] Over time, the Court has discussed at least three types of "actual innocence" claims, each with a different legal standard and purpose.[101]

In *Herrera v. Collins*,[102] the Court considered whether a habeas petitioner may assert a "freestanding" constitutional claim of actual innocence. In that case, the petitioner sought habeas relief alleging that newly discovered evidence showed he was "actually innocent" of the crime for which he stood convicted. The Court found that the "fundamental miscarriage of justice exception" did not apply, since that exception is only available when the prisoner uses a claim of actual innocence to excuse a procedural error relating to an independent constitutional claim.[103] But *Herrera* nevertheless assumed without deciding that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim."[104] *Herrera* noted the threshold showing for such a freestanding claim "would necessarily be extraordinarily high."[105]

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[99] *Murray v. Carrier*, 477 U.S. 478, 496, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986).

[100] *Herrera v. Collins*, 506 U.S. 390, 404, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993).

[101] See, generally, *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995); *Herrera, supra* note 100; *Sawyer, supra* note 39.

[102] *Herrera, supra* note 100, 506 U.S. at 401.

[103] *Id.*, 506 U.S. at 404.

[104] *Id.*, 506 U.S. at 417.

[105] *Id.*

In *Schlup v. Delo*,[106] the Court discussed using a claim of actual innocence as a "gateway" to obtain review of a constitutional claim that is otherwise procedurally barred under state law. The Court explained that a *Schlup*-type actual innocence claim is "'not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his [or her] otherwise barred constitutional claim considered on the merits.'"[107] Under *Schlup*, if the petitioner makes a "threshold showing" that he or she is actually innocent of the crime, the court may then consider whether the otherwise procedurally barred constitutional claim entitles the petitioner to federal habeas relief.[108]

In *Sawyer*, the Court described a third type of actual innocence claim—a claim that a habeas petitioner is "'actually innocent' of the death penalty."[109] A *Sawyer*-type actual innocence claim resembles the gateway actual innocence claim described in *Schlup*, as both are used to excuse a procedural default. But there is a critical difference: In a *Sawyer*-type claim, the petitioner alleges that the procedural default should be excused because he or she is actually innocent of the death penalty, rather than actually innocent of the crime itself.

The *Sawyer* Court acknowledged that the "prototypical example"[110] of an actual innocence claim involves "the case where the State has convicted the wrong person of the crime," and it recognized that "[i]t is more difficult to develop an analogous framework when dealing with a defendant who has been sentenced to death," since "[t]he phrase 'innocent of death' is not a natural usage of those words . . . ."[111] But it nevertheless found that such a claim was permissible in

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[106] See *Schlup, supra* note 101, 513 U.S. at 315.

[107] *Id.*, quoting *Herrera, supra* note 100.

[108] *Schlup, supra* note 101, 513 U.S. at 317.

[109] *Sawyer, supra* note 39, 513 U.S. at 349.

[110] *Id.*, 513 U.S. at 340.

[111] *Id.*, 513 U.S. at 341.

federal habeas cases. And in crafting the framework for actual innocence claims in the death penalty sentencing context, *Sawyer* focused on whether the petitioner was *eligible* for the death penalty, rather than whether the petitioner was innocent of the crime itself. *Sawyer* held that to demonstrate actual innocence of the death penalty, a petitioner "must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."[112] If such a showing is made, the federal habeas court can consider the merits of the constitutional claim, despite a state procedural bar.

Lotter correctly points out that Nebraska's postconviction jurisprudence has addressed the type of freestanding "actual innocence" claim described in *Herrera*.[113] And in 2016, we recognized that a *Herrera*-style claim of actual innocence "may be a sufficient allegation of a constitutional violation under the Nebraska Postconviction Act."[114] But even in cases where we have discussed a *Herrera*-type actual innocence claim, we have not once found a postconviction defendant to have satisfied the "extraordinarily high" showing necessary for an evidentiary hearing on such a claim.[115] Lotter himself has previously attempted to raise such an actual innocence claim, without success.[116]

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[112] *Id.*, 513 U.S. at 336.

[113] See, e.g., *State v. Dubray*, 294 Neb. 937, 885 N.W.2d 540 (2016); *State v. Phelps*, 286 Neb. 89, 834 N.W.2d 786 (2013); *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012), *disapproved on other grounds, State v. Avina-Murillo*, 301 Neb. 185, 917 N.W.2d 865 (2018); *Lotter, supra* note 24; *State v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000) (Gerrard, J., concurring).

[114] *Dubray, supra* note 113, 294 Neb. at 947, 885 N.W.2d at 551.

[115] *Id.* at 948, 885 N.W.2d at 551.

[116] See *Lotter, supra* note 24, 278 Neb. at 482, 771 N.W.2d at 564 (declining to decide whether *Herrera*-type claim of actual innocence is cognizable under Nebraska Postconviction Act because evidence failed to "present an issue of Lotter's actual innocence").

But in this case, Lotter is not asserting a freestanding *Herrera*-type actual innocence claim. Instead, he argues that "as a person with an intellectual disability, he is actually innocent of the death penalty and thus his claim is not subject to procedural default or time bars."[117] In other words, Lotter is asking us to recognize a *Sawyer*-type claim of actual innocence and to allow him to proceed with his *Atkins* claim despite Nebraska's time and procedural bar rules.

In asking us to apply *Sawyer* to his postconviction motion, Lotter refers us to several federal cases in which habeas petitioners have raised a *Sawyer*-type actual innocence claim to argue they should be allowed to proceed on their procedurally barred *Atkins* claims because their intellectual disability rendered them ineligible for the death penalty under state law.[118] But as we explain, recognizing an actual innocence exception to Nebraska's procedural and time bar rules is a policy decision for the Legislature. Our opinion in *State v. Hessler*[119] is instructive.

In *Hessler*, a defendant seeking postconviction relief urged us to recognize an exception to Nebraska's procedural bar rules based on the U.S. Supreme Court's decision in *Martinez v. Ryan*.[120] *Martinez* held that a state procedural default will not bar a federal habeas court from considering a substantial claim of ineffective assistance of trial counsel if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.[121] We declined to adopt the *Martinez* rule as part of our postconviction jurisprudence, explaining:

> *Martinez* did not recognize a constitutional right to effective assistance of postconviction counsel. Based

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[117] Reply brief for appellant at 7.

[118] E.g., *Prieto v. Zook*, 791 F.3d 465 (4th Cir. 2015); *Frazier v. Jenkins*, 770 F.3d 485 (6th Cir. 2014); *Sasser v. Norris*, 553 F.3d 1121 (8th Cir. 2009).

[119] *State v. Hessler*, 288 Neb. 670, 850 N.W.2d 777 (2014).

[120] *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012).

[121] *Id.*

> upon principles of equity, it expanded only the types of cause permitting a federal habeas court to excuse a procedural default in a federal habeas proceeding. Nothing in *Martinez* prevents state courts from enforcing procedural defaults in accordance with state law.[122]

Emphasizing that the Nebraska Legislature has limited state postconviction relief to a single proceeding, and has expressly authorized courts to reject successive motions,[123] *Hessler* concluded that whether to allow successive postconviction motions based on the reasoning of *Martinez* was a matter of policy to "be addressed in the first instance to the Legislature."[124]

[22] We find our reasoning in *Hessler* instructive in responding to Lotter's request that we recognize a *Sawyer*-type actual innocence exception to Nebraska's procedural and time bars. While *Sawyer* recognized a path for a federal habeas court to excuse a procedural default, it did not recognize a new constitutional rule. And we see nothing in the language of *Sawyer*, or in any subsequent Supreme Court decision, which requires state courts to apply the reasoning of *Sawyer* to excuse procedural defaults in postconviction cases, nor do we see anything in *Sawyer* which would prevent a state court from enforcing its procedural or time bar rules when presented with an *Atkins* claim on collateral review. Indeed, state courts have held that a postconviction defendant can waive an *Atkins* claim by failing to follow the state's applicable procedural rules.[125] And the expectation that state courts will enforce their procedural bar rules is the reason the *Schlup* and *Sawyer* rules were developed in the first instance.

We decline Lotter's invitation to import a *Sawyer*-type actual innocence claim into our state postconviction jurisprudence. Lotter may be able to assert such a claim in a federal

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[122] *Hessler, supra* note 119, 288 Neb. at 680, 850 N.W.2d at 786.

[123] See § 29-3001(3).

[124] *Hessler, supra* note 119, 288 Neb. at 681, 850 N.W.2d at 787.

[125] See, *State v. Frazier*, 115 Ohio St. 3d 139, 873 N.E.2d 1263 (2007); *Winston v. Com.*, 268 Va. 564, 604 S.E.2d 21 (2004).

habeas proceeding, but if a *Sawyer*-type actual innocence exception to Nebraska's procedural and time bars is to be recognized, it will be a policy decision made by the Legislature, not the courts. The district court did not err in rejecting Lotter's claim that he is actually innocent of the death penalty under *Sawyer*.

(iv) § 28-105.01 Does Not Exempt Atkins Claims From Procedural and Time Bars in § 29-3001

Finally, Lotter argues that his *Atkins* claim is not subject to the procedural or time limitations in § 29-3001 "because the express language of . . . § 28-105.01(2) states that the death penalty *shall not* be imposed upon any person with an intellectual disability '*notwithstanding any other provision of law.*'"[126] In other words, Lotter contends that when a postconviction motion raises an *Atkins* claim, that claim is exempted from the procedural and time limitations in the Nebraska Postconviction Act by the statutory language in § 28-105.01(2). To the extent this argument has been preserved for appellate review, we find it to be without merit.

[23] It is difficult to discern, from the record on appeal, whether this argument was presented to and passed upon by the district court. Generally, when the timeliness of a postconviction motion is at issue, the defendant must raise all applicable arguments in the district court to preserve them for appellate review.[127] The face of Lotter's fifth postconviction motion does not assert that the language of § 28-105.01(2)

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[126] Reply brief for appellant at 4 (emphasis in original).

[127] See *State v. Conn*, 300 Neb. 391, 914 N.W.2d 440 (2018). Accord *State v. Stelly*, 308 Neb. 636, 955 N.W.2d 729 (2021) (appellate court will not consider issue on appeal from denial of postconviction relief that was not raised in motion for postconviction relief or passed upon by postconviction court); *Munoz, supra* note 23 (appellate courts do not generally consider arguments and theories raised for first time on appeal; in appeal from denial of postconviction relief, appellate court will not consider for the first time on appeal issues not raised in verified motion).

exempts an *Atkins* claim from the procedural and time bars set out in the Nebraska Postconviction Act. And we see no such argument presented during the records hearing in February 2020. But the district court's order did briefly address, and reject, some sort of statutory argument based on the language of § 28-105.01(2), reasoning that the statute recognized only a "statutory claim, not a constitutional claim" that would be cognizable under the Nebraska Postconviction Act. Assuming without deciding that the district court was rejecting the same statutory argument Lotter now asserts on appeal, we reject it too.

[24,25] To consider the meaning of § 28-105.01(2), we apply familiar principles. When construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[128] Additionally, the rules of statutory interpretation require an appellate court to give effect to the entire language of a statute, and to reconcile different provisions of the statutes so they are consistent, harmonious, and sensible.[129] And in a previous case where we considered the meaning of the statutory definition of intellectual disability contained in § 28-105.01(3), we emphasized the importance of considering "the scope of the remedy to which its terms apply and [giving] the statute such an interpretation as appears best calculated to effectuate the design of the legislative provisions."[130]

[26] The Legislature first enacted § 28-105.01(2) in 1998,[131] several years before *Atkins* announced the constitutional rule banning imposition of the death penalty on persons with an intellectual disability. As such, § 28-105.01(2) was not

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[128] *Moore v. Nebraska Acct. & Disclosure Comm.*, 310 Neb. 302, 965 N.W.2d 564 (2021).

[129] *Id.*

[130] *Vela, supra* note 66, 279 Neb. at 151, 777 N.W.2d at 307.

[131] See 1998 Neb. Laws, L.B. 1266, § 2.

enacted to codify the constitutional right recognized in *Atkins*. Rather, it was enacted to establish a statutory right in Nebraska prohibiting imposition of the death penalty on persons who are intellectually disabled. And to enforce that statutory right, the Legislature enacted a specific statutory procedure to allow a defendant facing the death penalty to file a verified motion and request a hearing to determine intellectual disability, before any sentencing determination is made.[132]

The 1998 statutory scheme also provided a procedure for those who had already been sentenced to death when the new statutory right was recognized:

> Within one hundred twenty days after the effective date of this act, a convicted person sentenced to the penalty of death prior to the effective date of this act may bring a verified motion in the district court which imposed such sentence requesting a ruling that the penalty of death be precluded under subsection (2) of this section and that the sentence be vacated.[133]

Lotter had been sentenced to death when this statute took effect, but he did not file a motion under this provision. In 2013, the Legislature removed this provision from § 28-105.01 altogether,[134] presumably because the 120-day window had long since expired. Currently, the only enforcement procedures available to defendants are those set out in § 28-105.01(4), and those procedures apply only to defendants who have not yet been sentenced to death. As such, Lotter's opportunity to request a hearing to enforce the statutory right not to have the death penalty imposed has long since passed.

Having waived his opportunity to pursue the statutory enforcement procedure previously available to him, Lotter

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[132] *Id.*, codified at § 28-105.01(5) (Cum. Supp. 1998). See, also, § 28-105.01(4) (Cum. Supp. 2020).

[133] 1998 Neb. Laws, L.B. 1266, § 2, codified at § 28-105.01(4) (Cum. Supp. 1998).

[134] See 2002 Neb. Laws, L.B. 1, 3d Spec. Sess.

now asserts a constitutional claim of intellectual disability under *Atkins*, and he attempts to use language from § 28-105.01(2) to avoid the procedural and time bars under the Nebraska Postconviction Act. Specifically, Lotter argues that the phrase "notwithstanding any other provision of law" in § 28-105.01(2) should be construed as a Legislative "mandate[]"[135] that "renders moot"[136] the procedural and time limits which otherwise govern postconviction motions. We reject Lotter's proposed construction.

[27] As a general principle of statutory construction, courts have held that use of the phrase "notwithstanding any other provision of law" in a statute signals legislative intent to override other provisions of law that conflict with the statute.[137] We agree with this general principle,[138] but we see no conflict between the statutory rights and enforcement procedures set out in § 28-105.01 and the procedural and time limitations set out in the Nebraska Postconviction Act.

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[135] Reply brief for appellant at 5.

[136] *Id*. at 6.

[137] See, e.g., *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18, 113 S. Ct. 1898, 123 L. Ed. 2d 572 (1993) (noting that "in construing statutes, the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section"); *Conyers v. Merit Systems Protection Bd.*, 388 F.3d 1380 (Fed. Cir. 2004) (holding phrase "notwithstanding any other provision of law" generally signals that specific statutory provision is to override more general conflicting statutory provisions that would otherwise apply to same subject); *Arias v. Superior Court*, 46 Cal. 4th 969, 983, 209 P.3d 923, 931, 95 Cal. Rptr. 3d 588, 598 (2009) (noting statutory phrase "notwithstanding any other provision of law" generally declares legislative intent to override "only those provisions of law that conflict with the act's provisions—not, as defendants contend, every provision of law").

[138] See *State ex rel. B.H. Media Group v. Frakes*, 305 Neb. 780, 798-99, 943 N.W.2d 231, 246 (2020) ("by using the phrase '[n]otwithstanding any other provision of law,' the Legislature demonstrated with clear intention that [the subject statute] should prevail *when it conflicts with another statute*") (emphasis supplied).

Lotter's argument conflates the statutory right recognized in § 28-105.01(2) with the constitutional right recognized in *Atkins*. But the statutory right is enforced presentence through the procedures set out in § 28-105.01(4), not through the Nebraska Postconviction Act, which exists only to remedy prejudicial constitutional violations that render a judgment void or voidable.[139]

Simply put, there is no conflict between the provisions of § 28-105.01(2) and the provisions of § 29-3001(4), because they address separate legal claims and provide separate legal remedies. The former applies to statutory claims of intellectual disability raised in a verified motion prior to the imposition of any sentence, and the latter applies to all constitutional claims raised in a verified postconviction motion by prisoners in custody seeking to vacate or set aside their sentence.

[28] We conclude the phrase "notwithstanding any other provision of law" in § 28-105.01(2) neither impacts nor overrides the procedural and time limitations applicable to postconviction motions under the Nebraska Postconviction Act. Lotter's argument to the contrary is meritless.

(e) Conclusion on Lotter's *Atkins* Claim

For the foregoing reasons, we agree with the district court that Lotter's *Atkins* claim is both procedurally barred and time barred.

3. Lotter's L.B. 268 Claim

Lotter also argues he was entitled to an evidentiary hearing on his other postconviction claim, which asserted that the passage, and subsequent repeal by public referendum, of L.B. 268[140] had the effect of vacating, and then reinstating, his death sentences. The district court properly denied relief on this claim without an evidentiary hearing.

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[139] See, § 29-3001(1); *Combs, supra* note 19.

[140] See 2015 Neb. Laws, L.B. 268.

We described the procedural history of L.B. 268 in *State v. Jenkins*:[141]

> In May 2015, the Nebraska Legislature passed 2015 Neb. Laws, L.B. 268,—which abolished the death penalty in Nebraska—and then overrode the Governor's veto of the bill. The Legislature adjourned sine die on May 29. Because L.B. 268 did not contain an emergency clause, it was to take effect on August 30.
>
> Following the passage of L.B. 268, opponents of the bill sponsored a referendum petition to repeal it. On August 26, 2015, the opponents filed with the Nebraska Secretary of State signatures of approximately 166,000 Nebraskans in support of the referendum. On October 16, the Secretary of State certified the validity of sufficient signatures. Enough signatures were verified to suspend the operation of L.B. 268 until the referendum was approved or rejected by the electors at the upcoming election. During the November 2016 election, the referendum passed and L.B. 268 was repealed, that is, in the language of the constitution, the act of the Legislature was "reject[ed]."

[29,30] All of Lotter's constitutional claims relating to L.B. 268 are premised on the theory that the legislation went into effect on August 30, 2015, and commuted his death sentences to life in prison, and that thereafter, the successful public referendum resulted in reimposition of his death sentences. But as the district court correctly recognized, we have rejected that theory as legally flawed in three prior cases—*Jenkins*,[142] *State v. Mata*,[143] and *State v. Torres*.[144] In *Jenkins*, we explained that L.B. 268 never actually went into effect,

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[141] *Jenkins, supra* note 13, 303 Neb. at 706, 931 N.W.2d at 876-77. See, also, Neb. Const. art. III, § 3.

[142] *Jenkins, supra* note 13.

[143] *Mata, supra* note 13.

[144] *Torres, supra* note 13.

because "upon the filing of a referendum petition appearing to have a sufficient number of signatures, operation of the legislative act is suspended so long as the verification and certification process ultimately determines that the petition had the required number of valid signatures."[145] And we expressly held in *Jenkins*, *Mata*, and *Torres* that because L.B. 268 was suspended and never went into effect, any death sentences in effect at the time were unchanged.[146]

On appeal, Lotter acknowledges that our decisions in *Jenkins*, *Mata*, and *Torres* are "adverse[]"[147] to his central premise that L.B. 268 vacated his death sentences and the successful public referendum reinstated them. Lotter's appellate brief summarily states that all three cases "were wrongly decided and should be overruled,"[148] but he presents no argument in support, and we see no principled reason to revisit our settled jurisprudence on the issue.

Because all of Lotter's L.B. 268 claims are premised on the meritless theory that L.B. 268 vacated or changed his death sentences, the district court properly denied relief on these claims without conducting an evidentiary hearing.[149]

V. CONCLUSION

Because Lotter's *Atkins* claim is both procedurally barred and time barred, and because his L.B. 268 claim is meritless, the district court did not err in denying Lotter's fifth successive motion for postconviction relief without conducting an evidentiary hearing. The judgments are affirmed.

Affirmed.

Freudenberg, J., not participating.

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[145] *Jenkins, supra* note 13, 303 Neb. at 710, 931 N.W.2d at 879. See, also, *Torres, supra* note 13; *Mata, supra* note 13.

[146] *Id.*

[147] Brief for appellant at 27.

[148] *Id.*

[149] See, *Torres, supra* note 13; *Mata, supra* note 13; *Jenkins, supra* note 13.

IN THE DISTRICT COURT OF RICHARDSON COUNTY, NEBRASKA

STATE OF NEBRASKA, Plaintiff, v. JOHN L. LOTTER, Defendant.	)	Case Nos. CR 99-9000001, CR 99-9000002, CR 99-9000003 **ORDER ON DEFENDANT'S AMENDED POST-CONVICTION MOTION**

INTRODUCTION

This matter comes before the Court on John L. Lotter's ("Defendant") Amended Motion for Post-Conviction Relief filed on March 27, 2018. In response to Defendant's motion, the State filed a responsive pleading on May 29, 2018. The Court entered an Order on July 5th, 2018, denying the March 27, 2018 Post-Conviction Relief Motion. Defendant then filed a motion to reconsider this Court's July 5th Order. However, the July 5 Order was entered when the Court did not have jurisdiction. When the Court entered its July 5th Order, Defendant still had a pending post-conviction appeal that was being decided by the Nebraska Supreme Court. Defendant's pending post-conviction appeal was then subsequently decided by the Nebraska Supreme Court in *State v. Lotter*, 301 Neb. 125 (September 28, 2018), *cert. denied*, 139 S. Ct. 2716 (June 17, 2019). Following the Nebraska Supreme Court's decision, this Court entered the Nebraska Supreme Court's mandate affirming the denial of post-conviction relief.

On February 5, 2020, a hearing was held to address Defendant's March 27, 2018 Amended Motion for Post-Conviction Relief and/or the Motion to Reconsider this Court's July 5th Order. Given the odd procedural background of this case and that the Court lacked jurisdiction to enter its July 5th Order, all parties agreed that the February 5, 2020 hearing should be considered a records hearing on Defendant's March 27, 2018 Amended Motion for Post-Conviction Relief.

At the February 5, 2020 hearing, Defendant was represented by Attorneys Mr. Tim Noerrlinger and Ms. Rebecca Woodman. The State of Nebraska ("State") was represented by Attorney James Smith. Both parties presented oral arguments. Having reviewed the parties' pleadings and arguments, the Courts finds and orders as follows:

FACTS

In May of 1995, Defendant was convicted by a jury. Defendant was convicted of three counts of first degree murder, three counts of use of a weapon to commit a felony, and one count of burglary, and was sentenced to death by a panel of three judges. On June 7, 1999, the United States Supreme court denied Defendant's petition for writ of certiorari, and Defendant's conviction became final. *See Lotter v. Nebraska*, 526 U.S. 1162 (1999).

Defendant sought post-conviction relief in state court, which was denied by the Richardson County District Court. The denial was affirmed by the Nebraska Supreme Court. *See State v. Lotter*, 266 Neb. 245 (2003). On May 11, 2004, Defendant filed a petition for writ of habeas corpus with the United States District Court for the District of Nebraska. On April 29, 2005, the matter was stayed pending the resolution of state post-conviction proceedings. On May 6, 2010, the stay was terminated. Moreover, on March 18, 2001, the federal district court denied relief, and the Court of Appeals for the Eighth Circuit denied the application for a certificate of appealability.

The Defendant's current Amended Motion for Post-conviction Relief is Defendant's fifth post-conviction proceeding under the Nebraska Post-Conviction Act. All of Defendant's previous post-conviction motions were denied. The Nebraska Supreme Court affirmed the denials of Defendant's four prior post-conviction proceedings. (*See State v. Lotter*, 266 Neb. 245 (2003) (first post-conviction proceeding); *See State v. Lotter*, 278 Neb.466 (2009) (second post-conviction proceeding); *See State v. Lotter*, Case No. 3-12-837 to Case No. S-12-839 (2013) (third post-conviction proceeding summarily affirmed); and also, *State v. Lotter, supra*, 301 Neb. 125 (2018) (fourth post-conviction proceeding).

Next, the Nebraska Legislature ("Legislature") enacted legislation, LB 268, to abolish the death penalty. Governor Pete Ricketts ("Governor") vetoed LB 268. On May 27, 2015, the Legislature overrode the veto and enacted LB 268. The proposed bill stated that "It is the intent of the Legislature that in any criminal proceeding in which the death penalty has been imposed but not carried out prior to the effective date of this act, such penalty shall be changed to life imprisonment." This would have included Lotter's cases referenced herein. See Laws 2015 LB 268 § 23. The legislation was to go into effect on August 30, 2015.

However, on June 1, 2015, four days after the Legislature overrode the Governor's veto, Nebraskans for the Death Penalty filed documents with the Nebraska Secretary of State seeking a referendum related to LB 268. The referendum petition with ten percent of registered voters

signatures was filed on August 26, 2015, four days before the LB 268 was to have taken effect. On November 8, 2016, voters rejected the death penalty repeal.

STANDARD OF REVIEW

Under the Nebraska Post-Conviction Act, the defendant must allege facts which, if proved, constitute a denial or violation of the defendant's rights under the Nebraska or U.S. Constitution and which cause the judgment against the defendant to be void or voidable. Further, the defendant seeking post-conviction relief has the burden of establishing such a basis for relief. A court is not required to grant an evidentiary hearing on a motion for post-conviction relief which alleges only conclusions of law or fact. *State v. Lytle, 224 Neb. 486, 398 N.W.2d 705 (1987); State v. Von Dorn*, 234 Neb. 93, 449 N.W.2d 530 (1989). In an evidentiary hearing, the trial judge resolves conflicts in evidence and questions of fact. *State v. Schmidt*, 24 Neb. App. 239, 885 N.W.2d 51 (2016).

Moreover, an evidentiary hearing is not required under the Nebraska Post-Conviction Act when: (1) The motion for post-conviction relief does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the defendant; or (2) Notwithstanding proper pleading of facts in a motion for post-conviction relief, the files and records in the defendant's case do not show a denial or violation of the defendant's constitutional rights causing the judgment against the defendant to be void or voidable. *State v. Cole*, 207 Neb. 318, 295 N.W.2d 776 (1980); *State v. Luna*, 230 Neb. 966, 434 N.W.2d 526 (1989); *See also* § 21:4.Procedure and evidentiary hearing, Nebraska Appellate Practice & Procedure § 21:4. Finally, successive post-conviction motions need not be entertained or granted an evidentiary hearing unless the subsequent post-conviction motion shows, on its face, that the basis for post-conviction relief was not available at the time of the prior motion. *State v. Watkins*, 284 Neb. 742 (2012); *See also, State v. Marshall,* 272 Neb. 924 (2007).

ANALYSIS

Defendant argues that Defendant is entitled to post-conviction relief, and an evidentiary hearing, based on two grounds: 1) LB 268 vacated Defendant's death sentence which was then reinstated through the referendum process, and the reinstatement was a violation of Defendant's constitutional rights, and 2) Defendant is intellectually disabled and is actually innocent.

In connection with ground one, Defendant alleges several factors why Defendant is entitled to Post-Conviction Relief, namely: a) the referendum was legally insufficient due to a lack of a sworn statement; b) Defendant was denied due process when Defendant's sentence was changed

by LB 268 and then reinstated by the referendum; c) the repeal of LB 268 was an unconstitutional bill of attainder; and d) the Secretary of State and the Governor's alleged involvement in the referendum process violated Defendant's 8th Amendment Constitutional rights. With regard to ground one and the above factors, the Court finds that none of the factors listed entitle Defendant to Post-Conviction Relief or an evidentiary hearing. With regard to ground two, the Court finds Defendant's claim is time and procedurally barred. Because Defendant's Post-Conviction Motion is based on conclusions of law and fact that are erroneous, the Court denies Defendant's Motion for Post-Conviction relief without an evidentiary hearing.

1) LB 268 did not vacate Defendant's death sentence and it was not then reinstated through the referendum process, and Defendant's constitutional rights have not been violated.

a.) The referendum petition was legally sufficient, Defendant was not denied due process, and, the repeal of LB 268 was not an unconstitutional bill of attainder.

The referendum petition was legally sufficient, Defendant was not denied due process, and the repeal of LB 268 was not an unconstitutional bill of attainder**.** Defendant's motion argues that the referendum petition repealing LB 268 was legally insufficient due to a lack of sworn statement by the sponsors. Defendant further argues that if the referendum petition was legally insufficient, it never had any force or effect, meaning LB 268 is currently in effect. Defendant concludes that if LB 268 is currently in effect, Defendant's death sentence is void. Defendant further argues that LB 268 retroactively commuted Defendant's death sentence to life in prison. Moreover, Defendant argues that when the referendum reinstated the death penalty, this reinstated Defendant's death sentence and this reinstatement was a violation of Defendant's due process rights, was an unconstitutional bill of attainder, and violated the Eighth Amendment. The Court disagrees.

The Nebraska Supreme Court addressed these same arguments in *State v. Jenkins*, 303 Neb. 676, 710–11, 931 N.W.2d 851, 879 (2019); *State v. Mata*, 304 Neb. 326, 934 N.W.2d 475 (2019); and *State v. Torres*, 304 Neb. 753, 936 N.W.2d 730 (2020). Indeed, the Nebraska Supreme Court stated that "the filing of petitions on August 26, 2015—prior to the effective date of L.B. 268—suspended its [LB 268] operation until Nebraskans effectively rejected the bill by voting to repeal it…L.B. 268 never went into effect[.]" *Jenkins*, 303 Neb. at 710–11, 931 N.W.2d at 879. The Nebraska Supreme Court again reaffirmed this notion by holding in *State v. Mata* that the Legislature's repeal of death penalty was suspended before the repeal took effect due to the filing of the referendum petition. *Mata*, 304 Neb. 326, 934 N.W.2d 475. Therefore, it was determined

that the repeal did not entitle the defendant to a reduction of his sentence of death for his conviction for first-degree murder. *Id.* Moreover, discussed was defendant's contention that the suspension of LB 268 could not occur until a sufficient number of signatures were certified would have made ineffectual the people's power to suspend a legislative act's operation. *Id.* Finally, in determining that LB 268 never took effect, the Nebraska Supreme Court noted that allowing the repeal to take effect for any period would have defeated the referendum's purpose of preserving the death penalty. *See, supra, Mata*. This holding was again reaffirmed in *State v. Torres* of this year where it was determined that the legislature's repeal of the death penalty was suspended before the repeal took effect by the filing of the referendum petition. *See State v. Torres*, 304 Neb. 753, 936 N.W.2d 730 (2020).

Additionally, Defendant's cruel and unusual punishment, due process, and bill of attainder claims have no merit. These same claims were raised and summarily rejected. *See, supra, Torres* and *Mata*. As the Nebraska Supreme Court in *Mata* stated:

> It appears Mata may also be claiming he was subjected to cruel and unusual punishment by the political debate on the death penalty, the possibility that his sentence would be changed by L.B. 268 regardless of whether it went into effect, and the threat of his sentence of death remaining through the repeal of L.B. 268. However, the entirety of Mata's analysis and supporting authority presumes his sentence was changed by L.B. 268, which, as determined above, did not occur.

Mata, 304 Neb. at 340, 934 N.W.2d at 485. Moreover, the Nebraska Supreme Court has held that the Legislature's repeal of the death penalty was suspended before the repeal took effect by the filing of the referendum petition, and therefore, the referendum did not "reimpose" the death penalty upon any defendants in violation of due process, did not constitute an unconstitutional bill of attainder, and did not constitute cruel and unusual punishment. *Torres*, 304 Neb. 753, 936 N.W.2d 730. Because the repeal was suspended, there was no change in any defendants' original death sentence. *Id.*

In the present case, Defendant's arguments before this Court fail for the reasons stated above. None of Defendant's arguments have merit. Moreover, Defendant's arguments have already previously been treated by the Nebraska Supreme Court. *See, supra, Mata, Torres,* and *Jenkins*. The Nebraska Supreme Court has decided several times that Defendant's arguments in connection with LB 268 are without merit. Because ground one of Defendant's Post-Conviction

Motion is based on conclusions of law and fact that are erroneous, the Court denies Defendant's Motion for Post-Conviction relief without an evidentiary hearing.

b.) The Secretary of State and the Governor's alleged involvement in the referendum process did not violate the separation of powers doctrine or Defendant's Eighth Amendment rights.

The Secretary of State and the Governor's alleged involvement in the referendum process did not violate the separation of powers doctrine or Defendant's Eighth Amendment rights. As above, Defendant's separation of powers argument alleged in ground one, also based on LB 268, has no merit because this same claim was rejected as having no merit by the Nebraska Supreme Court. In *State v. Mata*, The Nebraska Supreme Court noted that:

> Mata asserts the Governor and State Treasurer impermissibly organized and contributed to a group which opposed L.B. 268 and worked toward its repeal through the public referendum, solicited money for the opposition group, and took on leadership within the opposition group. Mata seems to make claims of due process and cruel and unusual punishment violations derived from separation of powers requirements under the Nebraska Constitution. However, while Mata states that the participation of the Governor and State Treasurer in the process of the referendum violated his due process rights and rights against cruel and unusual punishment, it is unclear on what basis Mata is alleging such violations occurred. Instead, Mata's argument exclusively centers on how the Governor's and State Treasurer's actions supporting and participating in the referendum violated the constitutional separation of powers requirements and that such violations invalidated the referendum.

Mata, 304 Neb. 326, 342, 934 N.W.2d 475, 486. This argument is essentially Defendant's argument. In rejecting this argument the Nebraska Supreme Court discussed that:

> Without determining the constitutional appropriateness of the Governor's and State Treasurer's participation in the referendum process, Mata's separation of powers claims fail because the result of the referendum is not invalidated even if such actions were constitutionally improper as alleged. Such a determination is in line with cases where we have previously found dual-service violations. In those cases, the remedy was not abandonment of any action in which the violating party participated but was to remove the party from the violating position.

Id. at 343–44, 934 N.W.2d at 487. Similar to *Mata*, this court finds that Defendant, like the defendant in *Mata*, did not allege facts sufficient to invalidate the repeal of L.B. 268 due to separation of powers violations. Therefore, as in *Mata*, Defendant's claims fail to establish a denial or infringement on his rights so as to render his sentence void or voidable. Thus, Defendant's separation of powers argument is also without merit. Because ground one of Defendant's Post-

Conviction Motion is based on conclusions of law and fact that are erroneous, the Court denies Defendant's Motion for Post-Conviction relief without an evidentiary hearing.

2. Defendant's claim with regard to his intellectual disability is time and procedurally barred.

Defendant's claim with regard to his intellectual disability is time and procedurally barred. The Defendant's claim alleges due process, "actual innocence of death penalty," and related Eighth Amendment claims. Defendant argues that the Defendant's death sentences are cruel and unusual punishment and violate due process because he is and has been intellectually disabled. The Court disagrees.

First, to the extent the defendant relies upon Neb. Rev. Stat. § 28–105.01(2), a statute that was enacted in 2013, the defendant's post-conviction claim is a statutory claim, not a constitutional claim. The Nebraska Post-Conviction Act is limited to constitutional claims which make a judgment or sentence void or voidable. *See* Neb. Rev. Stat. § 29-3001.

Second, the claim is time barred by Neb. Rev. Stat. § 29-3001(4), because the Amended Post- Conviction Motion does not affirmatively allege that the factual predicate of the claim could not have been discovered through the exercise of due diligence within the one-year period of limitation when the constitutional claim itself had been recognized by the United States Supreme Court. This constitutional claim has been recognized by the United States Supreme Court for more than fifteen years.

Indeed, *Atkins v. Virginia*, 536 U.S. 304 (2002) held that under the Eighth Amendment the execution of the intellectually disabled is cruel and unusual punishment. Moreover, *Atkins* was decided in 2002. Additionally, *Hall v. Fla.*, 572 U.S. 701, 134 S. Ct. 1986 (2014) similarly held that the Eighth Amendment prohibits execution of the intellectually disabled. Moreover, *Hall* recognized that when a defendant's IQ is 70, or within a margin of error of 70, adaptive behavior deficits should be considered in analyzing whether a defendant is intellectually disabled. The *Hall* court essentially stated that relying only on an IQ score could not be the only measure of whether one is intellectually disabled, especially when the IQ score was near or around 70. The Court notes that Defendant argues that it is by *Hall's* standard that he is considered intellectually disabled. Moreover, *Hall* also noted that, " 'the views of medical experts' do not 'dictate' a court's intellectual-disability determination." *Hall*, 134 S.Ct., at 2000.

Even more, in *Williams v. Kelley*, 858 F .3d 464 (8th Cir. 2017), the Eighth Circuit Court of Appeals held that the United States Supreme Court's decision in *Hall* did not present a new rule of constitutional law applicable retroactively to cases on collateral review, meaning a post-conviction based on a claim of intellectually disability can be time barred. *Id.* (holding also that the Supreme Court's decision in *Moore v. Texas, 137 S. Ct. 1039, 197 L. Ed. 2d 416 (2017)* prohibiting state court's use of out-of-date medical guides, rather than contemporary guides reflecting medical community's consensus, to determine whether defendant was intellectually disabled, did not present new rule of constitutional law applicable retroactively to cases on collateral review). For example, in *State v. Lotter*, 301 Neb. 125 (2019), the Nebraska Supreme Court relied upon federal law and the Eighth Circuit to conclude Defendant's Sixth Amendment jury claim, in his most recent Nebraska Supreme Court post-conviction appeal, was time barred. Defendant made a *Hurst* claim, which the Nebraska Supreme Court held was not a "newly recognized right [that] has been made applicable retroactively to cases on post-conviction collateral review" and thus was "time barred" by Neb. Rev. Stat. § 29-3001(4) of the Nebraska Post-conviction Act. *Lotter*, 301 Neb. at 145-46. Based on the same reasoning, Defendant's current claim is also time barred.

In the present case, *Hall* was decided four years prior to Defendant's current post-conviction motion. Moreover, on direct appeal, Defendant did not raise any claim that the 8th Amendment prohibited his execution on the grounds of intellectual disability. Additionally, this ground was not raised in any of Defendant's four prior post-conviction proceedings. Finally, this ground was not raised within one year of the United States Supreme Court decision in *Hall*. Moreover, Defendant's intellectual disability claim is not a new rule of constitutional law applicable on collateral review. *See, supra*, *Williams*. Moreover, the timeline demonstrates that the factual predicate of the claim could have been discovered through the exercise of due diligence within the one-year period of limitation when the constitutional claim itself had been recognized by the United States Supreme Court in *Hall*. Therefore, Defendant's motion is time barred pursuant to § 29- 3001(4).

The Defendant's second ground of his current fifth motion for post-conviction relief is denied without an evidentiary hearing as being time and procedurally barred. Because Defendant's claim is time and procedurally barred, the Defendant's Motion for Post-Conviction relief based on this ground is denied without an evidentiary hearing.

CONCLUSION

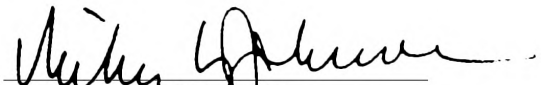
The Court's prior order issued on July 5, 2018, denying post-conviction relief is hereby vacated because the order was entered when the Court did not have jurisdiction due to the Defendant's then-pending post-conviction appeal, which was later decided by the Nebraska Supreme Court in *State v. Lotter*, 301 Neb. 125 (September28, 2018), *cert. denied*, 139 S. Ct. 2716 (June 17, 2019).

Here, the Court concludes that none of the claims Defendant has made entitle Defendant to Post-Conviction Relief or an evidentiary hearing. Moreover, one of Defendant's claims is time and procedurally barred. Because Defendant's Post-Conviction Motion is based on conclusions of law and fact that are erroneous, the Court denies Defendant's Motion for Post-Conviction relief without an evidentiary hearing.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that Defendant's Motion for Post-Conviction Relief is denied without an evidentiary hearing.

DATED this 15th day of April, 2020.

BY THE COURT:



VICKY L. JOHNSON
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I, the undersigned, certify that on April 15, 2020 , I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

Rebecca E Woodman
rewlaw@outlook.com

Timothy S Noerrlinger
tim@naylorandrappllaw.com

James D Smith
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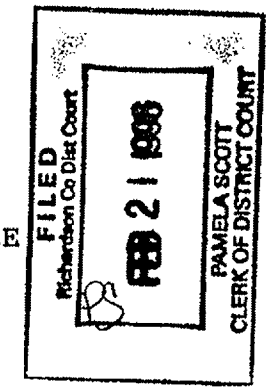
Date: April 15, 2020 BY THE COURT: Pamela Scott
CLERK

FIRST DISTRICT COURT SEAL RICHARDSON COUNTY, NEBRASKA

IN THE DISTRICT COURT OF RICHARDSON COUNTY, NEBRASKA



THE STATE OF NEBRASKA, Plaintiff, vs. JOHN L. LOTTER, Defendant.	)	CASE NO. 2682 ORDER OF SENTENCE

THIS MATTER came on for sentencing of the Defendant, John L. Lotter, on the 21st day of February, 1996. The Defendant was present in person with his Attorneys, Emil M. Fabian and Barbara Thielen. The State of Nebraska was represented by James A. Elworth, Special Deputy Richardson County Attorney, and Douglas E. Merz, Richardson County Attorney.

The Court informed the Defendant that on May 25, 1995, pursuant to jury verdict, he had been convicted on three counts of the crime of murder in the first degree. The Court then asked the Defendant if the Defendant or his counsel had anything to say as to why judgment and sentence should not be passed against him. Neither the Defendant nor his counsel made any statement or showing as to why sentence should not be imposed at this time.

The Court then asked the Defendant and his counsel if there were any other matters to be presented, in addition to the evidence adduced on November 20-22 and 27, 1995, and the oral argument presented on January 29, 1996, concerning the nature of the sentence to be imposed on the Defendant. No further evidence was adduced, and no further argument was made.

The Court, consisting of a three-judge sentencing panel composed of Judges Robert T. Finn, Michael W. Amdor, and Gerald E. Moran, unanimously finds as follows:

I.

PROCEDURAL BACKGROUND

In this case, a trial by jury commenced on May 15, 1995. On May 25, 1995, the jury returned a verdict of guilty on three counts of murder in the first degree in Case No. 2682. The jury also returned a verdict of guilty of burglary in Case No. 2683; and guilty of three counts of use of a deadly weapon to commit a felony in Case No. 2684. Judgment on the verdicts was entered against the Defendant on each count on the same date. A sentencing date was set for July 25, 1995. This original sentencing date was continued until November 20, 1995, at which time a hearing began on aggravating and mitigating circumstances. Prior to the commencement of the proceedings for determination of sentence, upon request by the trial judge, the Honorable C. Thomas White, Chief Justice of the Nebraska Supreme Court, designated District Judges Michael W. Amdor and Gerald E. Moran to sit with the trial judge, Robert T. Finn, as a panel to make the determination of the sentence to be imposed on the Defendant.

Prior to hearing on November 20, 1995, the defense filed several pre-hearing motions which, after argument of counsel, briefs, or both, were ruled upon as follows: (1) a motion to require identification of aggravating circumstances was overruled; (2) a motion regarding use of trial record and jury verdict at sentencing was overruled; (3) a motion to prevent

preparation of pre-sentence reports and defendant's objection to court ordered preparation of pre-sentence report were initially found to be moot at a hearing on August 16, 1995; upon further consideration this motion was overruled and a pre-sentence investigation was ordered herein on October 16, 1995; (4) a demand for jury trial on the sentence was withdrawn without prejudice by Defendant; (5) a motion to declare Nebraska death penalty statutes unconstitutional/motion to exclude death as a possible sentence was overruled; (6) a motion to preclude imposition of death penalty was overruled; (7) a motion to preclude evidence of alleged sexual assault and kidnapping and a motion in limine were sustained; (8) a motion to preclude imposition of death penalty (third) was overruled; and (9) a motion in limine regarding prior assaultive behavior was overruled.

The defense also filed a motion for discovery prior to sentencing which was sustained on August 16, 1995. On that date reciprocal discovery was ordered pursuant to statute. On August 24, 1995, the State filed a motion for the release of certain records. This motion was overruled on October 16, 1995.

On November 13, 1995, the Defendant filed a motion to disqualify Plaintiff's counsel. This motion was heard on November 20, 1995, and while the State was ordered precluded from introducing certain information or potential evidence, the motion to disqualify Plaintiff's counsel was overruled. The rulings on these motions will be discussed in detail in Section VI hereinafter.

II.

THE PENALTY-PHASE HEARING

A hearing on the aggravating and mitigating circumstances was held before the three-judge panel on November 20-22 and 27, 1995, with additional oral arguments heard on January 29, 1996. Prior to the start of the evidentiary hearing, a complete transcript of the testimony adduced at the Defendant's 1995 trial was furnished to each of the members of the three-judge panel. This testimony was received and examined by each of the judges before reaching a conclusion on the sentences to be imposed on the Defendant. In addition to the oral testimony of witnesses adduced by counsel, the following items were received in evidence at the sentencing hearing and have been considered by the members of the panel in reaching their conclusion:

Exhibit 123	Letter from Scott to Nissen.
Exhibit 130	Nebraska State Penitentiary file on John Lotter.
Exhibit 132	Transcript of testimony in State v. Lotter, (5 Vols.), Case No. 2682.
Exhibit 133	Verdict form, Count I, Case No. 2682.
Exhibit 134	Verdict form, Count II, Case No. 2682.
Exhibit 135	Verdict form, Count III, Case No. 2682.
Exhibit 136	Agreement with Thomas M. Nissen.
Exhibit 137	Judgment and Sentence in State v. Nissen, Case No. 2687.
Exhibit 138	Testimony of Nissen in this case, pp 467-477.
Exhibit 139	Testimony of Chrans in this case, pp 887 et seq.
Exhibit 140	Testimony of Schott in this case, pp 999-1001.
Exhibit 141	Amended information in State v. Nissen, Case No. 2687 with journal entries.
Exhibit 142	County Court complaint on Nissen, obstructing government operation (sent. 1 yr in 1992).
Exhibit 143	County Court complaint on Nissen, false reporting (fine).

Exhibit 144	County Court complaint on Nissen, third degree assault.
Exhibit 145	County Court complaint on Nissen.
Exhibit 146	Nissen charged with arson, burglary; plea 08-06-92 (concurrent sentence with obstructing government operation).
Exhibit 147	Information charging Nissen with burglary and possession firearm.
Exhibit 148	Information charging Nissen with first degree sexual assault and kidnapping - (dismissed).
Exhibit 149	Protection order.
Exhibit 150	Second Nissen interview with NSP.
Exhibit 151	Report of NSP Trooper Olberding.
Exhibit 152	Transcript of testimony in State v. Nissen (5 vols.), Case No. 2687.
Exhibit 153	NSP report on first Nissen interview.
Exhibit 154	Goos testimony in State v. Rust.
Exhibit 155	Goos affidavit.
Exhibit 156	Partial Bill of Exception in State v. Bradford.
Exhibit 157	State v. Bradford (sent. order).
Exhibit 158	State v. Floyd (sent. order).
Exhibit 159	Committment in State v. Blackbonnet.
Exhibit 160	State v. Burchetts (sent. order).
Exhibit 161	State v. Hasselhoffer (sent. order).
Exhibit 162	State v. Rolenc (sent. order).
Exhibit 163	State v. Riley (sent. order).
Exhibit 164	State v. Young (sent. order).
Exhibit 165	Partial Bill of Exceptions in State v. Barney.
Exhibit 166	State v. Escamilla (sent. order).
Exhibit 167	State v. Anderson, journal entry.
Exhibit 169	Certified copy committment of YDC Kearney 02/23/87.
Exhibit 170	Certified copy of District Court conviction in Buffalo County.
Exhibit 171	Lotter Miranda form.
Exhibit 175	Lotter's reckless driving conviction.
Exhibit 176	Lotter's escape conviction.
Exhibit 177	Lotter's attempted burglary conviction.
Exhibit 178	Lotter's driving under influence conviction.
Exhibit 179	Sentencing orders in first degree murder cases where death was imposed.
Exhibit 180	Sentencing order where life imposed ("not exhaustive").
Exhibit 181	Sentencing order in multiple homicide cases where life sentences were imposed.
Exhibit 182	
Exhibit 183	Report of (then Deputy) Hayes on Nissen's arson.
Exhibit 184	CV of Timothy Jeffrey, PhD.
Exhibit 185	Report of Timothy Jeffrey.
Exhibit 186	CV of Mary Ann Greene-Walsh.

Exhibit 187	Boystown rejection of placement.
Exhibit 188	CV of Paul Fine MD.
Exhibit 189	1974 report of microencephalopathy.
Exhibit 190	Report, head misshapen.
Exhibit 191	1980 evaluation by Dr. Fine.
Exhibit 192	1980 evaluation by clinical psychologist.
Exhibit 193	Nebraska Psychiatric Institute Evaluation.
Exhibit 194	Beitenmann report.
Exhibit 195	St. Joseph psych. hospitalization 08/09/85.
Exhibit 196	St. Joseph psych. hospitalization 04/04/89.
Exhibit 197	Buffalo County hospitalization.
Exhibit 198	Comprehensive Individualized Treatment Plan 02/10/83.
Exhibit 199	From ESU No. 4 in Auburn, NE, contains "sentence completion worksheets".

The sentencing panel also had before it the District Court file in this case, which file was not marked as an exhibit.

Based on the foregoing evidence, the panel proceeded to a consideration of the aggravating and mitigating circumstances set forth in Neb. Rev. Stat. Sections 29-2522 and 29-2523, as well as the non-statutory mitigating circumstances proffered by the Defendant.

III.

AGGRAVATING CIRCUMSTANCES

The panel finds as a matter of law that any determination that an aggravating circumstance exists must be found beyond a reasonable doubt.

Regarding the aggravating circumstances, the statutory definitions of which are hereafter set forth, the sentencing panel unanimously finds as follows for each such circumstance:

1. Aggravating Circumstances:

(a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity. (Section 29-2523(1)(a)).

No evidence was adduced tending to show that the Defendant had previously been convicted of another murder or of a crime involving the use or threat of violence to the person. Thus the first prong of this subsection is clearly not applicable to the Defendant. Rather, the State contends that the second prong of this subsection, that the offender has a substantial history of serious assaultive or terrorizing criminal activity, has been established for the Defendant.

At the sentencing hearing, the State presented evidence that the Defendant was twice committed to the Youth Development Center at Kearney, first in 1986 and again on February 23, 1987, for auto theft. The Defendant was 15 years old at the time of the first commitment. Within two or three weeks after being committed the second time, the Defendant escaped from the Youth Development Center by walking off the grounds. After that incident Lotter stole a car in an attempt to get back home. Defendant was spotted by a Buffalo County Sheriff's Deputy, and when the deputy tried to apprehend Defendant, Lotter led him on a high speed chase that, at times, reached speeds of 90 miles per hour. At one point, Lotter rammed a Shelton police cruiser, pushing it into a ditch. The deputy testified that Lotter's intent appeared to be to get away rather than intentionally inflict harm upon anyone.

As a result of this incident, Lotter was convicted as an adult in Buffalo County District Court of felony theft and felony escape charges. At the hearing in this case the State introduced evidence that, while waiting to be transported from Kearney to the Penitentiary, Lotter and two other individuals who were incarcerated with him planned to escape from jail. According to the evidence, a guard was to be assaulted and then bound with telephone cords. However, before the plan could be carried out, the chair legs and telephone cord were discovered and the plan was never put into effect. It should be noted, once again, that the Defendant was 15 years old at the time of this incident. Further, the record is barren as to whether criminal charges were

were ever filed against the Defendant as a result of this alleged plan to escape county jail. Thereafter, Lotter was committed to the Nebraska Penal Complex for consecutive terms of one and three years. At this time he had just turned 16 years of age.

The State produced evidence that within a month of Lotter's release from the Penitentiary in 1990, he was arrested for burglary, held in the Richardson County Jail, and, at some point, escaped from the Richardson County Jail. The record reflects that the Defendant was convicted of both burglary and escape, and on August 16, 1990, Lotter was sentenced to five year concurrent prison terms. The State did not offer any evidence as to the facts underlying these convictions.

The State further adduced evidence that on April 3, 1993, Lotter led a Missouri State Trooper on a high speed chase and, during the chase dangerously crossed a narrow bridge at a speed in excess of 70 miles per hour. When he was finally stopped the Defendant refused to lie face down when commanded to do so by the Missouri State Trooper. As result of his refusal to follow the trooper's command, the trooper held his gun on Lotter. It should be noted that Defendant did not attempt to hit the trooper or grab his gun, but did announce his refusal while in a prone position on his hands and knees. This high speed chase episode resulted in a 60 day jail sentence imposed on June 7, 1993.

The State further produced testimony from Rhonda McKenzie, Defendant's ex-girlfriend and mother of his child, who told of an incident in early 1993 when Defendant choked her to the point of

unconsciousness during a fight. As to this fight and others with Defendant, Ms. McKenzie indicated that both of them were equally responsible for the fights they had. As to the choking incident, she indicated that he stopped when he noticed she couldn't breathe. The evidence further reflects that the police were not called.

Ms. McKenzie also testified about an incident in the early fall of 1993 when Lotter bent her fingers, causing her pain, because she had told him to quit tipping over a girl's chair at a beer party. At this same beer party, which was held at the residence of Mary Hardenberger and her husband, Lotter became involved in an altercation with several of the approximately 25 guests. This altercation eventually resulted in Lotter being thrown off the front porch by Mrs. Hardenberger's husband. Mrs. Hardenberger recalled that while out on the front lawn Defendant threatened to shoot everyone at the party as a result of this fight. However, the degree of seriousness, or lack thereof, that the Hardenbergers and their guests gave the threat is evidenced by the fact that they did not call the police. It appears there was no need to do so, as the record is barren of any action taken by the Defendant to back up this threat.

The State's evidence in support of the second prong of subsection (1)(a) (substantial history of serious assaultive or terrorizing criminal activity) includes two high speed chases where Defendant's apparent motive is escape rather than a desire to seriously assault or terrorize others. One chase occurred

while Defendant was 15 years old. The other was an offense adequately punished by a sentence of 60 days in the county jail. These high speed chases clearly do not support a finding that this subsection applies to the Defendant.

In examining other evidence that the State offers in support of this subsection, this panel concludes that neither Lotter's threatened violence to other attendees at the Hardenberger's beer party, nor his mistreatment of Rhonda McKenzie, will support a finding beyond a reasonable doubt of the Defendant's intent to engage in serious assaultive or terrorizing criminal activity. As to the plan to escape from the Buffalo County Jail, there is no evidence that anyone was injured or assaulted. The escape plan, whatever it may have been, was never acted upon, and there is no evidence that criminal charges were ever filed. Once again, we note that Defendant was 15 years old at the time of the events in the Buffalo County Jail. We are unable to find beyond a reasonable doubt that this evidence supports a finding that this subsection applies to this Defendant. Finally, no evidence was presented as to the facts underlying the 1990 burglary and escape conviction relied upon by the State.

After considering all of the testimony and exhibits offered by the State in support of their contention that this subsection should be applied to this Defendant, the panel concludes that regardless of whether the events that have been testified to are considered alone, or in combination, there is insufficient evidence upon which to base a finding beyond a reasonable doubt

that the second prong of aggravating circumstance (1)(a) is applicable.

(b) The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator. (Section 29-2523(1)(b))

We find that the evidence fails to show beyond a reasonable doubt that the first prong of this subsection (the murder was committed in an apparent effort to conceal the commission of a crime) is applicable. We base this finding upon the rationale set forth in State v. Rust, 197 Neb. 528 (1977).

Considering the second prong of this subsection (the murder was committed in an apparent effort... to conceal the identity of the perpetrator of a crime), the evidence reflects that the Defendants, on the night these homicides were committed, and after arming themselves with a gun and knife procured by Defendant Lotter, drove to Humboldt, Nebraska, to the farmhouse of Lisa Lambert. They drove there for the express purpose of murdering Teena Brandon so that she would not be alive to act as a witness for the State in any potential prosecution against them for sexually assaulting and kidnapping her.

According to Nissen, on the way to Lambert's home, both Defendants agreed that anyone else present when Brandon was killed would also have to be killed. Nissen testified at Lotter's trial that he and Lotter, with Lotter being the actual trigger man, carried out their intent by first murdering Teena Brandon, and then murdering Lisa Lambert, and finally murdering Philip Devine.

The motive for the killing of Teena Brandon, to protect Nissen and Lotter from possible prosecution, was established not only by Marvin Nissen, but also by corroborating evidence provided by Linda Guiterres, Investigator Hayes, the Defendants' trip to Lincoln searching for Brandon on December 26 and 27, 1993, i.e., Lincoln pawn slip, as well as the testimony of Rhonda McKenzie and Kandi Nissen. A thorough discussion of the facts established in this case is found under Section VII hereinafter.

The motive for murdering Teena Brandon, twisted though it is, can be readily discerned from the facts adduced at trial concerning the feverish plotting and attempts to locate Brandon in the week prior to the murders. Lisa Lambert and Philip Devine, as even Nissen acknowledged, had caused them absolutely no harm or distress. From the facts developed at trial, there is quite simply no other motivation for this Defendant murdering Lisa Lambert and Philip Devine other than to conceal his identity as perpetrator of the crime of murdering Teena Brandon.

We therefore conclude that the second prong of this aggravating circumstance (the murder was committed in an apparent effort... to conceal the identity of the perpetrator of a crime) is clearly applicable beyond a reasonable doubt to the murder of Lisa Lambert and the murder of Philip Devine. Therefore, the panel determines that the second prong of aggravating circumstance (1)(b) is applicable to the Defendant beyond a reasonable doubt in the murders of Lisa Lambert and Philip Devine.

(c) The murder was committed for hire, or for pecuniary gain, or the Defendant hired another to commit the murder for the Defendant. (Section 29-2523(1)(c)).

The State adduced no evidence to support the existence of aggravating circumstance (1)(c), and the sentencing panel concludes that it is not applicable in this case.

(d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence. (Section 29-2523(1)(d)).

The State adduced no evidence to support the existence of aggravating circumstance (1)(d), and the sentencing panel concludes that it is not applicable in this case.

(e) At the time the murder was committed, the offender also committed another murder. (Section 29-2523(1)(e).

The testimony of Marvin Nissen at Defendant's trial, and corroborated by other evidence in the case, reveals that all three victims were murdered within minutes of each other in Lambert's home. The evidence adduced at Defendant's trial and the jury's verdict clearly establish that this aggravating circumstance (1)(e) is applicable beyond a reasonable doubt to this Defendant in each of the three murders in this case. The panel therefore determines that aggravating circumstance (1)(e) is applicable to the Defendant beyond a reasonable doubt in the murder of Teena Brandon, in the murder of Lisa Lambert, and in the murder of Philip Devine.

(f) The offender knowingly created a great risk of death to at least several persons. (Section 29-2523(1)(f)).

The State adduced no evidence to support the existence of aggravating circumstance (1)(f), and the sentencing panel concludes that it is not applicable in this case.

(g) The victim was a law enforcement officer or a public servant having custody of the offender or another. (Section 29-2523(1)(g)).

The State adduced no evidence to support the existence of aggravating circumstance (1)(g), and the sentencing panel concludes that it is not applicable in this case.

(h) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws. (Section 29-2523(1)(h)).

As to the first prong of this subsection (the crime was committed to disrupt or hinder the lawful exercise of any governmental function), the panel does not find sufficient statutory, case law, or evidence in the record to establish and support a finding beyond a reasonable doubt that this prong of (1)(h) is applicable to this Defendant. The panel therefore determines that this first prong of aggravating circumstance (1)(h) is not applicable to the Defendant in this case.

Considering the second prong of this subsection (the crime was committed to disrupt or hinder... the enforcement of the laws), after the alleged kidnapping and sexual assault of Teena Brandon on December 24, 1993, both Defendants were made aware on December 25, 1993, by Linda Guiterres that the police had been called in to investigate the case. On December 28, 1993, Investigator Hayes informed both Defendants of the allegations against them during questioning at police headquarters.

As discussed under subsection (1)(b) above, Nissen's account of his and Defendant's motivation for the murders is corroborated by other credible witnesses and exhibits in this case. As a result of not only the testimony supplied by Marvin Nissen, but by all of the corroborated evidence in this case, the panel finds the motive for the murder of Teena Brandon was to prevent her from being a witness for the State in any potential prosecution against each Defendant for kidnapping and sexually assaulting her. Clearly the murder of Teena Brandon was committed to disrupt or hinder the enforcement of the laws.

The panel concludes that the second prong of this aggravating circumstance (the crime was committed to disrupt or hinder... the enforcement of the laws) is applicable beyond a reasonable doubt to the murder of Teena Brandon. The panel therefore determines that this portion of aggravating circumstance (1)(h) is applicable to the Defendant beyond a reasonable doubt.

IV.

STATUTORY MITIGATING CIRCUMSTANCES

As to the mitigating circumstances, the statutory definitions of which are hereafter set forth, the sentencing panel unanimously finds as follows for each such circumstance:

(a) The offender has no significant history of prior criminal activity. (Section 29-2523(2)(a)).

The Defendant adduced no evidence to support the existence of this mitigating circumstance (2)(a), and the sentencing panel concludes that it is not applicable in this case.

(b) The offender acted under unusual pressures or influences or under the domination of another person. (Section 29-2523(2)(b)).

The panel finds no evidence that the Defendant was acting under the domination of another person at the time the homicides were committed.

Defendant does contend that this subsection should be found to be applicable in this case in that he acted under unusual pressures or influences. Defendant bases this contention on evidence he presented concerning his background. The Defendant was ostracized by potential friends and playmates as a child and isolated from his family due to a series of placements outside of the home which began when the Defendant was age eight. Dr. Paul Fine, a psychiatrist who treated Defendant as a child, testified

that Lotter was a social-isolate, a misfit, and not a leader. Dr. Fine also testified that during his professional assocation with the Defendant he formulated an opinion that Lotter's basic pathology was overwhelming anxiety in the face of stress; impulsive feelings and behavior; lack of skills to deal with stressful expectations in society; possible brain dysfunction; learning disabilities; and ongoing environmental stress.

Dr. Fine did not state that Defendant was unable to distinguish between right and wrong. He did state that once Defendant became hyper-aroused, agitated or impulsive, or overwhelmed with anxiety, he was unable to think of consequences and would be driven by his impulsiveness and anxiety. Dr. Fine testified that due to this pathology, Defendant is, in his opinion, definitely impaired. When Defendant is aroused by a stressful situation, he acts without thinking of the consequences.

The evidence adduced during Defendant's trial indicates that any pressure or influences that the Defendant was under at the time these three homicides were committed was a direct result of his deliberate, non-pressured actions on December 24, 1993 involving Teena Brandon. Thereafter, the Defendant and Marvin Nissen spent an entire week discussing their predicament and options for solving their self-inflicted problem of potential prosecution. The Defendants ultimately chose murdering Teena Brandon as the solution to their perceived problem.

The plan to murder Teena Brandon was discussed feverishly at times, and calmly at other times, during the week prior to the murders. The first attempt to murder Brandon in Lincoln failed

on December 26, 1993. Thereafter, the Defendants regrouped, and then continued to plot and search for Teena Brandon in order to murder her.

An examination of the psychiatric and psychological testimony produced by the Defendant indicates that Defendant's impulsive actions without considering consequences are brought on by duress. Defendant's contention is that he was under duress during the moments in which these murders were committed. However, the facts do not support such a finding nor the finding that (2)(b) is applicable in this case.

Defendant's psychological response to pressure situations might have had some limited impact in this case had the stressful situation been suddenly thrust upon him due to forces outside of his control. But the evidence reveals that one week of cold, calculated planning preceded these homicides. In fact, if there has ever been evidence presented in a Nebraska courtroom that a Defendant engaged in a more purposeful, calmly considered, deliberate, premeditated plot to murder, this panel is unable to uncover such a case. We therefore conclude that Defendant is not entitled to the benefit of this mitigating circumstance.

(c) The crime was committed while the offender was under the influence of extreme mental or emotional disturbance. (Section 29-2523(2)(c)).

The Defendant unquestionably experienced a tragic childhood. Unable to be controlled or taught while in school, he was removed from his home in Falls City and hospitalized at the Nebraska

Psychiatric Institute in Omaha for a five to six month period of time when he was only eight years old. Thereafter, he was placed at the Cedars Group Home in Lincoln; later hospitalized at the St. Joseph Center for Mental Health in Omaha; and ultimately was placed in a foster home in Omaha for emotionally disturbed children. His foster parents were Mr. and Mrs. Clarence Robinson, and Mr. Robinson testified at the sentencing hearing. While in the foster home the Defendant was seen by therapeutic case worker Mary Ann Greene-Walsh and Dr. Paul Fine. At 15 years of age the Defendant was committed to the Youth Development Center at Kearney, and thereafter, was in and out of institutions, both county jail and prison, until just months before the homicides in this case.

The psychiatrist, Dr. Paul Fine, labeled Defendant as "severely dysfunctional." Dr. Timothy Jeffrey, a psychologist, testified that the facts surrounding these homicides, as he understood them, would suggest to him that the Defendant was under emotional distress at the time the murders were committed. And, as discussed under subsection (2)(b) above, when the Defendant is under a great deal of stress, he acts without considering the consequences. Neither doctor suggested that the Defendant is unable to distinguish right from wrong, but rather, that he does not consider consequences of his actions while under duress.

The testimony of Dr. Fine is somewhat diminished by the fact that he had not seen the Defendant for ten years, and when he did visit with him for approximately one hour while preparing for his testimony, Dr. Fine and the Defendant did not discuss the

Defendant's mental state at the time the crimes were committed. Dr. Jeffrey's testimony was also hampered by the Defendant's unwillingness to discuss his mental state at the time of the crimes. In addition, Dr. Jeffrey's views were founded, at least in part, on the assumption that the Defendant was intoxicated on the night of the murders.

There is conflicting evidence in the record as to whether or not the Defendant was intoxicated on the night of the murders. The panel has concluded that the credible evidence supports a conclusion that while the Defendant may have been drinking earlier on the night these homicides were committed, he was not intoxicated. A trial witness, Jim Morehead, testified that he sat at a table with both Lotter and Nissen in a bar in Rulo, Nebraska, on the evening of December 30, 1993, and it was his opinion that Lotter was not intoxicated. Immediately after committing the murders, Lotter and Nissen returned to Nissen's home in Falls City. Lotter's then girlfriend, Rhonda McKenzie, described Lotter as having been drinking but knowing what he was doing. Furthermore, certain of Lotter's actions indicate conscious reflection on the night of the murders. These actions include the following: stealing the gun at one location and obtaining the knife and gloves at another location; searching for Teena Brandon at the Guiterres home; driving to Humboldt; formalizing the plan to murder any witnesses present if Teena Brandon was located; acting on a clear, if twisted, motive for murdering Teena Brandon; attempting to dispose of the physical evidence after the homicide; and instructing Rhonda McKenzie and Kandi Nissen to give them alibis as to the time they arrived

at Nissen's home that night. These actions lead to the inescapable conclusion that the Defendant was not intoxicated at the time the murders were committed.

The panel finds from the evidence presented that neither doctor was able to state definitively that the Defendant was under the influence of extreme mental or emotional disturbance at the time that the murders were committed. While their testimony does shed some light on the Defendant's mental condition, in general, the evidence presented in support of the Defendant's contention that mitigating circumstance (2)(c) applies in this case is unconvincing. The sentencing panel concludes that mitigating circumstance (2)(c) is not applicable.

(d) The age of the Defendant at the time of the crime. (Section 29-2523(2)(d)).

The Defendant presented evidence that although he was 22 years of age on December 31, 1993, he actually emotionally and intellectually functions as a child or pre-adolescent. After his evaluation, Dr. Jeffrey concluded that Defendant's emotional functioning and value structure could be likened to that of a nine, ten, or eleven year old. Dr. Fine concurs that the Defendant's cognitive problem-solving and moral development are certainly behind his actual age of 24.

The State points out that the Defendant was 22 years old at the time of the crimes and has an IQ in the low normal range with clear, logical, sequential and coherent thought processes. The State further stresses that the evidence supports a conclusion

that the Defendant has the intellectual capacity to know the difference between right and wrong. The State is correct in that both Doctors Fine and Jeffrey agree that the Defendant knows the difference between right and wrong.

The Court notes that the Defendant's actions in this case, as discussed under (2)(b) and (2)(c) above, were carefully planned and deliberately acted upon. The panel finds that the details that went into the planning, commission, and efforts to conceal the identities of the persons committing these homicides were not the actions of a "child", but rather, the actions of a person who was mature enough to recognize that in the event he was convicted of kidnapping and sexually assaulting Teena Brandon, years of incarceration were all that the future held for him.

The sentencing panel concludes that mitigating circumstance (2)(d) is not applicable in this case.

(e) The offender was an accomplice in the crime committed by another person and his participation was relatively minor. (Section 29-2523(2)(e)).

Defendant contends that this mitigating circumstance should be applied due to the fact that he was charged with three counts of first degree murder under various theories, including premeditated murder, felony murder, and aiding and abetting first degree murder. In finding Defendant guilty of three counts of first degree murder, the jury was not required to indicate which theory their verdicts were based upon in each of the cases.

Further, Defendant contends that it is only the testimony of Marvin Nissen which places Defendant at the scene of the crimes.

As discussed under subsections (2)(b) and (c), the panel is convinced that there is a great deal of credible evidence in the record that the Defendant fired the shots that killed the three victims. Furthermore, the trial record reveals that it is barren of any evidence whatsoever that the Defendant was merely an accomplice in these crimes or that his participation was relatively minor.

The sentencing panel concludes that mitigating circumstance (2)(e) is not applicable in this case.

(f) The victim was a participant in the Defendant's conduct or consented to the act. (Section 29-2523(2)(f)).

There is no evidence to support the existence of this mitigating circumstance, and the panel concludes that it is not applicable in this case.

(g) At the time of the crime, the capacity of the Defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication. (Section 29-2523(2)(g)).

Previously, under subsections (2)(b), (c), and (d) above the undeniably tragic circumstances of Defendant's childhood, adolescence, and young adulthood prior to these crimes were discussed. We have examined Dr. Jeffrey and Dr. Fine's testimony

concerning Defendant's mental state, in general, as opposed to whether Defendant was under extreme mental or emotional disturbance at the precise time the crimes were committed as under (2)(c) above. Their testimony is persuasive that the Defendant has an extensive psychiatric and psychological history. Throughout the years the Defendant has been diagnosed with a number of psychiatric and psychological disorders. In Dr. Jeffrey's psychological evaluation of the Defendant he concluded that he had a diagnosis of anti-social personality disorder. Dr. Fine, after having reviewed the Defendant's psychiatric history, stated that Lotter has suffered from severe, disabling-type disorders since birth. Dr. Fine characterized Lotter as being severely dysfunctional. Even if Nissen's testimony is taken as truthful, both doctors agree that in their opinion the elements of mitigating circumstance (2)(g) describe the Defendant at the time of the crimes.

As previously discussed under subsection (2)(c) above, the panel concludes that the Defendant was not intoxicated at the time the homicides were committed. We do recognize that there is evidence from both the State and the Defendant that he was consuming alcohol during the evening prior to the murders. While the alcohol may have affected the Defendant to some degree, there is not evidence to conclude that the effects of the alcohol rose to the level of intoxication.

Based upon the evidence of Defendant's abnormal childhood experiences; his longstanding history of various mental disorders;, Drs. Jeffrey and Fine's opinions of Defendant's emotional maturity level (as discussed under subsection (2)(d)

above); Defendant's alcohol consumption prior to committing the homicides; and Drs. Jeffrey and Fine's opinion that the elements of (2)(g) describe Defendant's mental state in general and, therefore, at the time of the crime; the sentencing panel concludes that mitigating circumstance (2)(g) is applicable to each of the murders in this case.

V.

NON-STATUTORY MITIGATING CIRCUMSTANCES

In addition to the statutory mitigating circumstances specified in Section 29-2523(2), this sentencing panel is required, both by statute, see Neb. Rev. Stat. Section 29-2521 (Reissue 1989), and by case law, Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); State v. Holtan, 205 Neb. 314, 318-319, 287 N.W.2d 671, 674, cert. denied, 449 U.S. 891, 101 S.Ct. 250, 66 L.Ed.2d 117 (1980), to consider any non-statutory mitigating evidence proffered by the Defendant which the panel deems to have probative value as to the character of the Defendant or the circumstances of the offense.

The Defendant has directed our attention to several non-statutory mitigating factors which he argues are contained in this record, including his "serious medical/psychiatric problems"; the "cognitive deficits, learning disabilities and educational deficiencies" from which he suffered; his turbulent family history and an exceptionally unhappy and unstable childhood"; the lack of a relationship with his father and the separation from his mother at an early age; his removal from his home in the second grade; his infrequent contacts with his siblings and other family members after that time; suffering ridicule and rejection by his peers; his placement in group homes, foster case, psychiatric hospitals and the Youth Development Center at Kearney; being sent to the State Penitentiary at the age of 16; and his feeling of being unwelcome

in the small community of Falls City which he considered "home." The Defendant further calls our attention to the fact that several witnesses testified that he tried very hard to overcome the many problems he faced. And, despite his efforts and the assistance provided by the educational and mental health professionals, he consistently failed.

We have carefully considered the non-statutory mitigating factors which the Defendant argues are applicable. The Court has given that evidence such weight, if any, to which it is entitled.

VI.

NON-PREJUDICIAL EFFECT OF VIOLATION OF COURT ORDERS

As evidenced by exchanges in the record between the panel and the State, and the insolent tone taken in many of the State's legal briefs, it is apparent that the State has had great difficulty in accepting and complying with Court rulings and Orders in these proceedings. The conduct of the Special Deputy Richardson County Attorney in this regard has been, in a word, contentious. Predictably this posture lead to the defense filing a Motion to Disqualify Plaintiff's Counsel for intentionally violating a court order, specifically this panel's order denying the State access to records of the Defendant we deemed to be confidential or privileged. Further, it was called to our attention that the State had failed to comply with a Discovery Order which had been entered on August 16, 1995. This panel dealt with both issues immediately prior to commencing presentation of evidence in these proceedings. The findings of the panel on these issues will be outlined at this time so as to be of assistance to the Nebraska Supreme Court in its review.

The first issue concerns a Motion For Release Of Records filed by the State on August 24, 1995. In that motion the State moved the Court for an Order:

> directing the Falls City School District, the Nebraska Department of Corrections, Youth Development Center, and the Probation Offices of Buffalo County, Nebraska and Richardson County, Nebraska, to make available for review any and all records in the possession of said agencies pertaining to the Defendant, John L. Lotter.

Hearing on this and other motions was held on August 30, 1995. At the hearing the panel requested that the issue concerning release of records be briefed by both counsel for the State and counsel for Defendant. The State was cautioned at the hearing that the records they sought were quite possibly privileged, but that the panel would rule after reviewing counsel's submission of legal authority.

On October 16, 1995, the panel denied the State's Motion For Release Of Records on the grounds of confidentiality and privilege. Counsel for both parties were advised that in the event the Defendant opted to use any of the requested records to support the establishment of mitigating circumstances, or to rebut the State's attempt to prove aggravating circumstances, then the State would be provided the opportunity to review any such records prior to their use.

Three weeks prior to the this ruling the State obtained Defendant's records from the Nebraska Department of Corrections. The State's determination to gain access to these records, regardless of any future Court order to the contrary, was made clear to this panel even prior to our ruling on this issue. After conceding in it's brief dated September 15, 1995, that the State was unable to find any statute or case law supporting it's contention that it was entitled to these reports and records, the State concluded it's brief as follows:

> The practical reality of this situation is that the State can gain access to the information requested in its motion through the subpoena process. It was thought that the process could be streamlined and made less expensive if the Court signed an order allowing access to these materials, and it is mainly for that reason that the State reiterates its request that the Court grant the Motion For Release Of Records. However, should the Court fail to do so, the State will proceed to access those records through other avenues. (Emphasis supplied).

The Defendant moved to disqualify Plaintiff's (State's) counsel based upon the State's disobedience of court order in obtaining access to the aforementioned records. As noted above, the defense motion to disqualify was heard November 20, 1995. At the hearing the State advised the Court that it had been confused on the issue of Defendant's claim of privilege since it had accessed similar information in other cases. This explanation is unacceptable. It was the State that filed the Motion For Release of Records, which implies it's counsel recognized the necessity of a court ruling on this issue. Moreover, the State was cautioned on August 30, 1995, that the records it sought might well be privileged. As noted, a Court order denying the State's motion was entered of record on October 16, 1995.

With all the foregoing duly noted, it does not appear to the panel that any privileged information was used, either directly or indirectly, by the State during it's presentation of evidence at the sentencing hearing. It should further be noted that the defense did not call the panel's attention to any evidence adduced at the hearing which Defendant contended was a result of

the State's access to the Defendant's privileged records. Therefore, insofar as this issue is concerned, the panel found that no prejudice resulted to the Defendant.

A second issue was also heard immediately prior to commencement of the sentencing hearing. The defense requested that the panel order the State to comply with a discovery order entered on August 16, 1995. The order states as follows:

> THE COURT FINDS that the Motion for Discovery filed by defendant be sustained for statutory discovery, said discovery to be reciprocal and the State shall disclose such statutory discovery as provided by the laws of the State of Nebraska on or before September 25, 1995, to the defense and the defense shall provide statutory discovery to the State on or before November 6, 1995.

An examination of Neb. Rev. Stat. Section 29-1912(1)(d) reveals that "the names and addresses of witnesses on whose evidence the charge is based" were to be supplied by each counsel to opposing counsel.

Rather than disclose the names of the witnesses the State intended to call at the sentencing hearing, the State advised the defense that it might call any of the endorsed trial witnesses, plus some or all of twenty additionally named people. The practical effect of this response to the order of discovery was to place the defense in the position of attempting to prepare to cross-examine up to 170 potential witnesses. The State countered that, despite the panel's discovery order, it did not wish to "... give them [defense counsel] our case on a silver platter."

Based upon the foregoing, the defense was informed by the panel that, if requested, the hearings would be recessed and they would be allowed to depose any State's witnesses they did not believe they were fully prepared to cross-examine. Thereafter, evidence was adduced by the State. At no time did the defense request a recess for discovery purposes as offered.

Insofar as the State failing to comply with the discovery order by supplying the defense with a meaningful list of witnesses that it intended to call, we note for the record that the State's witnesses, for the most part, were called in an attempt to prove the second prong of the following aggravating circumstance:

> ...has a substantial history of serious assaultive or terrorizing criminal activity. Neb. Rev. Stat. Section 29-2523(1)(a).

As stated previously, the panel found that the evidence presented by the State did not support it's contention that this aggravating circumstance applied to Defendant Lotter. Therefore, insofar as this issue is concerned, we find that no prejudice resulted to the Defendant.

The panel recognizes that these are serious violations of the Court's orders. There is no place for gamesmanship in a sentencing proceeding designed to determine if capital punishment should be imposed. However, the panel does not find that there was any prejudice to the Defendant as a result of the State's failure to comply with these two Court orders.

VII.

COMPARISON OF LOTTER AND NISSEN'S PARTICIPATION IN THESE THREE HOMICIDES REQUIRED UNDER NEB. REV. STAT. SECTION 29-2522(3)

The State argues that Marvin Nissen's participation in these three homicides should not be compared with Defendant Lotter's participation for the purpose of determining whether distinctions exist regarding imposition of the death penalty in this case when Nissen received life sentences. We disagree with the State's position. We find that this comparison of the participation of each Co-Defendant in these homicides is required under Neb. Rev. Stat. Section 29-2522(3) in order to ensure that any sentence imposed in this case is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the Defendant.

a) ALLEGED KIDNAPPING AND SEXUAL ASSAULT OF TEENA BRANDON

At 6:00 AM on Christmas morning, December 25, 1993, Teena Brandon appeared at the home of Linda Gutierres in Falls City, Nebraska. At the time she was described as not wearing shoes or a jacket, her back was red and scratched, and her mouth was puffy, red and bleeding. (Ex.152, Nissen Trial, Vol. IV, 629:1-630:24). After explaining what had happened to her, the police were sent for, a report was taken, and an ambulance was called. (Ex.152, Nissen Trial, Vol. IV, 632:18-633:2). Prior to December 25, 1993, Brandon had been staying at the Gutierres home.

Approximately four hours before Teena Brandon arrived at the Gutierres home, Defendants Lotter and Nissen (also previously acquainted with Mrs. Gutierres) had stopped by the Guiterres home. They had a conversation with Mrs. Gutierres during which they told her that they had removed Teena Brandon's pants in order to prove that she was a female. Lotter and Nissen said that this incident had occurred the previous afternoon during a card party at Nissen's home. Prior to this attack, and during her time in the Falls City area, Ms. Brandon had been pretending to be a male. The Defendants told Mrs. Guiterres that other people were also present at the card party, notably Philip Devine and Mrs. Guiterres' daughter, Lana. (Ex.152, Nissen Trial, Vol. IV, 634:2-640:1).

b) QUESTIONING OF LOTTER AND NISSEN BY POLICE

The report that the local police took of the incident at Nissen's home involving Teena Brandon was of a far more serious nature than the version of events the Defendants related to Mrs. Guiterres on December 25, 1993. Both Lotter and Nissen were eventually questioned by Investigator Keith Hayes of the Falls City Police Department on December 28, 1993. During this questioning at Police Headquarters, both Defendants were told that the allegations against them were that they had kidnapped, sexually assaulted, and physically assaulted Teena Brandon. (Ex.152, Nissen Trial, Vol. II, 313:18-317:3).

After the police questioning on December 28, 1993, both Nissen and Lotter were aware that there might well be consequences for their previous actions involving Teena Brandon. (Ex.132, Lotter Trial, Vol. II, 440:9-442:7).

c) LOTTER AND NISSEN SEARCH FOR TEENA BRANDON IN LINCOLN

After the alleged occurrences at Nissen's home on December 24, 1993, Nissen and Lotter knew they were in potentially serious criminal trouble. As early as December 25, they started to plan the killing of Teena Brandon in order to prevent her from testifying against them in any future prosecution. Both Defendants were involved in the planning discussions. (Ex.132, Lotter Trial Vol. II, 428:23-432:16).

On December 26, 1993, both Defendants made their first attempt to locate Teena Brandon and kill her. On that day they each took a change of clothes, as well as a hatchet and some rope they obtained from Marvin Nissen's home, and drove to Lincoln to look for Teena Brandon. On the way to Lincoln they drove past the home of Lisa Lambert in Humboldt, Nebraska, to see if Brandon was possibly there at that time; she was not. Their plan was to abduct Brandon, take her to a remote location and kill her by chopping off her head and her hands. Their hope was that by discarding her severed head and hands, the police would not be able to identify her body. As mentioned, they had each brought a change of clothes along in case they bloodied themselves during this planned murder. The plot failed on this date when they were unable to locate Ms. Brandon. (Ex.132, Lotter Trial, Vol. II, 432:17-437:12).

d) THE NIGHT OF THE HOMICIDES

Returning to Falls City, the Defendants continued to plan the murder of Teena Brandon. During the evening hours of December 30, 1993, the Defendants went to various locations in the countryside surrounding Falls City where they drank and visited with friends and relatives. (Ex.132, Lotter Trial, Vol. II, 437:15-439:9; 444:20-449:6). Eventually, just after midnight on December 31, 1993, Nissen waited in the car while Lotter obtained a knife and some gloves from his mother's home. Lotter then stole a gun from a friend's home. Shortly before 1:00 AM they began again their search for Teena Brandon. (Ex.132, Lotter Trial, Vol. II, 451:17-455:13).

Around 1:00 AM, Linda Guiterres was at her home in Falls City with her son, two of her daughters and a family friend. As she recalled at Nissen's trial, both Defendants arrived at her home at 1:00 AM wearing work-type gloves and asking the whereabouts of Teena Brandon. Guiterres told Nissen that both Teena Brandon and Philip Devine were staying the night at Lisa Lambert's home in Humboldt. Although Nissen and Lotter said they had walked to the Guiterres home, Mrs. Guiterres observed that when they left her home they went to a car which was parked in the next block down. (Ex.152, Nissen Trial, Vol. IV, 640:2-647:3).

What Mrs. Guiterres did not know about their visit was recounted in chilling detail by Marvin Nissen during his testimony at Lotter's trial when he explained the purpose of

their stop at the Guiterres home. On the way to Guiterres' the two decided that if Teena Brandon were located there, then besides Brandon, everyone else found in the home would also have to be killed. After parking Lotter's car about two blocks away, they put on their gloves, Lotter armed himself with the gun and Nissen armed himself with the knife. After walking up to Guiterres' home, Lotter and Nissen knocked on the door not knowing whether or not Teena Brandon was present inside. After learning that Brandon was in Humboldt, the pair ran back to Lotter's car and began the drive to Lisa Lambert's home. On the way to Humboldt, just as they had discussed prior to entering the Guiterres home, both Defendants agreed aloud that if Brandon were found in Lisa Lambert's home, everyone else present would have to die. (Ex.132, Lotter Trial, Vol. II, 455:14-460:22).

The State correctly points out that Defendant-Nissen was convicted of one first degree and two second degree murders while, on the other hand, Defendant-Lotter was convicted of three first degree murders. However, Nissen's jury was not presented with the testimony that Nissen gave during Lotter's trial when he unequivocally confessed to planning and carrying out all three homicides involved herein. Defendant-Nissen clearly confessed under oath to full participation in three first degree murders with Defendant-Lotter.

During the planning and preparation stage in the days leading up to these homicides we find that there is no appreciable difference in degree of culpability between these Co-Defendants.

e) THE HOMICIDES

At the time of the actual commission of these three homicides, the evidence, based largely upon Marvin Nissen's testimony, is that Defendant-Lotter fired all shots at all three victims resulting in their deaths. The defense counters that Nissen's credibility is highly suspect and not worthy of belief. However, the fact remains that based upon all the evidence presented, physical evidence as well as testimonial, the jury verdict against Defendant-Lotter was guilty of first degree murder of all three victims.

Nissen's account of his and Lotter's participation in these savage homicides is set forth in graphic detail during his statement to Investigator Chrans and during his testimony in Lotter's trial. (Ex.152, Nissen Trial, Vol. II, 211:16-223:17; Ex. 132, Lotter Trial, Vol. II, 390:5-535:14). Nissen describes himself as physically and verbally intimidating the victims while Lotter shot them. He also testified that he picked up a live round and some shell casings off the floor in order not to leave evidence at the scene. Nissen acknowledged that he was a non-reluctant, full participant in all three homicides.

Nissen did admit during his testimony at Lotter's trial that he had, in fact, been the one who stabbed Teena Brandon, but claimed that he did so after Lotter had finished shooting her. (Ex.132, Lotter Trial, Vol. II, 404:10-406:11). However, the sequence as to when Nissen claimed he stabbed the victim Brandon is questionable in view of conflicting testimony produced by the State during Nissen's trial from a witness named Harry David

Foote. Mr. Foote had been incarcerated for a time in the Richardson County Jail with Marvin Nissen after his arrest for these homicides. Foote testified that, during a conversation he and Marvin Nissen had regarding Nissen's charges, Nissen "blurted out in a low voice, 'if I hadn't have stabbed her, maybe John wouldn't have started shootin'!" (Ex.152, Nissen Trial, Vol. III, 450:21-23).

Suffice it to say that under either version of when Nissen stabbed Teena Brandon, we find that there is no appreciable difference in degree of culpability between these Co-Defendants during the actual commission of the homicides.

f) CONDUCT OF EACH DEFENDANT AFTER COMMISSION OF THE HOMICIDES

Within hours of the murders both Defendants were placed under arrest. Nissen gave a statement to Roger Chrans, Criminal Investigator with the Nebraska State Patrol, wherein he implicated both himself and Defendant-Lotter in the three homicides. Nissen told the investigator the motive for the killings, as well as the sequence of events and activities of he and Lotter on the night of the murders. He supplied true information as to where the gun, knife, sheath with name "Lotter" on it, and gloves used in the homicides had been obtained. He further told the investigator the location of these items (gun, knife, sheath, gloves) which were recovered and later used by the State as important physical evidence during the prosecution of both Nissen and Lotter. During his statement to Investigator Chrans, Nissen attempted to minimize his involvement in the

homicides and expand Lotter's involvement. (Ex.152, Nissen Trial, Volumes I & II, 187:14-262:2). However, it is a fact that Nissen's cooperation, regardless of his motive, provided the State with both the initial information and the physical evidence upon which it based its prosecution of both Defendants. Nissen's statement to Investigator Chrans does distinguish his conduct from Defendant Lotter after commission of the crimes.

The case against Nissen went to trial first and he was convicted of first degree murder in the killing of Teena Brandon and two counts of second degree murder in the killings of Lisa Lambert and Philip Devine. At Nissen's trial, his statement in which he minimized his involvement was used against him.

Thereafter, the prosecution turned its attention full time to the case against Defendant Lotter. It appears to this panel that without Marvin Nissen's testimony the case against John Lotter was largely circumstantial and that there were some significant weaknesses in the evidence against Lotter. In an obvious effort to bolster the prosecution's case, a bargain was struck between the State and Nissen to the effect that if he would testify truthfully against Lotter, the State would not, among other promises, seek the death penalty against him. Nissen agreed, testified, and was ultimately sentenced to consecutive life sentences.

Clearly, Nissen's motive in testifying against Lotter was not grounded upon remorse or a desire to cooperate but rather upon his desire to avoid a potential death sentence. However, regardless of his motivation for testifying, it does not diminish the impact and importance of his testimony against Defendant

Lotter. By offering Nissen a bargain, the State quite properly made every effort to ensure that Defendant Lotter, a person charged with committing three first degree murders, and who was accused of actually being the person who fired the fatal shots, did not escape conviction. We find that the State did not act arbitrarily, nor capriciously, nor did it abuse it's discretion by agreeing not to seek the death penalty against Nissen in exchange for his promise to testify against this Defendant. We further find that Nissen's testimony against Lotter at his trial does distinguish his conduct from Defendant-Lotter after commission of the crime.

In conclusion the panel finds beyond a reasonable doubt that Marvin Nissen's statement to the police after his arrest, and his testimony for the State at John Lotter's trial, does sufficiently distinguish his conduct from Lotter's after commission of these homicides, and does support imposition of different penalties for each Co-Defendant. Considering the totality of the relevant circumstances contained in the record, the panel finds beyond a reasonable doubt that imposition of a death sentence upon John Lotter is not and would not be disproportionate to the consecutive life sentences already imposed upon Marvin Nissen.

VIII.

DETERMINATION OF SENTENCE

In determining the sentence to be imposed on the Defendant, the sentencing panel is required by Neb. Rev. Stat. Section 29-2522 (Reissue 1989) to consider (1) whether sufficient aggravating circumstances exist to justify imposition of a sentence of death; (2) whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or (3) whether a sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the Defendant. The Nebraska Supreme Court has repeatedly emphasized that the determination of sentence is to be based not on a mere numerical counting of aggravating and mitigating circumstances, but, rather, requires a careful weighing and examination of the various factors. The sentencing panel has undertaken that careful weighing and examination.

The sentencing panel specifically finds that, with regard to the murders of both Lisa Lambert and Philip Devine, the second prong of aggravating circumstance (1)(b) (the murder was committed in an apparent effort... to conceal the identity of the perpetrator of a crime) and, aggravating circumstance (1)(e) (at the time the murder was committed, the offender also committed another murder) are applicable in these cases beyond a reasonable doubt. We further find beyond a reasonable doubt that in the case wherein Lisa Lambert is the victim, that aggravating circumstance (1)(e) applies to the murders of Teena Brandon and

Philip Devine. We further find beyond a reasonable doubt that in the case wherein Philip Devine is the victim, that aggravating circumstance (1)(e) applies to the murders of Teena Brandon and Lisa Lambert.

The sentencing panel specifically finds that, with regard to the murder of Teena Brandon, the second prong of aggravating circumstance (1)(h) (the crime was committed to disrupt or hinder... the enforcement of the laws) and, aggravating circumstance (1)(e) (at the time the murder was committed, the offender also committed another murder) are applicable in this case beyond a reasonable doubt. The sentencing panel further finds beyond a reasonable doubt that in the case wherein Teena Brandon is the victim, that aggravating circumstance (1)(e) applies to the murders of Lisa Lambert and Philip Devine.

It is the sentencing panel's conclusion that the presence of these aggravating circumstances is sufficient to justify imposition of a sentence of death for each of the murders of which the Defendant has been convicted.

The sentencing panel further finds that mitigating circumstance (2)(g) (at the time of the crime, the capacity of the Defendant... to conform his conduct to the requirements of law was impaired as a result of mental illness...) is applicable to the murders of Teena Brandon, Lisa Lambert, and Philip Devine. The sentencing panel further finds that this mitigating circumstance is entitled to some weight and consideration in each case. We likewise find that the non-statutory mitigating

circumstances with respect to the Defendant's childhood, family history, and history of mental disorder exist as to all three murders.

In weighing such mitigating circumstances against the aggravating circumstances which we have heretofore found, we conclude that the mitigating circumstances above set forth are not of sufficient weight to approach or exceed the weight which we give to the aggravating circumstances applicable to each murder, and we restate again our conclusion that the sentence of death should be imposed on the Defendant for all three murders.

As required by Neb. Rev. Stat. Section 29-2522, the panel has considered whether a sentence of death imposed in this case is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the Defendant. In this regard, the panel has reviewed all relevant opinions of the Nebraska Supreme Court. In light of that review, and having considered all of the evidence offered by Defendant during the sentencing hearing, the panel finds beyond a reasonable doubt that the imposition of a sentence of death in each of these cases for these three murders is not and would not be excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the Defendant.

Finally, under Section VII of this order, the sentencing panel has considered, in detail, whether the sentence of death imposed in this case is excessive or disproportionate to the penalty imposed on the Co-Defendant, Marvin Nissen, considering both the crime and the Defendant. As we concluded under Section

VII of this Order, the panel finds that the sentence of death imposed in this case for all three murders is not excessive or disproportionate to the penalty imposed upon the Co-Defendant, Marvin Nissen, considering both the crimes and the Defendant.

IX.

IT IS THEREFORE ORDERED AND ADJUDGED that, as to Count I of the Information, the murder of Teena Brandon, it is the judgment and sentence of the Court that the Defendant, John L. Lotter, is hereby sentenced to the penalty of death for the murder in the first degree of Teena Brandon.

IT IS FURTHER ORDERED AND ADJUDGED that, as to Count II of the Information, the murder of Lisa Lambert, that the Defendant, John L. Lotter, is hereby sentenced to the penalty of death for the murder in the first degree of Lisa Lambert.

IT IS FURTHER ORDERED AND ADJUDGED that, as to Count III of the Information, the murder of Philip Devine, that the Defendant, John L. Lotter, is hereby sentenced to the penalty of death for the murder in the first degree of Philip Devine.

IT IS FURTHER ORDERED that the Clerk of this District Court shall deliver a copy of this judgment and sentence to the Warden of the Nebraska Penal and Correctional Complex or other proper and qualified officer charged with the execution of the sentence, and that such copy shall serve as the order and direction to execute this sentence by inflicting the punishment of death as provided in such sentence, and according to the Statutes.

IT IS FURTHER ORDERED that a signed or certified copy of this judgment and sentence shall be delivered to the Sheriff of Richardson County, Nebraska, who shall promptly deliver the Defendant, John L. Lotter, to the Warden of the Nebraska Penal and Correctional Complex.

IT IS FURTHER ORDERED that, in accordance with Neb. Rev. Stat. Sections 29-2521.04, 29-2522, 29-2524, and 29-2525 (Reissue 1989), the Clerk of the District Court shall forthwith prepare and file with the Clerk of the Nebraska Supreme Court a transcript of the record of the proceedings, and any other records required by the Supreme Court, without requiring the filing of a Petition in Error, and for which no charge shall be made, in order that the required automatic review of this Order of Sentence may be made by the Supreme Court as provided by law.

Dated at Falls City, Richardson County, Nebraska, this 21st day of February, 1996.

BY THE COURT:

Robert T. Finn, District Judge

Michael W. Amdor, District Judge

Gerald E. Moran, District Judge

IN THE DISTRICT COURT OF RICHARDSON COUNTY, NEBRASKA

STATE OF NEBRASKA,	)	
	)	
Plaintiff,	)	
	)	Case Nos. CR-99-9000001,
v.	)	CR-99-9000002, CR-99-9000003
	)	
JOHN L. LOTTER,	)	
	)	
Defendant.	)	

AMENDED MOTION FOR POSTCONVICTION RELIEF

Defendant, through counsel, moves for postconviction relief from his sentences of death based on the following: 1) constitutional violations related to the vacatur of his death sentence under LB 268, its purported reinstatement through the referendum process, and the specific targeting of Defendant's execution in the reinstatement effort; and 2) his death sentence is *per se* constitutionally prohibited because he is intellectually disabled, *i.e.*, he is "actually innocent" of the death penalty.

I. Background

John Lotter was convicted by a death qualified jury in May 1995 of three counts of first degree murder, three counts of use of a weapon to commit a felony, and one count of burglary,[1] and was sentenced to death by a panel of three judges. Mr. Lotter's conviction became final on June 7, 1999, when the United States Supreme Court denied his petition for writ of certiorari. *Lotter v. Nebraska*, 526 U.S. 1162 (1999). Mr. Lotter sought post-conviction relief in state court, which was denied by the Richardson County District Court; the Nebraska Supreme Court affirmed. *State v. Lotter*, 266 Neb. 245 (2003). On May 11, 2004, Mr. Lotter filed a petition for a writ of habeas corpus with the United States District Court for the District of Nebraska. The

[1] The sentence for burglary was later vacated on direct appeal. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified on denial of rehearing* 255 Neb. 889, 587 N.W.2d 673 (1999).

matter was stayed on April 29, 2005, pending resolution of state post-conviction proceedings. On May 6, 2010, the stay was terminated, and on March 18, 2011, the federal district court denied relief. *Lotter v. Houston*, 771 F. Supp. 2d 1074 (2011). The Court of Appeals for the Eighth Circuit denied his application for a certificate of appealability.

A. LB 268 and Referendum Process

1. After Mr. Lotter's Initial Death Sentence, The Law Stated He Was Sentenced to Death, Sentenced to Life under LB 268, and then Sentenced to Death Again Through the Work of the Governor and Treasurer in Legislation Reinstating the Death Penalty.

On May 27, 2015, the Nebraska Legislature overrode Governor Pete Ricketts' veto to enact LB 268, an act to abolish the death penalty in Nebraska. Laws 2015, LB 268. The act also provided that the sentences of those already on death row, including Mr. Lotter, would be changed to a sentence of life imprisonment. Laws 2015, LB 268 §23. The legislation was set to formally go into effect after three months, on August 30, 2015. *See* Neb. Const. art III, §27.

On June 1, 2015, four days after enactment of the law, Nebraskans for the Death Penalty filed documents with the Nebraska Secretary of State seeking a referendum against LB 268. Although the referendum petition submitted to repeal LB268 was ostensibly sponsored by individuals other than Governor Ricketts, none of those individuals swore to the truth and accuracy of their sponsorship. Included in the referendum petition was a document identifying Nebraskans for the Death Penalty and three members of its Board—Vice Chairwoman of the Nebraska Republican Party in the 3rd Congressional District Judy Glassburner, Omaha City Councilwoman Aimee Melton, and former Nebraska State Board of Education member Bob Evnen—as sponsors. The document was signed by Councilwoman Melton before a notary public. Despite being described as a "Sworn List of Sponsors," the document failed to include

any statement, indication, or evidence that Councilwoman Melton or any of the other sponsors swore under oath to the identification of the sponsors.[2]

Nebraskans for the Death Penalty was initiated by Governor Ricketts, along with his staff, his allies, and other members of the Nebraska executive branch acting on Governor Ricketts' request, order, and encouragement, in order to circumvent the Legislature's override of the Governor's veto.

Each of the identified sponsors has publicly known connections to Governor Ricketts. On the day the petition was filed, Councilwoman Melton explained to reporters that she was asked by a person close to the governor to help lead the petition.[3] Vice Chairwoman Glassburner is a supporter of Governor Ricketts and appeared in one of the Governor's campaign ads during the gubernatorial election.[4] And Governor Ricketts is the single largest donor to "Bob Evnen for Nebraska," Evnen's campaign fund, having contributed 19% of the total donations that Evnen received, including $5,000 while Evnen served on the Board of Nebraskans for the Death Penalty.[5] On information and belief, each of these board members formed the Board of Nebraskans for the Death Penalty, joined its

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[2] Secretary of State of Nebraska, *Referendum Petition Regarding LB 268 (2015), Sworn List of Sponsors* (June 1, 2015), http://www.sos.ne.gov/elec/2016/pdf/LB268-referendum.pdf.

[3] Joe Duggan & Martha Stoddard, *Omaha Councilwoman Aimee Melton Among Ricketts Allies Launching Group to Bring Back Death Penalty*, Omaha World-Herald (June 2, 2015), http://www.omaha.com/news/nebraska/omaha-councilwoman-aimee-melton-among-ricketts- allies-launching-group-to/article_3f516da1-6823-5f51-869a-c26e8680e1d1.html. Melton later disclaimed her sponsorship but never amended filings to remove her name as arguably the primary sponsor. The Wheels Down Politics Show – Aimee Melton and Judge Ronald E. Reagan (June 12, 2005), http://wheelsdownpolitics.com/blog/2015/06/12/the-wheels-down-politics-show-aimee-melton-and-judge-ronald-e-reagan/.

[4] Duggan & Stoddard, at n. 2, *supra*.

[5] Omaha World-Herald, Campaign Finance: Bob Evnen For Nebraska, http://www.dataomaha.com/campaignfinance/07CAC01034/bob-evnen-for-nebraska.

Board, and initiated the referendum against LB268 at the behest and under the control of Governor Ricketts and members of the executive branch.

Leading figures within Nebraskans for the Death Penalty also have demonstrated ties to Governor Ricketts and the executive branch.

- Jessica Flanagain, formerly Jessica Moenning, assumed the role of campaign manager and coordinator for Nebraskans for the Death Penalty, receiving payment of $43,000 through her one-person consulting firm, Bright Strategies.[6] Flanagain is a longtime paid political advisor to Governor Ricketts, dating back to at least the Governor's 2006 Senate campaign. Flanagain served as a paid advisor to Governor Ricketts in his 2014 gubernatorial campaign and, following his election, wrote the Governor's first State of the State address.[7] In the infancy of the Governor's administration, Flanagain, as a privately paid consultant, traveled regularly to the Governor's Office for meetings and used publicly-funded office space at the State Capitol. On December 21, 2015, while work on the referendum against LB268 was ongoing, Governor Ricketts announced that Flanagain would become a publicly paid special advisor to the governor for external affairs, receiving a salary of $130,000.[8] As a publicly paid advisor to the governor, Flanagain was a member of the executive branch.

- Chris Peterson, another consultant to Governor Ricketts, was hired to be the spokesperson for Nebraskans for the Death Penalty, receiving through his one-person consulting firm, CP Strategies, $90,957 in payment.[9] Peterson was also a paid consultant to Governor Ricketts in his 2014 gubernatorial campaign.

- Don Stenberg, Nebraska's State Treasurer, former Attorney General, and a member of the executive branch, also served as co-chairman of the referendum

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[6] Omaha World-Herald, Campaign Finance: Nebraskans for the Death Penalty,http://www.dataomaha.com/campaignfinance/15BQC00419/nebraskans-for-the-death-penalty-inc.

[7] Paul Hammel, *Gov. Pete Ricketts Changing Staff Lineup; Privately Paid Adviser Will Go On Public Payroll*, Omaha World-Herald (Dec. 22, 2015), http://www.omaha.com/news/nebraska/gov-pete-ricketts-changing-staff-lineup-privately-paid-adviser-will/article_2cb78ab2-d939-5d26-9cce-11ac80cc119e.html.

[8] Office of Governor Pete Ricketts, *Gov. Ricketts Announces Two Staff Transitions* (Dec. 21, 2015), https://governor.nebraska.gov/press/gov-ricketts-announces-two-staff-transitions.

[9] Omaha World-Herald, Campaign Finance: Nebraskans for the Death Penalty, http://www.dataomaha.com/campaignfinance/15BQC00419/nebraskans-for-the-death-penalty-inc.

campaign alongside Nebraska State Senator Beau McCoy.[10] State Treasurer Stenberg is a known political ally of Governor Ricketts. Although State Treasurer Stenberg later became described as an "honorary" co-chair, he played a substantial role in advancing the referendum petition.

- Leonard Steven Grasz, who served as Secretary and Treasurer for Pete Ricketts for Governor, Inc. from September 2013 to the present, was also the Assistant Secretary to Nebraskans for the Death Penalty from June 2015 to March 2017.[11] He served simultaneously as legal counsel to Pete Ricketts for Governor and to Nebraskans for the Death Penalty.[12]

Governor Ricketts and his father and mother, Joe and Marlene Ricketts, were the primary donors to Nebraskans for the Death Penalty as the group sought to obtain the signatures to place the referendum on the ballot. Of the approximately $244,000 received by the group in its first month of existence (June 2015), $200,000, or over 80%, came from the Ricketts family.[13] Governor Ricketts made another $100,000 donation the following month, in July 2015.[14] In total, Nebraskans for the Death Penalty received $1,446,085 over the course of its existence— $300,000 of that amount, or 21%, came directly from Governor Ricketts.[15] Another $125,000, or an additional 9%, came from Joe and Marlene Ricketts. On information and belief, Governor Ricketts, his staff, and others at his direction used Governor Ricketts' position as Governor of Nebraska and the resources of the State to raise funds from other major donors to Nebraskans for the Death Penalty and otherwise support the activities of Nebraskans

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[10] JoAnne Young, *Circulators Will Be Out Saturday Gathering Signatures to Overturn Death Penalty Repeal*, Lincoln Journal Star (June 5, 2015), http://journalstar.com/legislature/circulators-will-be-out-saturday-gathering-signatures-to-overturn-death/article_cd4fe9d1-2c90-56b0-9177-47bb6e479cc1.html.

[11] Leonard Steven Grasz, *United States Senate Committee on the Judiciary: Questionnaire for Judicial Nominees*, https://www.judiciary.senate.gov/imo/media/doc/Grasz%20SJQ.pdf.

[12] Husch Blackwell, *Steve Grasz*, https://www.huschblackwell.com/professionals/steve-grasz.

[13] Paul Hammel, *Pete and Joe Ricketts Have Contributed $200,000 to Pro-Death Penalty Group*, Omaha World-Herald, http://www.omaha.com/news/nebraska/pete-and-joe-ricketts-have-contributed-to-pro-death-penalty/article_e761a0e4-9b68-56fe-97fc-1db7e79fd5b0.html.

[14] Martha Stoddard, *Ricketts Gives Another $100,000 to Nebraskans for the Death Penalty*, Omaha World-Herald, http://www.omaha.com/news/nebraska/ricketts-gives-another-to-nebraskans-for-the-death-penalty/article_787ac960-4282-57cc-b76c-bf998b756d4b.html.

[15] Omaha World-Herald, Campaign Finance: Nebraskans for the Death Penalty, http://www.dataomaha.com/campaign-finance/15BQC00419/nebraskans-for-the-death-penalty-inc.

for the Death Penalty. On information and belief, major donors to Nebraskans for the Death Penalty have close ties to Governor Ricketts.

Governor Ricketts also began to raise money for the referendum from the general public at least as of July 2015, including by sending letters to Nebraskans with the Governor's title prominently displayed that requested donations be made directly to Nebraskans for the Death Penalty. The letter included an envelope where a recipient of the letter could agree, "Yes Governor. I will support Nebraskans for the Death Penalty. Enclosed is my contribution of:" with suggestions for donation amounts and instructions that checks be made payable to Nebraskans for the Death Penalty. In response to public inquiries to the Governor's office regarding the referendum, Governor Ricketts and his staff routinely directed the public to learn more information by contacting Nebraskans for the Death Penalty and visiting its website.

Led by the Governor and his allies, Nebraskans for the Death Penalty then collected signatures for a public referendum, "Referendum 426," that would let voters decide to accept or reject the legislation. On December 7, 2015, Governor Ricketts announced that the referendum *now* left the fate of the prisoners (whom the Legislature earlier said would be sentenced to life imprisonment) to the voters. He stated:

> In November 2016, Nebraska voters will determine the future of capital punishment in our state at the ballot box. To give deference to the vote of the people, my administration will wait to carry out capital punishment sentences or make additional efforts to acquire drugs until the people of our state decide this issue.

Gov. Ricketts' Statement on Capital Punishment, Dec. 7, 2015, https://governor.nebraska.gov/press/gov-ricketts%E2%80%99-statement-capital-punishment.

On November 8, 2016, voters in fact rejected the death penalty repeal. With the Governor's official proclamation of those results on December 5, 2016, capital punishment in this state was effectively reinstated. But for the unlawful actions of Governor Ricketts, State

Treasurer Stenberg, and other members of the executive branch in proposing, initiating, financing, organizing, managing, and directing the referendum petition and subsequent referendum against LB268, the referendum would not have occurred and would not have passed. The executive branch's use of the power of referendum to circumvent the lawful veto of the Legislature violates Nebraska's separation of powers, rendering the referendum invalid.

2. The Execution Reinstatement Effort Targeted Mr. Lotter And Other Death-Row Prisoners.

The referendum effort focused on the execution of Mr. Lotter (as well as other death row prisoners). Much of the advertising, promotion, and publicity in support of the death penalty reinstatement campaign focused on Mr. Lotter (and other death row prisoners) by name. For example, the website in support of the referendum, run by Nebraskans for the Death Penalty, had an interactive map of the state with the words "Nebraska's Ten Death Row Inmates." *See* http://www.voterepeal.com/. On the web site, which is still active, scrolling over the map brings up the name, prisoner number, the location of the crimes, and date of the death sentence for each prisoner, including Mr. Lotter.

Nebraskans for the Death Penalty also produced video advertisements that show pictures of each of the men and describe their crimes while ominous music plays in the background. The advertisement's voiceover then says:

> These are the men on Nebraska's death row. Their crimes were heinous. They terrified communities, and devastated families: killing innocent wives, husbands, mothers, fathers, and even children as young as three years old. The death penalty protects the public from the most dangerous people in our society.

Id.

Comments by supporters of the campaign also show that they were in support of reinstating the death penalty in order to ensure that these ten men would be executed. Nebraskans

for the Death Penalty's official Facebook page included comments like, "These are the worst of the worst individuals in NE. Google Jeffrey Hessler, he is on death row, because he needs to be. I'm voting to REPEAL, in order to KEEP the death penalty in Nebraska!" and "That's the way I'm voting we need the death penalty these are sick people and need to be stopped dead." The group's Facebook page also shared hundreds of posts and articles, some of which profiled the men currently on death row or were pleas from the families of victims asking that these ten men receive the death penalty. Facebook, Nebraskans for the Death Penalty Posts, https://www.facebook.com/Nebraskans-for-the-Death-Penalty-512638988889407/. *See also* Tracy Connor, *'Boys Don't Cry' Mom: Keep Nebraska's Death Penalty*, NBC News, May 16, 2015, *available at* https://www.nbcnews.com/news/us-news/brandon-n358326 ("I want him to die," Joann Brandon said of death-row inmate John Lotter. "It will bring some closure to me."). During a public debate on the referendum in October 2016, state treasurer and chairman of Nebraskans for the Death Penalty, Don Stenberg, explicitly referred to the ten prisoners and called for them to be executed. *See* Andrea Larson, *Advocates for and against death penalty take part in public discussion* (Oct. 13, 2016), http://norfolkdailynews.com/news/advocates-for-and-against-death-penalty-take-part-in-public/article_245180e8-9152-11e6-aa83-97586eb1abab.html.

In a public debate at University of Nebraska-Lincoln, State Senator McCoy said: "All 10 men on death row in Nebraska acknowledge their guilt, and . . . the death penalty is an appropriate punishment for the most horrific criminal acts." McCoy went on to say that "his meetings with family members of the victims of death row inmates have helped form his belief that the death penalty is the best policy for Nebraska" and that he "hopes Nebraskans will remember the victims and their families when they make their decisions."

Nebraska Sens. Coash, McCoy set to debate death penalty at UNL, DAILY NEBRASKAN, October 24, 2016, *available at* 2016 WLNR 33553847.

B. Mr. Lotter's Intellectual Disability

Dr. Ricardo Weinstein, an expert retained by Mr. Lotter's counsel, conducted an evaluation of Mr. Lotter to determine whether he is intellectually disabled. In doing so, Dr. Weinstein reviewed portions of the trial transcript in Mr. Lotter's case, Mr. Lotter's school, social, juvenile, jail, and prison records, and medical and mental health records of various agencies and institutions throughout Mr. Lotter's life. In addition, Dr. Weinstein reviewed the declarations of the following witnesses who have known Mr. Lotter during his childhood, as a teenager, and as an adult: Dr. Paul Fine, a psychiatrist who worked with Mr. Lotter as a child in a therapeutic foster care program he supervised through Creighton University; Mary Ann Greene-Walsh, a social worker in the therapeutic foster care program, who was Mr. Lotter's caseworker during his various foster care and educational placements; Bernice Kopetsky, Mr. Lotter's teacher during first and second grade; Brandon Johnson, who was housed with Mr. Lotter at the Youth Detention Center (YDC) in Kearney, Nebraska and was later jailed with Mr. Lotter at the Buffalo County Jail and the Lincoln Correctional Center where, although they were both juveniles, they were housed in the adult system; Chad Buckman, also a resident at YDC as a juvenile, who attended school there with Mr. Lotter; Michelle Ottens, who was a resident at the Nebraska Center for Children and Youth (NCCY) during Mr. Lotter's placement there as a teenager; Scott Bendler, a teacher of Mr. Lotter at NCCY; Trena Michelle Lotter Wallace, Mr. Lotter's sister; Rhonda McKenzie, Mr. Lotter's girlfriend at the time of the murders underlying this case and the mother of his daughter; Ida Peacock, Mr. Lotter's paternal cousin who grew up with him in Falls City, lived with Mr. Lotter's family during childhood, and with whom Mr.

Lotter lived briefly as an adult; Dwayne Peacock, the husband of Ida Peacock, and Mr. Lotter's friend and roommate; Sylvia Lopez, Mr. Lotter's foster mother in Omaha when he was a teenager; Diane Acklin, Mr. Lotter's maternal aunt; and Donna Lotter, Mr. Lotter's mother. Appendix A, Declaration of Dr. Ricardo Weinstein, at 7.

On March 6, 2017, Dr. Weinstein administered the Woodcock-Johnson, Fourth Edition to Mr. Lotter to determine his intellectual functioning. Mr. Lotter scored a 67 for General Intellectual Ability, which "constitutes a full-scale IQ score that is more than two standard deviations below the mean," and demonstrates that Mr. Lotter has "significant limitations in intellectual functioning." Appendix A at 2, 8. The age-equivalent for a 67 IQ score is 8 years and 7 months. Appendix A at 8. Dr. Weinstein notes that Mr. Lotter was administered an IQ test in 1981, when he was just under 10 years old, and received a full-scale IQ score of 76. However, because the norms for the particular test administered at that time were nine years obsolete, in accordance with professional clinical manuals the score had to be adjusted to account for the outdated norms, resulting in a downward adjustment to 73. Appendix A at 9.

Along with his review of records and life history witness declarations, Dr. Weinstein personally interviewed several of these witnesses -- Ida and Dwayne Peacock, Donna Lotter, Sylvia Lopez, Trena Michelle Lotter Wallace, Mary Ann Greene-Walsh, and Dr. Fine -- as part of his assessment of Mr. Lotter's adaptive functioning. In addition, Dr. Weinstein administered an Adaptive Behavior Assessment System, Third Edition (ABAS-3) to Mary Ann Greene-Walsh. Appendix A at 8. Dr. Weinstein concluded from his interviews and testing that Mr. Lotter has significant adaptive deficits in all three relevant skill domains -- conceptual, social, and practical. Appendix A at 9-12. Indeed, "[t]he results of the ABAS-3 clearly demonstrate extremely low scores in in all three domains of functioning, as well as global adaptive functioning," and "[i]n all

areas, Mr. Lotter scored below the first percentile, meaning that over 99 percent of the community function at a higher level." Appendix A at 13.

Finally, because "Mr. Lotter exhibited very significant deficits and required intervention by professionals that directly and indirectly provided special services and placements early on in his developmental years . . . one may conclude that Mr. Lotter's problems are developmental in nature and were present since childhood." Appendix A at 13.

From his evaluation and the test results obtained, Dr. Weinstein concludes:

> Based on the work performed and test results obtained it is my opinion to a high degree of scientific certainty that Mr. Lotter qualifies for the diagnosis of Intellectual Developmental Disability (formerly Mental Retardation). His intellectual functioning is at least two standard deviations below the mean of a normative population, he exhibits and exhibited concurrent deficits in Social, Practical and Conceptual Skills reflecting adaptive behavior deficits that have been present since early childhood and that persisted at least until the time of the offense for which he was sentenced to death. The scores obtained on the ABAS-3 validate the deficits identified.

Appendix A at 13.

II. ARGUMENT

A. Mr. Lotter's Execution In These Unprecedented Circumstances Would Violate The U.S. And Nebraska Constitutional Bans Against Cruel And Unusual Punishment.

On December 4, 2017, Defendant brought additional, related claims, which Defendant did not know were cognizable in postconviction relief, in a Declaratory Judgment Action in Lancaster County (Case No. 17-4302). In an opinion dated February 12, 2018, and served on Defendant's counsel (in the Declaratory Judgment Action) on February 13, 2018, the District Court Judge in Lancaster County denied these claims, holding the equally serviceable remedy of postconviction relief was available. *See* Attachment A (Judgment of Dismissal). The judgment of dismissal in the declaratory judgment action held that if, as Defendant alleged, the State had no authority to execute him (because the referendum purporting to reinstate LB 268 went into effect

on August 30, 2015, before it was suspended on October 16, 2015, or because the referendum itself was defective), then his execution would violate the Eight Amendment. Attachment A, at 6-7 (citing *Lewis v. Jeffers*, 497 U.S. 764, 282 (1990); *Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006); *Lowenfeld v. Phelps*, 484 U.S. 231, 244 (1988)).

Defendant therefore makes the following additional claims in this amended post-conviction motion, under the theory that, because these claims are valid, Defendant's execution would violate the Eighth Amendment: 1) the sponsors of the referendum failed to file with the Secretary of State the *sworn* statement required under Neb. Rev. Stat. § 32-1405(1), rendering the referendum the sponsors purported to initiative defective; 2) the Governor and Treasurer exercised legislative authority, violating the Nebraska Constitution, by initiating the referendum petition, creating a ballot question committee in support of the referendum, funding the committee's efforts to collect signatures for the referendum, and submitting those signatures to the Secretary of State; 3) LB 268 went into effect, including section 23 of the bill which explicitly conveyed the intent that the repeal of the death penalty would be retroactive, transforming Defendant's death sentence to one of life imprisonment. *See* Points (A), (B), (C), *infra*.

1. The sponsors of the Petition failed to comply with the requirement of a sworn-statement to initiate the referendum.

Neb. Rev. Stat. § 32-1405(1) provides:

> Prior to obtaining any signatures on an initiative or referendum petition, a statement of the object of the petition and the text of the measure shall be filed with the Secretary of State together with *a sworn statement* containing the names and street addresses of every person, corporation, or association sponsoring the petition.

Id. (emphasis added). This provision could not be any clearer in requiring the factual statement initiating the referendum or initiative to be sworn. The sponsors of the referendum provided instead an unsworn statement, which failed to include an oath, using specific language such as "hereby swears" or "under penalty of perjury" to assure the reader that the statement being signed is truthful. *See Moyer v. Neb. DMV,* 275 Neb. 688, 692 (2008) (providing examples of sworn statements); *How to Prepare a Sworn Statement*, Black's Law Dictionary (2d online ed.), https://thelawdictionary.org/article/how-to-prepare-a-sworn-statement/

The Supreme Court has noted, "[r]equiring a sworn statement is not an onerous duty." *Loontjer v. Robinson*, 266 Neb. 902, 11 (2003) For these reasons, strict compliance and not mere substantial compliance is needed. *Id.* at 910-11.

Strict interpretation of statutory regulations designed to discern fraud in a proposed measure is not unique to Nebraska. Several other states have enacted similar mandatory statutory requirements to initiate referendums. *See, e.g., Feldmeier v. Watson*, 123 P.3d 180, 183, 211 Ariz. 444 (Ariz. 2005) ("We require referendum proponents to strictly comply with all constitutional and statutory requirements"); *In re Werner*, 662 A.2d 35, 38 (Penn. 1995) (noting that the absence of a certifying, sworn affidavit was not an amendable defect); *Ferguson v. Secretary of State*, 240 A.2d 232, 234, 249 Md. 510 (Md. 1968) (dismissing a petition for a ballot referendum for failure to provide an affidavit "of the person procuring the signatures thereon that of the said person's own personal knowledge every signature thereon is genuine and bona fide, and that the signers are registered voters").

Because of the failure of the sponsors to comply with the requirement of a sworn statement, the referendum purporting to reinstate the death penalty was invalid. *Loontjer*, 266

Neb. at 910. As noted above, Defendant's execution based upon an overturned statute would violate the Eighth Amendment.

2. The Governor and Secretary of State violated the Separation of Powers by Exercising Legislative Power.

By initiating the referendum petition, creating a ballot question committee in support of the referendum, funding the committee's efforts to collect signatures for the referendum, and submitting those signatures to the Secretary of State, the Governor and Treasurer unconstitutionally exercised legislative power that the people have expressly reserved for themselves to approve or reject the acts of the Legislature:

> The legislative authority of the state shall be vested in a Legislature consisting of one chamber. The people reserve for themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independent of the Legislature, which power shall be called the power of initiative. The people also reserve power at their own option to approve or reject at the polls any act, item, section, or part of any act passed by the Legislature, which power shall be called the power of referendum.

Neb. Const. Art. III, § 1. Article III-1 vests the legislative power of referendum with the people, and not the executive branch. "When the people invoke the right to a referendum, they are exercising their coequal *legislative power* to expressly approve or repeal the enactments of the Legislature." *Pony Lake Sch. Dist. 30 v. State Comm. for the Reorganization of Sch. Dists.*, 271 Neb. 173, 192 (2006) (emphasis added). And no person "being one of the" legislative, executive, or judicial 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, § 1. Thus, the actions by the Governor and Treasurer violate both Article III-1's reservation of the referendum power to the people and Article II-1's prohibition on members of the executive exercising legislative power. The Nebraska Constitution does not countenance executive exercise of this legislative power of referendum. And absent express authority in the Constitution, the executive

does not have such power: the Nebraska Constitution "is to be regarded as a grant of powers to [the executive and judicial branches]. Neither the executive nor the judiciary, therefore, can exercise any authority or power, except such as is clearly granted by the Constitution." *Jaksha v. State*, 222 Neb. 690 (1986) (quoting *Elmen v. State Board of Equalization & Assessment*, 120 Neb. 141, 148 (1930)).

The Governor and Treasurer engaged in numerous acts that constitute the exercise of referendum power under the express terms of the Nebraska Constitution and governing statutes:

- Governor Ricketts, through his staff, allies, and other agents acting at the Governor's request, direction, order, and/or encouragement, created and served on Nebraskans for the Death Penalty (NEDP), a ballot question committee in support of a referendum against LB 268, pursuant to Neb. Rev. Stat. §§ 49-1401 *et seq.* State Treasurer Stenberg directly served as co-chairman of NEDP.
- On June 1, 2015, Governor Ricketts and State Treasurer Stenberg, acting through NEDP, filed a referendum petition with the Nebraska Secretary of State seeking a referendum against LB 268, pursuant to Neb. Const. art. III-3, and Neb. Rev. Stat. §§ 32-628 and 32-1405.
- In June 2015, the first month of NEDP's existence, Governor Ricketts and his family contributed $200,000 of the approximately $244,000 in donations to NEDP. These donations were used by NEDP to collect signatures for the petition pursuant to Neb. Const. art. III-3 and Neb. Rev. Stat. § 32-1409.
- In or around June or July, 2015, Governor Ricketts used his position as Governor and the resources of the state to raise additional funds and otherwise support the referendum, including but not limited to obtaining donations from other major donors to NEDP.
- At least as of July 2015, Governor Ricketts sent fundraising letters that prominently used his position as Governor and the prestige of the Governor's office to solicit donations to NEDP from the public.
- On August 27, 2015, Governor Ricketts and State Treasurer Stenberg, acting through NEDP, delivered approximately 166,000 signatures in support of the referendum against LB-268, pursuant to Neb. Const. art. III-3 and Neb. Rev. Stat. § 32-1409.

Governor Ricketts and State Treasurer Stenberg were not permitted to form NEDP as a ballot question committee pursuant to Neb. Rev. Stat. § 49-1401 *et seq.*, file a referendum petition

pursuant to Neb. Const. Art. III, § 3, and Neb. Rev. Stat. § 32-628 and Neb. Rev. Stat. § 32-1405, directly fund or fundraise in support of the operations of NEDP, or submit signatures to the Secretary of State in support of the referendum pursuant to Neb. Const. Art. III, § 3 and Neb. Rev. Stat. § 32-1409. Each of these actions goes beyond mere advocacy to the express exercise of the referendum power.

In initiating the referendum against LB 268, the executive branch seized control of the very heart of legislative power—lawmaking authority—by usurping the referendum power for itself. The actions of Governor Ricketts and the executive branch are offensive to democratic governance, which requires a system of checks and balances to prevent any single branch of government from centralizing the powers of government unto itself. As the Supreme Court explains:

> The purpose of the doctrine [of separation of powers] is to preserve the independence of each of the three branches of government in their own respective and proper spheres thus tending to prevent the despotism of an oligarchy of the Legislature or judges, or the dictatorship of the executive, or any cooperative combination of the foregoing. In the words of Justice Brandeis, "[The purpose was] not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

In re Neb. Cmty. Corrs. Council, 274 Neb. 225, 234 (2007) (quoting *Prendergast v. Nelson,* 199 Neb. 97, 124-125 (1997) (Clinton, J., concurring in part, and in part dissenting) quoting *Myers v. United States*, 272 U.S. 52 (1926)). Here, Governor Ricketts' power was checked when his veto of LB 268 was overridden by the Legislature. He had no further authority to reject the passage of LB 268. To allow Governor Ricketts to circumvent the Legislature and usurp lawmaking authority through the referendum process is contrary to the limits on executive power set forth in the Nebraska Constitution. For these reasons, his acts in driving the referendum that resulted in the purported overturning of LB 268 were unconstitutional and unlawful. As explained above,

because the execution of Defendant under a law that has been invalidated would violate the Eighth Amendment, Defendant is entitled to postconviction relief.

3. LB 268 went into effect on August 30, 2015, transforming Defendant's death sentence to one of life imprisonment.

LB 268 went into effect on August 30, 2015—90 days after the Legislature adjourned sine die on May 29, 2015, *see* Neb. Const. Art. III, § 27. This is certain because the Revisor of Statutes determined that it did, and amended the official published statutes of Nebraska accordingly. *See* Nebraska Revisor of Statutes, Operative Dates for Legislative Bills Enacted During the 2015 Legislative Session, http://nebraskalegislature.gov/pdf/reports/revisor/datelist2015.pdf (listing the effective date of LB 268 as August 30, 2015). The Revisor has a statutory duty to "prepare, arrange, and correlate for publication, at the end of each legislative session, the laws enacted during the session and to arrange and correlate for publication replacements of the permanent volumes of the statutes. Neb. Rev. Stat. § 49-702.

Another duty of the Revisor is to create the supplements that serve as the record of the law at any given time. The Revisor must

> certify that the contents of the supplements and reissued volumes, as published, *are true copies of all laws of a general nature that are in force at the time of the publication thereof.* The Revisor of Statutes shall deposit a copy of the supplements and reissued volumes so certified in the office of the Secretary of State. *The supplements and reissued volumes shall constitute the official version of the statutes of Nebraska and may be cited as prima facie evidence of the law in all of the courts of this state.*

Neb. Rev. Stat. § 49-767 (emphasis added).

Fulfilling this duty, the Revisor incorporated LB 268 into the 2015 Supplement to the Revised Statutes. Existing provisions modified or deleted by LB 268 were duly amended, and new provisions were assigned their own sections, including section 23 of LB 268, which became

Neb. Rev. Stat. § 29-2502. The Revisor made these amendments pursuant to law, fully cognizant that the law would remain in effect pending the results of the ongoing verification of the referendum signatures, noting that as of October 13, 2015, when the supplement was being printed, "LB 268 *would be suspended if* the Secretary of State certifies sufficient signatures on the referendum petition to suspend the taking effect of such act until the same has been approved by the electors of the state." R.S. Supp., 2015, *Insert, Statutes affected by LB 268 Referendum Petition*, 1 (emphasis added).

Contrary to the State's argument in other proceedings that no provision of Nebraska law required verification and counting of the petition signatures in support of referendum before LB 268 could be suspended, *id.*, three provisions together do just that: Neb. Const. Art. III, § 3 sets out a 10-percent requirement and a geographical distribution requirement for suspension; Neb. Const. Art. III, § 4 vests the Legislature with the authority to enact law "to facilitate the initiative and referendum process[;]" and Neb. Rev. Stat. § 32-1409(3) requires the "Secretary of State [to] total the valid signatures and determine *if constitutional and statutory requirements have been met*. *Id.* (emphasis added). *See also* R.S. Supp., 2015, *Insert, Statutes affected by LB 268 Referendum Petition*, 1 (noting the same).

Here, neither the statutory process under § 32-1409(3) nor any other process took place to determine if the signatures met the constitutional requirement for suspension before LB 268 went into effect on August 30, 2015. Nor is there any alternative to the Constitution and Legislature's explicit process for determining if the constitutional requirements for suspension have been met. For example, if the signatures are supposed to have suspended LB 268 upon filing, how would that occur and the Revisor of Statutes still have incorporated LB 268 into the 2015 Supplement? Did the Secretary of State (or some other supposed authority) count the number of (unverified)

signatures and calculate whether that number was a number equaling at least ten percent of Nebraska registered voters at that time, and that the signatures were distributed amongst the counties as required by Article III, section 2? Did the Revisor ignore such a determination, publish LB 268 despite the determination, and specifically assert that LB 268 had not been suspended in error? No.

The only process is the statutory process that did not take place until October 16, 2015, whose purpose is to "prevent fraud, deception, and misrepresentation in the petition process." Neb. Rev. Stat. § 32-1409(1). The Supreme Court has found this to be a proper purpose, aimed at facilitating the referendum process. *See State ex rel. Stenberg v. Moore*, 258 Neb. 199, 215 (1999) (agreeing prevention of fraud can be valid reason for legislation implementing a referendum, but finding the signature-matching requirement at issue did not serve the goal). Therefore, LB 268 went into effect on August 30, 2015, and the signatures filed triggered suspension only weeks later.

Moreover, the Legislature had every authority to make LB 268 retroactive. Under the Nebraska Constitution, the powers of the Legislature are broad: "The [state] constitution is not a grant but a restriction of legislative power." *Elmen v. State Board of Equalization & Assessment*, 120 Neb. 141, 148 (1930) (quoting *Magneau v. Fremont*, 30 Neb. 843, 852, 47 N.W. 280 (1890)). Applying this principle, courts have noted the Legislature's nearly "unlimited field within which to legislate." *Power Oil Co. v. Cochran*, 138 Neb. 827, 839 (1941) (noting limitation of Constitution, referendum, and initiative). By contrast, the powers of the executive and judiciary are limited to that "clearly granted by the Constitution." *Elmen*, 120 Neb. at 148 (internal citation and quotation marks omitted).

Therefore, unless the Constitution specifically limits the Legislature from establishing the criminal penalties for crimes, and doing so retroactively, then it may do so. It "is the Legislature's function through the enactment of statutes to declare the law and public policy and to define crimes and punishments." *In re Neb. Cmty. Corrs. Council*, 274 Neb. 225, 230 & n. 24 (2007) (citing *Stewart v. Bennett*, 273 Neb. 17, 23 (2007). *Accord*, *Polikov v. Neth*, 270 Neb. 29, 39 (2005); *State v. Stratton*, 220 Neb. 854 (1985) (finding legislative requirement of consecutive sentences in certain circumstances did not violate separation of powers by intruding on judiciary's sentencing authority). Indeed, the Legislature's authority in this regard is "exclusive" and may not be delegated to any other branch of government. *Lincoln Dairy Co. v. Finigan*, 170 Neb. 777, 784 (1960). The Legislature thus had authority to repeal the death penalty.

And it had the authority to do so retroactively, a decision the courts must honor so long as the Legislature makes its intent clear. *See State v. Von Dorn,* 234 Neb. 93, 99 (1989) (finding new legislation that did not disclose intent to be applied retroactively would not be so applied, and citing *Housand v. Sigler*, 186 Neb. 414, 415-16 (1971) (similar). *See also Larson v. Jensen*, 228 Neb. 799, 804 (1988) (noting that noncriminal statutes are not to be given retroactive effect unless the Legislature has clearly expressed a contrary intention); *Moore v. Peterson*, 218 Neb. 615, 617 (1984) ("A legislative act operates only prospectively and not retrospectively *unless* the legislative intent and purpose that it should operate retrospectively is clearly disclosed.") (emphasis added). In section 23 of LB 268, the Legislature made clear its intent that the repeal of the death penalty accomplished in other sections (particularly six and nine) would operate retroactively, explicitly using the key term of these decisions—"intent":

> It is the intent of the Legislature that in any criminal proceeding in which the death penalty has been imposed but not carried out prior to the effective date of this act, such penalty shall be changed to life imprisonment.

Neb. Rev. Stat. § 29-2502 (2015 Supplement).

This legislation not only enjoys a presumption of constitutionality, *Adams*, 293 Neb. at 616, but it also follows precedent. Before the U.S. Supreme Court in 2002 constitutionally banned the execution of prisoners with intellectual disability (previously referred to as mental retardation), the Legislature banned the practice in this state in 1998. *See* Neb. Rev. Stat. § 28-105.01 (Cum.Supp.1998). Just as LB 268 abolished the death penalty for all offenders, subsection two of this statute stated that "the death penalty shall not be imposed upon any person with mental retardation. Subsection four provided that "a convicted person sentenced to the penalty of death prior to July 15, 1998" may file an application for relief (within a prescribed time) under subsection two. This, too, was simply the exercise of Legislative authority to retroactively apply a new law.

To be sure, Neb. Const. Art. IV, § 13 vests the power to grant reprieves, pardons, or commutations in the Board of Pardons. But LB 268 intrudes on none of these functions.

Six years after Nebraska's Constitution of 1875, the Supreme Court construed the executive's pardon power in *Pleuler v. State*, 11 Neb. 547 (1881). The power was then located in Article V, section 13, which granted the power "to grant reprieves, commutations, and pardons" to the Governor alone. Neb. Const. of 1875, Art. V, § 13. The Court described this power as "not a right given for consideration to the individual by the legislature, but *a free gift from the supreme authority, confided to the chief magistrate*, and to be bestowed according to his own discretion." *Pleuler*, 11 Neb. at 575 (emphasis added). The Court has similarly described a pardon as an act of grace, an order relieving a prisoner of the legal consequences of his actions. *State v. Spady*, 264 Neb. 99, 103 (2002) (collecting cases). Although affording less relief than a

pardon, a commutation too is a "discretionary act of grace from the executive branch[.]" *Otey v. State*, 240 Neb. 813, 837 (1992).

The decisions on which the State has argued in other proceedings do not refute any of this. *See State v. Bainbridge*, 249 Neb. 260 (1996); *Johnson v. Exon*, 199 Neb. 154 (1977); In *Bainbridge*, the statute at issue was a clear case of the Legislature attempting to vest individualized discretion to commute in a sentencing court. The statute found unconstitutional allowed a person whose driver's license had been revoked for 15 years (due to drunk driving convictions) to show that she or he had reformed by, generally, getting treatment, refraining from drunk driving, and abstaining from excessive consumption. *See generally* 1992 Neb. Laws LB 291, § 10 (setting forth partially overturned statute). This of course represents commutation, and is nothing like the Legislature's retroactive repeal of the death penalty across the board. In *Bainbridge*, the Legislature had not outlawed the sentence of 15-year driver's-license revocations, but merely allowed for individual relief from that sentence for offenders who could show rehabilitation.

Johnson similarly did not involve, as here, the Legislature enacting law outlawing a particular sentence and doing so retroactively. The question there was the amount of time that would be served in fulfillment of sentence in the judgment under complex good-time credit laws, but the initial sentences of the two plaintiffs (terms of three to four years for Johnson, and five years for Cunningham) stood. *Johnson*, 199 Neb. at 155-58. In any case, the new beneficial time calculation laws at issue were to be made retroactive only with approval in each case by the Board of Pardons, mooting the supposed separation of powers problem. *Id.* at 158.

The Legislature's ability to retroactively apply a change in the criminal sentence, including reducing existing sentences, is akin to the court's power to retroactively correct

unconstitutional sentences even if that means reducing them. *See State v. Mantich,* 287 Neb. 320, 342 (2014) (vacating juvenile's sentence of life imprisonment and remanding for resentencing to a milder sentence, and holding that *Miller v. Alabama*, 567 U.S. 460 (2012), prohibiting mandated life without parole sentence for juvenile offenders, is a new substantive rule retroactive to cases on collateral review). Similarly, forty-five years ago, the Supreme Court issued a mandate ordering the death sentence of Thomas A. Alvarez to be vacated,[16] following the mandate of the U.S. Supreme Court in *Alvarez v. Nebraska*, 408 U.S. 937 (1972), which in turn was following *Furman v. Georgia*, 408 U.S. 238 (1972). The Supreme Court did not follow the lead of other states, and refer the unconstitutional sentences to the executive for correction using the pardon power. *See, e.g., Stanley v. State*, 490 S.W.2d 828, 830 (Tex. Crim. App. 1972) (noting with respect to eleven appellants that, after *Furman*, "Governor Preston Smith, acting upon the recommendation of the Board of Pardons and Paroles, has granted each appellant a commutation of sentence, from death to life imprisonment."). The Supreme Court did not do so, because its power to replace an unconstitutional sentence, retroactively, with a constitutional one for all affected prisoners does not conflict with the executive's narrow power to pardon individual prisoners or commute their sentences. Likewise, the pardon power poses no conflict with the Legislature's plenary lawmaking authority to retroactively change a sentence when its own action renders a previously-lawful sentence unlawful. Neither of these constitutionally-anticipated acts can be reserved for the Board of Pardons, whose powers are constitutionally limited. *Elmen,* 120 Neb. at 148.

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[16] *See State v. Alvarez*, Mandate (Neb. Oct. 3, 1972). *See also State v. Alvarez,* 182 Neb. 358 (1967) (affirming conviction and sentence on direct appeal).

The foregoing claims are those dismissed in the Declaratory Judgment Action under the theory that imposition of the death penalty without any state-law authority to do so would violate the Eighth Amendment. As alternative arguments, the following claims presuppose the opposite – i.e., that Defendant loses his claims that the referendum was invalid and that, in any case, section 23 of LB 268 transformed his death sentence into life imprisonment.

4. Imposition Of The Death Penalty Following The Imposition Of A Life Sentence Constitutes Cruel And Unusual Punishment Under The Eighth Amendment To The U.S. Constitution.

Nebraska's legislative commutation and subsequent re-imposition of death sentences subjects Mr. Lotter to extreme psychological and emotional harm in violation of the United States Constitution's prohibition against cruel and unusual punishments. *See* U.S. Const. amends. VIII; XIV. The Constitution does not permit execution of a sentence in a manner creating unnecessary stress or anxiety. Legal, medical, and psychological scholars have noted the tremendous harm caused by variability and uncertainty around death sentences.

The Eighth and Fourteenth Amendments bar states from using punishments that "involve the unnecessary and wanton infliction of pain." *Gregg v. Georgia,* 428 U.S. 153, 173 (1976). To establish an Eighth Amendment violation, a petitioner need not show the existence of a specific injury, but rather must only demonstrate that the punishment involves "conditions posing a substantial risk of serious harm." *Taylor v. Crawford,* 487 F.3d 1072 (8th Cir. 2007) (holding that petitioner could bring an Eighth Amendment claim for the *risk* of injury caused by lethal injection protocol, though ultimately finding that the facts of that case did not present a constitutionally significant risk).

The Founders adopted the Eighth Amendment not only to prohibit the government from inflicting physical pain on the people, but also to prevent "exercises of cruelty . . . other than

those which inflicted bodily pain or mutilation." *Weems v. United States*, 217 U.S. 349, 373 (1909). The Eighth Amendment forbids laws and punishment subjecting a person to "circumstance[s] of degradation," *id.* at 366, or to "circumstances of *terror*, pain, *or disgrace*" that are "superadded" to a sentence of death. *Id.* at 370 (emphasis added). Furthermore, the Supreme Court has ruled unconstitutional those punishments which do not "accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.'" *Gregg*, 428 U.S. at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

Repeatedly, the U.S. Court of the Appeals for the Eighth Circuit and other federal courts have held that Eighth Amendment violations may exist in cases without any physical injuries. *Hobbs v. Lockhart*, 46 F.3d 864, 869 (8th Cir. 1995) ("We cannot conclude that plaintiff's emotional distress was not an injury serious enough to be constitutionally cognizable."); *Obama v. Burl*, 477 Fed. Appx. 409, 411 (8th Cir. 2012) (unpublished) (finding a potential Eighth Amendment violation where constant lighting of prisoner's cell "caused inability to sleep, emotional distress, and constant headaches"); *Beal v. Foster*, 803 F.3d 356, 357–58 (7th Cir. 2015) (quoting *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir.2012)) ("the alleged pain sufficient to constitute cruel punishment may be physical or psychological.")).

In this case, the State creates a substantial risk of serious emotional and psychological harm to Mr. Lotter by re-imposing a death sentence after the Legislature enacted a law reforming his death sentence to life and after the Department of Corrections told him that he would not be executed because his sentence had been reduced to life in prison. Mr. Lotter is subject to a uniquely cruel and unprecedented form of psychological suffering through alternating periods of relief and terror as he has been told that his life would be spared, that the voters would decide if he could be executed, and then told again that he would be executed. The inconsistent dictates of

the state on which Mr. Lotter's life hinges add stress and exacerbate his anxiety to such an extent as to violate his rights to be free from unnecessary suffering and the deprivation of their basic dignity.

Extensive medical research highlights the psychological and emotional pain felt by those who face an impending death, and researchers have found that anxiety associated with impending death is aggravated when uncertainty does not allow a person to prepare adequately. J. Arndt et al., *Suppression, Accessibility of Death-Related Thoughts, and Cultural Worldview Defense: Exploring the Psychodynamics of Terror Management*, 73 Journal of Personality and Social Psychology 5 (1997); Ernest Becker, THE DENIAL OF DEATH 11-12 (Free Press paperback ed. 1997); Tom Pyszczynski et al., *A Dual Process Model of Defense Against Conscious and Unconscious Death-Related Thoughts: An Extension of Terror Management Theory*, 106 Psychological Review 835 (1999).

Even in the ordinary case, death-row prisoners face these emotional challenges. Researchers note that condemned prisoners, like terminally ill patients, may eventually come to terms with impending death. Craig Haney, *Psychological Secrecy and the Death Penalty: Observations on "The Mere Extinguishment of Life,"* 16 Studies in Law, Politics, and Society 3 (1996). During this final stage, prisoners may accept or become resigned to their fate, and mentally prepare themselves for their execution. Robert Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 LAW & PSYCHOL. REV. 141, 145-46 (1979); Elisabeth Kubler Ross, ON DEATH AND DYING 112 (1969). This acceptance or resignation, however, is in stark contrast to the shock that prisoners experience when first sentenced to death.

When first arriving on death row, the "prospect of execution … gives rise to intense preoccupation. The future is necessarily uncertain and men feel vulnerable and afraid." Johnson,

supra, at 151. As a result of the Nebraska Legislature's reprieve and the subsequent reinstatement of the death penalty, Mr. Lotter is made to repeatedly endure one of the most psychologically traumatic aspects of his sentence and incarceration. Furthermore, the uncertainty surrounding his sentence adds a further sense of terror because of the unpredictability of his upcoming death. *See* Joel Lieberman, *Terror Management, Illusory Correlation, and Perceptions of Minority Groups*, 21 Basic and Applied Social Psychology 13 (1999); Victor Florian & Mario Mikulincer, *Fear of Death and the Judgment of Social Transgressions: A Multidimensional Test of Terror Management Theory*, 73 Journal of Personality and Social Psychology 369 (1997). Unlike prisoners who remain on death row and have the opportunity to accept and prepare for their executions, Mr. Lotter has been thrown into a state of confusion, chaos, and uncertainty that has added serious psychological harm and emotional pain beyond that anticipated with the ordinary sentence of death.

Even if not the intended result here, it is a known form of torture to keep a prisoner ignorant and guessing as to his future, ricocheted among unpredictable situations. Researchers note that "[s]ubjecting prisoners to unpredictable situations to maximize stress is a practice well known to people working with torture survivors." Metin Basoglu & Susan Mineka, *The Role of Uncontrollable and Unpredictable Stress in Post-traumatic Stress Responses in Torture Survivors*, in Torture and Its Consequences: Current Treatment Approaches 201 (1992); *see also* A. Koestler, DARKNESS AT NOON (Macmillan 1941). Specifically, experienced torturers recognize that one way to make the effects of torture more severe is to use "methods which block the [victim]'s coping efforts" in a way that will "remove control from the victim and maximize unpredictability," thereby creating additional and "more extensive psychological suffering." Basgolu & Mineka, *supra.* Subsequently, the trauma inflicted on torture survivors is not only a

result of the kind of pain that is inflicted, but also the manner in which it is applied and how the victim is able to process the experience. In this case, the stress and pain already suffered by condemned prisoners is exacerbated by drawing out their mental anguish in a manner mirroring the favorite tool of those seeking to inflict maximal pain.

The possibility that causing such extreme pain and suffering is not the primary goal of those inflicting the punishment is not relevant in this kind of an Eighth Amendment cruel and unusual punishment analysis. The Court of Appeals for the Eighth Circuit has made it clear that the legislature (or in this case the voters) need not have the specific intent to cause pain or suffering to the prisoner by the use of a certain punishment process. *Taylor v. Crawford*, 487 F.3d at 1079-80 (holding that petitioner challenging the State's execution protocol did not have to prove deliberate indifference on the part of prison officials). Therefore, even if the voters did not intend to cause this kind of suffering, the imposition of the death penalty in this case still violates the Eighth Amendment.

To be sure, all death row prisoners suffer to some extent based on the knowledge of and uncertainty surrounding their execution. In declining to hold the death penalty categorically unconstitutional under the Eighth Amendment, the Supreme Court accepts that some degree of emotional or psychological suffering comes with it. *See Baze v. Rees*, 553 U.S. 36, 47 (2008) (lead opinion of Chief Justice Roberts) ("We begin with the principle, settled by *Gregg*, that capital punishment is constitutional . . . It necessarily follows that there must be a means of carrying it out."). In the case of Mr. Lotter, however, the State has created conditions that add a level of suffering and cruelty that far exceeds what a typical condemned prisoner faces. Mr. Lotter is forced to again endure the most traumatic parts of his sentence and is subjected to psychological conditions that are more analogous to torture than incarceration. It is exactly this

kind of "unnecessary and wanton infliction of pain" on top of an existing death sentence that the Eighth Amendment prohibits. *Gregg,* 428 U.S. at 173. In fact, the Supreme Court has previously held punishments to be unconstitutional for very similar reasons. Although decided under the Ex Post Facto Clause rather than the Eighth Amendment, the Court in *In re Medley*, 134 U.S. 160 (1890), found that not telling a prisoner the time and date of his execution was unconstitutional. The Court's reasoning focused on the additional psychological pain and suffering, noting that "secrecy [about the time of execution] must be accompanied by an immense mental anxiety amounting to a great increase in punishment." *Id.* at 172.

The Supreme Court also examined the cruelty of imposing a second death sentence in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, (1947). There, the petitioner had suffered through and survived a botched execution in the electric chair and asked for relief "because he once underwent the psychological strain of preparation for electrocution" and to "require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment." *Id.* at 464. Ultimately, the Court ruled against the prisoner because the original failed execution was accidental, *id.*, and because Justice Frankfurter did not believe that the Eighth Amendment had been incorporated through the Fourteenth Amendment. *Id.* at 471 (Frankfurter, J., concurring) (a decision that has subsequently been reversed by the Court in *Robinson v California*, 370 U.S. 660 (1962)). The torturous execution of Mr. Lotter after telling him he will serve a life sentence is not an unfortunate accident but the foreseeable result of the State's decision to place him (and other death-row prisoners) in the middle of its death penalty debate and to target him for execution after he had been told his life would be spared. *See also* Point IV, *infra* (showing Mr. Lotter's death sentence is a Bill of Attainder).

The State has ping ponged Mr. Lotter from death to life and to death again. His individual fate became hostage to an ongoing political contest between the Legislature, the Governor, and the voters. The Department of Corrections was in between, transmitting each official development. In the history of capital punishment in this nation, there is no known parallel to what Lotter has been forced to endure (other than his fellow death-row prisoners during this time period). Regardless of intent, the trauma that the State has added to Mr. Lotter's already painful pending execution adds up to punishment barred as cruel and unusual under the Eighth Amendment.

The punishment is also prohibited under the Eighth Amendment's prohibition against punishments that do not comport with "the evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 101. Under that analysis, courts look to "objective indicia of society's standards, as expressed in pertinent legislative enactments and state practice." *Roper v. Simmons*, 543 U.S. 551, 562 (2005). Typically, this means that courts count how many states still permit a particular type of sentencing practice and how many have abolished or never adopted it. *See, e.g., id.* at 313-17; *Atkins v. Virginia*, 536 U.S. 304, 312 (2002); *Kennedy v. Louisiana*, 554 U.S. 407, 422-26 (2008).

In this case, the practice in question is so unusual that there is no evidence that any other state has ever imposed a sentence in such a manner. There is no consensus across states that shows that society accepts the practice of legislatively reinstating vacated death sentences, and there is no record to suggest that a prisoner has ever been executed after the State reassured him that he would only serve a sentence of life in prison. In fact, the evidence shows that in states that have judicially or legislatively abolished the death penalty, no person who was on death row at the time of abolition has ever been executed, even if that state later reinstated capital

punishment. *See* Brief of Amici Curiae Legal Historians & Scholars at 6-9, *State v. Santiago*, 122 A.3d 1 (Conn. 2015), 2012 WL 7985132 (demonstrating what occurred after each death-penalty repeal in America). The fact that states have resoundingly rejected the practice of executing prisoners after states abolish the death penalty, and that no state has ever executed a group of prisoners after informing them that the death penalty has been abolished, shows that the execution of Mr. Lotter does not comport with our society's evolving standards of decency and is therefore unconstitutional.

5. Imposition Of The Death Penalty Following The Imposition Of A Life Sentence Constitutes Cruel And Unusual Punishment Under The Nebraska State Constitution.

Mr. Lotter is further protected from cruel and unusual punishment by the Nebraska State Constitution. Neb. Const. art I, §9. While much of the analysis of state and federal constitutional questions is similar and therefore reincorporated here by reference instead of repeated, there are some differences bearing emphasis. The Nebraska Supreme Court has found the State Constitution to be more protective against cruel and unusual punishment than the Federal Constitution. In *State v. Mata*, 275 Neb. 1 (2008), the court found that Nebraska's use of the electric chair for executions violated Nebraska's prohibition on cruel and unusual punishments, even if it would not violate the Eighth Amendment. In *Mata*, the Nebraska Supreme Court relied on much of the same analysis as used in federal Eighth Amendment claims, including consideration of the "risk that prisoner will suffer unnecessary and wanton pain" and the subjective "evolving standards of decency" of society. *Mata*, 275 Neb at 40-44.

The Nebraska court, however, also emphasized that punishments "must accord with 'the dignity of man,' which is the basic concept underlying the prohibition against cruel and unusual punishment." *Id.* at 44-45. In applying this "dignity of man standard," *id.* at 45, the court noted that a punishment may be undignified "irrespective of the pain that" the punishment may inflict

on the prisoner. The court pointed to the physical disfigurement and burns that could result from electrocution as undignified. In the case of Mr. Lotter, he is subjected not only to the substantial risk of serious harm but to the degrading and undignified treatment of being told his sentence has been changed to life imprisonment by the Legislature's duly-enacted statute and then old that the voters would decide his fate in a referendum, and finally that it has been determined that he will again face execution. To spare a prisoner's life only to take it away again is beneath the dignity of man protected by the Nebraska Constitution.

The Nebraska Supreme Court has also been more explicit than the Eighth Circuit with regard to the fact that legislators' intent is not relevant in analyzing whether a sentence is imposed in a cruel and unusual manner. The court said that "[a]lthough the state and federal Constitutions prohibit the 'unnecessary and wanton' infliction of pain, we do not believe 'wanton' in the context of state sanctioned punishment implies a mental state. In a method of execution challenge, 'wanton' means that the method itself is inherently cruel." *Mata*, 275 Neb. at 46. Therefore, the additional suffering that prisoners are subjected to because of the death penalty repeal and reinstatement violates the Nebraska Constitution because the psychological impact is exceptionally traumatic (cruel and wanton) and there is no penal necessity to inflict that additional level of pain and suffering.

B. Mr. Lotter's Execution In These Unprecedented Circumstances Violates The Due Process Clause Of The Nebraska and U.S. Constitutions.

The Government shall not "deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Nebraska Constitution echoes this sentiment, promising, "No person shall be deprived of life, liberty, or property, without due process of law, nor be denied equal protection of the laws." Neb. Const. art. 1 § 3.

With LB 268, the Nebraska Legislature changed the extant death sentences to life imprisonment. Even if the claims above fail, and Defendant is deemed sentenced to death once again as a matter of Nebraska law, his rights to due process forbid the switch from life to death again.

Due process forbade the State from reinstating the capital sentences *en masse*. *See Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (finding state mandatory sentence violated the prisoner's right to liberty and due process of law). Rather, both state and federal law guaranteed each individual to a new sentencing procedure. *Id.*; *see also Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (discussing importance of individualized sentencing procedures in capital trials to both the specific prisoner and society as a whole); *State v. Reeves*, 258 Neb. 511, 523-535 (2000) (holding that state resentencing process requires an individualized hearing to take place in the original district court in compliance with state statutes).

1. Resentencing Must Take Place In The District Court Where The Original Trial Was Held.

In 2000, the Nebraska Supreme Court considered a case very similar to this case in *State v. Reeves*, 258 Neb. 511 (2000). The *Reeves* court held "the Nebraska Constitution places original sentencing authority in the district courts and does not provide sentencing as one of [the Nebraska Supreme Court's] powers." *Id.* at 529. "[T]he Nebraska Legislature did not authorize [the Nebraska Supreme Court] to perform the same function as the sentencing judge or sentencing panel." *Id.* at 531.

The *Reeves* Court considered the language of Neb. Rev. Stat. § 29-2520, which provides the procedures for the penalty phase of a capital trial.[17] Section 29-2520 states in relevant part:

[17] Mr. Lotter recently challenged the validity of Neb. Rev. Stat. § 29-2520 (2017) in light of the U.S. Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). *State v. John L.*

> Whenever any person is found guilty of a violation of section 28-303 and the information contains a notice of aggravation as provided in section 29-1603, the district court shall, as soon as practicable, fix a date for an aggravation hearing to determine the alleged aggravating circumstances. If no notice of aggravation has been filed, the district court shall enter a sentence of life imprisonment.

Neb. Rev. Stat. § 29-2520 (1) (2017). Nowhere does the statute grant the Nebraska Supreme Court the power to resentence capital defendants, even when the court identifies a constitutional error. *Reeves*, 258 Neb. at 531. Nor does § 29-2520 contain any language granting power to the Nebraska Legislature to impose death sentences. Neb. Rev. Stat. § 29-2520. As a result, a ballot referendum, which functions as a legislative matter,[18] does not have the power to reinstate a death sentence. *Id.*; *see Reeves*, 258 Neb. at 531. "[T]he statutory sections regarding the weighing of aggravating and mitigating circumstances and the determination of the sentence specifically place that role in the district court, with the judge who presided at trial." *Id.*

No resentencing hearing took place in the district court in this case. Instead, the Legislature through appropriate legislative action removed capital punishment as an option, changing Mr.Lotter's sentence to a sentence of life without the possibility of parole. Laws 2015, LB 268 §23. In reaction, a ballot referendum sought to reinstate the death sentences for all of those prisoners whose sentences had been changed to life imprisonment. The ballot referendum,

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Lotter, Richardson County District Court Case Nos. 2682, 2683, 2684 (Motion for Postconviction Relief filed January 12, 2017) (currently on appeal, *State v. Lotter*, Nos. 17-1126, 17-1127, and 17-1129). In particular, Mr.Lotter challenged the use of the three-judge panel created to weigh the aggravating and mitigating circumstances. Neb. Rev. Stat. §§ 29-2520 (4)(h) & 29-2521(3). *Hurst* requires the jury–not a single judge or a panel of judges–to be the ultimate arbiter regarding a capital defendant's sentence, including the weight to be given to each aggravating and mitigating factor. *Hurst*, 136 S. Ct. at 624.

[18] *State ex rel. Lemon v. Gale*, 272 Neb. 295, 304 (2006) ("The Legislature and the electorate are concurrently in rank as sources of legislation, and provisions authorizing the initiative should be construed in such a manner that the legislative power reserved the people is effectual.")

however, failed to consider the law under the existing statute, which mandates that only the district court where the original trial was held holds the power to conduct a penalty phase proceeding, including a resentencing hearing. Neb. Rev. Stat. § 29-2520; *see also Reeves*, 258 Neb. at 531. As a result, the ballot referendum failed to provide the individual prisoners affected by Referendum 426 with sufficient due process in violation of the Fourteenth Amendment of the United States Constitution and Article I § 3 of the Nebraska Constitution.

2. A Capital Resentencing Hearing Is A "Critical Stage" Of Trial.

Due process (along with its sister, Equal Protection) emphasizes "the central aim of our entire judicial system–all people charged with a crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court." *Griffin v. Illinois*, 351 U.S. 12, 17 (1956).

The goal of equality for all applies no less during sentencing proceedings as during the initial guilt determination. *See Gardner*, 430 U.S. at 358. "[T]he sentencing is a critical stage of the criminal proceeding . . . The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." *Id.* The American belief that "debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases." *Id.* at 360.

Because sentencing hearings are a critical stage of trial, sentencing is among the type of proceedings that have been accorded greater protection under substantive due process. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 278 (1998) (noting that the amount of process due

to an individual is proportional to the degree to which the particular stage in question was "integral" to the trial process).

The right to life and substantive due process protections are especially critical in capital cases because "death is a different kind of punishment from any other which may be imposed in this country . . . in both its severity and its finality." *Gardner*, 430 U.S. at 538. Thus, if the State seeks to impose a death sentence, every stage of the trial–*especially the penalty phase as a "critical stage"*–must be given all of the substantive due process that the courts can afford. *Id.* The protection of due process cannot waiver. "The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." *Id.* (citing *Witherspoon v. Illinois*, 391 U.S. 510, 521-23 (1968)).

Here, Mr. Lotter seeks to protect his right to life regarding Nebraska's sentencing procedure. Because this involves a "critical stage" of trial, his right to due process must be protected with the full force of the law. *See Woodard*, 523 U.S. at 278 (finding process due dependent on the proceeding); *Gardner*, 430 U.S. at 538 (noting the importance of process in capital cases); *Reeves*, 258 Neb. at 531 (finding sentencing hearings in capital cases a critical stage that requires the attention of the original trial judge). In this instance, due process requires that the Government provide Mr. Lotter with adequate notice and a right to be heard before depriving him of his right to life, liberty, or property. U.S. Const. amend. XIV, § 1; Neb. Const. art. I, § 3.

Further, because (1) sentencing is a critical stage of trial and (2) the right to life is a particularly protected fundamental right, Mr. Lotter could not be resentenced without first going through the proper sentencing channels. *See Gardner*, 430 U.S. at 357-58; *Reeves*, 258 Neb. at

531. Referendum 426 did not go through the proper channels; the referendum failed to provide a resentencing hearing for the men whose sentences were changed under LB 268 (2015) and instead reinstated death sentences *en masse*. The failure to resentence Mr. Lotter under the statutory procedures, which require a sentencing hearing, was analogous to a court's sentencing Mr. Lotter to death *ex parte*–an unfathomable idea. *See Gardner*, 430 U.S. at 357-58.

3. Failure To Provide An Individualized Resentencing Hearing Deprived Mr. Lotter Of His Protected Right To Life Under The Fourteenth Amendment Of The United States Constitution.

"Due Process emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated." *Evitts v. Lucey*, 469 U.S. 387, 405 (1985). While each prisoner is entitled to individualized consideration of his or her case, a capital prisoner's case requires particular attention:

> In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different. Although the condemned prisoner does not enjoy the same presumptions accorded a defendant who has yet to be convicted or sentenced, he has not lost the protection of the Constitution altogether.

Ford v. Wainwright, 477 U.S. 399, 411 (1986) (internal citations omitted).

Death is different "in both its severity and finality." *Gardner*, 430 U.S. at 357. A death sentence affects both society in general as well as the individual being sentenced. Society is considering taking the life of one of its individuals, which "differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Id.* at 358. "There is [ ] no room for legitimate debate about whether a living person

has a constitutionally protected interest in life. He obviously does." *Woodard*, 523 U.S. at 291 (Stevens, J., concurring in part and dissenting in part).

"It is axiomatic that due process is flexible and calls for such procedural protections as the particular situation demands." *Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 12 (1979) (internal citations omitted). Legal process exists to minimize the risk of error, especially erroneous judicial decisions. *Id.* at 13. As a result, "the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error." *Id.* In this case, the greatest risk of error is an erroneous sentence of death.

Even though Referendum 426 reinstated capital punishment as an option, there is no guarantee that a jury would have chosen to reinstate the death penalty in Mr. Lotter's case. A prisoner who received a valid sentence under a statute that is later voided cannot receive his original punishment without affirmation of the new sentence by a jury. *Hicks*, 447 U.S. at 346.

> The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion . . . [and denying] the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision . . . [disregards] the petitioner's right to liberty [and] is a denial of due process of law.

Id. (emphasis in original) (internal citations omitted).

In this case, a jury *might* have sought to reinstate the death penalty, but a jury was never given that opportunity. Instead, the State reinstated Mr.Lotter's sentence *en masse* without providing Mr. Lotter an opportunity to deny or explain the particularities of his own circumstances. *See Gardner*, 430 U.S. at 362 (finding due process violation where a death

sentence was imposed based on information that the defendant was provided no opportunity to deny nor explain).

Nebraska's failure to provide Mr. Lotter with an individualized resentencing hearing exposed Mr. Lotter and all of Nebraska's death row population to the same defects that caused the U.S. Supreme Court to find capital punishment unconstitutional in *Furman v. Georgia*, 408 U.S. 238 (1972). Every capital case must disclose the rationale for imposing the death sentence, no matter how many times the death sentence is imposed on an individual; if the death sentence is vacated, the district court must articulate the rationale for reinstating a sentence of death. *Gardener*, 430 U.S. at 361; *Reeves*, 258 Neb. at 531. Anything less violates Due Process. *Id.*

C. The Repeal Of LB 268 Was An Unconstitutional Bill Of Attainder Because It Imposes A New Death Sentence On Individuals Without Additional Judicial Process.

The repeal by referendum of LB 268 is an unconstitutional bill of attainder, targeting Mr. Lotter, among others, for execution. LB 268 had overturned the death penalty in Nebraska and resentenced the ten men on death row to life without parole. Its repeal by referendum targeted those ten men and sentenced them anew to death through a legislative act rather than through judicial process.

"A bill of attainder is a legislative act which inflicts punishment without a judicial trial." *Cummings v. Missouri,* 71 U.S. 277, 323 (1866). The United States and Nebraska Constitutions forbid the passage of such laws. Const. art. 1 § 9; Neb. Rev. St. Const. art. I § 16. Although there is question regarding the comparative broadness of the national and Nebraska prohibitions, the Supreme Court of Nebraska has previously held that certain protections in the Nebraska Constitution are more expansive than those in the U.S. Constitution. *Mata,* 275 Neb. at 39-40 (holding that the Nebraska Constitution can be more protective than the Eighth Amendment).

The constitutional protections against bills of attainder were "intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature." *United States v. Brown,* 381 U.S. 437, 442 (1965). They reflect "the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons." *Id.* at 1713.

Legislative Act by Referenda: In Nebraska, the legislative branch includes the people of the State when they speak through voter initiatives and referenda. The legislative authority of the State is thus constitutionally bifurcated–one half belonging to the legislature, the other to the people, who have reserved the right of initiative and referendum. Ne. Rev. St. Const. Art III § 1. "The legislative authority of the state shall be vested in a Legislature consisting of one chamber. The people reserve for themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independent of the Legislature, which power shall be called the power of initiative. The people also reserve power at their own option to approve or reject at the polls any act, item, section, or part of any act passed by the Legislature, which power shall be called the power of referendum." *Id.* The "[l]egislature and the electorate are concurrently equal in rank as sources of legislation, and provisions authorizing the initiative should be construed in such a manner that the legislative power reserved in the people is effectual." *State ex rel. Stenberg v. Moore,* 258 Neb. 199, 211 (1999).

As a result, courts have treated Nebraskan referenda passed by the people as legislative acts. In 2006, the Eighth Circuit ruled that an amendment to the Nebraska Constitution passed by referendum was not a bill of attainder because it did not inflict punishment. *Citizens for Equal*

Protection v. Bruning, 455 F.3d 859 (8th Cir. 2006). If laws passed by referendum could not be bills of attainder this would have been dispositive, and the court would not have engaged in the more detailed analysis under the three pronged test. *See also: State v. Thorne,* 921 P. 2d 736 (Wash. 1996) (the Supreme Court of Washington treated a referendum passed by voters as a legislative act and ruled it was not a bill of attainder on separate grounds).

Federal courts and Nebraska state courts use essentially the same test to determine whether or not a law is a bill of attainder. To establish a bill of attainder under the Nebraska constitution, a petitioner must show by the "clearest proof" that a particular legislative act would "(1) specify the affected persons, (2) inflict punishment, and (3) lack a judicial trial." *State v. Palmer*, 257 Neb. 702, 717 (1999). Mr. Lotter's s death sentence, handed down by the referendum-repeal of LB 268, satisfies all three of these requirements.

(1) Specifies Affected Persons:

Here, the *de facto* question on the Nebraska ballot was not just whether the death penalty repeal should be allowed in the future but whether Mr. Lotter may be sentenced to death once more and executed. The original legislative bill specifically addressed the fate of the men already on death row, stating: "In any criminal proceeding in which the death penalty has been imposed but not carried out prior to the effective date of this act, such penalty shall be changed to life imprisonment without possibility of parole." L.B. 268 § 23. The public campaign in support of the referendum, led by Nebraskan's For the Death Penalty, left no question that the purpose of the referendum was to ensure that Mr. Lotter and the other death-row prisoners would be executed. He was mentioned by name on television ads, websites, and in public debates. The campaign's focus on the individuals on death row—and the public's reaction to this campaign—made it clear that a vote for the referendum would impose a death sentence on Mr. Lotter.

In repealing LB 268, the voters sought to resentence Mr. Lotter and the other nine men to death. Although not mentioned in the ballot title for the referendum, Mr. Lotter's life was put to a popular vote: would it be life without parole or execution?

Of course, bills of attainders are not required to name the specific people they target and may affect a larger group than just a single person. *Cummings,* 71 U.S. 277. Courts have repeatedly held that even laws implicating *prospective* groups still target specific individuals when the bill levies a unique punishment to them. *Brown,* 381 U.S. at 462; *Crain v. City of Mountain Home, Arkansas,* 611 F.2d 726 (8th Cir. 1979). In *Crain* and *Brown*, the courts struck as bills of attainder law that significantly lowered the salary of the city attorney and banned members of the Communist party from holding labor union positions, respectively. Even though the law at issue in *Brown* "inflict[ed] its deprivation upon more than three people," the Court still held it to be a bill of attainder because it specified (without naming) "the people upon whom the sanction it prescribes is to be levied." 381 U.S. at 461. And even though in *Crain* one of the laws at issue was "facially constitutional" and would have affected all future city attorneys—a potentially infinite class—the court still held it to be a bill of attainder because its target and impetus was to punish one particular city attorney. *Id.*

Similarly, while this referendum affects all future capitally charged defendants, it specifically targets Mr. Lotter and nine other men. For future defendants, death is only a *possibility*: the choice between life without parole or execution left to a jury. LB 268 had changed Mr. Lotter's sentence of death to life. Its repeal by referendum then imposed death–leaving him in a state of tortured uncertainty. *See also*, Part II, *supra.*

The decision *Neelley v. Walker*, 67 F.Supp. 3d 1319 (M.D. Ala. 2014), presents an analogous situation. In *Neelley*, the court found that a prisoner had stated a colorable bill of

attainder claim where the Alabama Legislature had retroactively rescinded the right to parole review for former death row prisoners serving life imprisonment. The plaintiff was the *only* prisoner in fifty years who had ever won a rare commutation of her death sentence to life imprisonment, making her parole eligible. The court based its decision on language in floor debates expressing the intent of the Legislature to deny her the opportunity of parole and a suspicious provision making the new law retroactive to four months prior to her commutation. *Id.* at 1329-30. *See also Woldt v. People*, 64 P.3d 256, 271 (Colo. 2003) (in context of Ex Post Facto Clause, three capital defendants were "identifiable targets of the legislation" where the section applied only to three persons who had received the death penalty from a three-judge panel).

If the Legislature had passed a bill naming ten men serving life without parole and resentenced them to death, it would be a paradigmatic unconstitutional bill of attainder. The effects of the referendum are identical to this theoretical bill of attainder. The difference is of form, not substance.

(2) Inflicts Punishment:

The death penalty is the paradigmatic historic legislative punishment. "The classic example [of attainder] is death." *ACORN* v. *United States,* 662 F.Supp.2d 285, 291 (E.D.N.Y. 2009). The repeal of LB 268 by referendum sentenced Mr. Lotter to death. He could not and would not have been executed without its passing.

The classic sources for considering whether there was a legislative intent to punish include "legislative history, the context or timing of the legislation, or specific aspects of the text or structure of the disputed legislation." *Eagleman v. Diocese of Rapid City*, 862 N.W.2d 839, 845 (S.D. 2015) (quoting *Nixon v. Adm'r of Gen. Servs.,* 433 U.S. 425, 478 (1977)). The

legislative history of and discussion surrounding the referendum reveals that resentencing the ten men to death was not a mere side effect of the legislation but its intent and the source of much of its support. But for the passing of the referendum Mr. Lotter would not face the ultimate punishment the State can inflict.

(3) Lacks a Judicial Trial:

In the referendum, Mr. Lotter and the men on Nebraska's death row faced a *de facto* sentencing trial by legislature. Although he had once received a jury trial that included a penalty phase the passage of LB 268 changed his death sentence to one of life imprisonment. The referendum effectively re-litigated the question of whether Mr. Lotter should receive the death penalty or life in prison. If the referendum had been rejected, his sentence of life without parole would have been confirmed. If it passed, as it did, he would again be sentenced to death. Whether Mr. Lotter could be executed thus hinged on the results of the referendum vote, not on the verdict of a jury.

The Nebraska Supreme Court has consistently rejected claims of bills of attainder when "the Legislature has not determined guilt, it has merely imposed burdens on those whom the judicial branch has already found guilty." *In re Interest of A.M., Jr.*, 281 Neb. 482 (2011) (declining to hold that statutes requiring convicted sex offenders to register and receive treatment were impermissible bills of attainder). Death, however, is not a slightly harsher degree of punishment placed on one already convicted, but a different punishment in kind. *Woodson v. North Carolina*, 428 U.S. 280 (1976). Imposing a death sentence first requires a second jury trial to "allow [for] the particularized consideration of the aspects of the character and record of each convicted defendant." *Id.* In *Brown*, the Supreme Court described the dangers of allowing the legislature to replace juries:

> Everyone must concede that a legislative body, from its numbers and organization, and from the very intimate dependence of its members upon the people, which renders them liable to be peculiarly susceptible to popular clamor, is not properly constituted to try with coolness, caution, and impartiality a criminal charge, especially in those cases in which the popular feeling is strongly excited,—the very class of cases most likely to be prosecuted by this mode.

Brown, 381 U.S. at 445.

The referendum placed into the hands of the electorate that which is reserved specifically to juries, lacking the constitutional safeguards and "particularized consideration" that accompany the penalty phase of a trial. This is exactly the kind of legislation the framers were protecting against when they instituted bans on bills of attainder, and it cannot stand.

* * *

The following claim is an additional claim based on events that have happened since the date Mr. Lotter filed his original postconviction motion on December 4, 2017.

D. Mr. Lotter is Intellectually Disabled, and Therefore Actually Innocent of the Death Penalty, as He Belongs to the Class of Offenders for Whom Execution is Categorically Prohibited Under the Eighth and Fourteenth Amendments.

Dr. Weinstein's expert opinion is that Mr. Lotter is an intellectually disabled person. Appendix A at 3. Under well-established law as set forth by the Supreme Court of the United States, the Eighth and Fourteenth Amendments prohibit his execution. Because his new evidence-based claim, if proved, renders his death sentence *per se* unconstitutional and thereby void, his "actual innocence" of the death penalty allows his claim to be heard on the merits in this postconviction proceeding. *See* Neb. Rev. Stat. 29-3001(1); *State v. Dubray*, 294 Neb. 937, 947, 885 N.W.2d 540 (2016) ("A claim of actual innocence may be a sufficient allegation of a constitutional violation under the Nebraska Postconviction Act") (citing *State v. Phelps*, 286 Neb. 89, 834 N.W.2d 786 (2013)). *See also Sawyer v. Whitley*, 505 U.S. 333, 345 (1992) (in the

context of federal habeas corpus, "innocence of the death penalty" constitutes a miscarriage of justice permitting a successive federal habeas petition); *Sasser v. Norris*, 553 F.3d 1121, 1126 n. 4 (8th Cir. 2009) (stating that a petitioner is "actually innocent" and thus ineligible for the death penalty where he demonstrates that he is intellectually disabled).

1. The death penalty is an inherently disproportionate punishment for persons with intellectually disability under the Eighth Amendment's "cruel and unusual punishments" clause.

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court of the United States applied its two-part test for proportionality review and held that the Eighth Amendment, applicable to the states through the Fourteenth Amendment, forbids the execution of persons with intellectual disability, overruling *Penry v. Lynaugh*, 492 U.S. 302 (1989). *See id.* at 311, quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society").

First, the Court in *Atkins* found that a national consensus against executing "mentally retarded" persons had emerged, as measured by objective evidence of state legislative enactments banning the practice.[19] 536 U.S. at 313-315. This direction of change since *Penry* "provides powerful evidence that today our society views [intellectually disabled] offenders as categorically less culpable than the average criminal." *Id.* at 316.

Relying on clinical definitions of intellectual disability "that require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18," as well as professional studies,

[19] As the Supreme Court pointed out in *Hall v. Florida*, 134 S.Ct. 1986, 1990 (2014), the terminology has since changed to refer to the identical phenomenon as "intellectual disability," the term that will be used hereafter.

the Court in *Atkins* observed that, although intellectually disabled persons "frequently know the difference between right and wrong and are competent to stand trial,"

> Because of their impairments . . . by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others[. . .]There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their culpability.

Id. at 318.

Second, the Court agreed with the national consensus and found, in its independent judgment, that the social and penological purposes served by the death penalty -- retribution and deterrence -- were not served by imposing the death penalty on an intellectually disabled person because of their reduced culpability, and that doing so "'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Id.* at 319, quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982).

While the Supreme Court in *Atkins* left to the states "'the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences,'" *id.* at 317, quoting *Ford v. Wainwright*, 477 U.S. 399 (1986) (brackets in original), and n. 22 (noting that state statutory definitions examined by the Court "are not identical, but generally conform to the clinical definitions" of intellectual disability), the Court reconsidered that approach in *Hall v. Florida*, 134 S.Ct. 1986 (2014).

In *Hall*, the Court held that Florida's definition of intellectual disability, which was interpreted by the Florida Supreme Court to strictly require an IQ test score of 70 or less, without which a finding of intellectual disability was foreclosed, "creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional" under the

Eighth and Fourteenth Amendments. 134 S.Ct. at 1990. Repeating language from its prior cases, the Court stated that "[t]he Eighth Amendment 'is not fastened to the obsolete but may acquire meaning as public opinion is enlightened by a humane justice[,]'" and thus reaffirmed that, "To enforce the Constitution's protection of human dignity, this Court looks to the 'evolving standards of decency that mark the progress of a maturing society.'" *Id.* at 1992, quoting *Weems v. United States*, 217 U.S. 349, 378 (1910); *Trop*, *supra*, 356 U.S. at 101.

To determine whether Florida's strict IQ cutoff rule was constitutional, the Supreme Court in *Hall*, consistent with the "evolving standards of decency," looked to "the psychiatric and professional studies that elaborate on the purpose and meaning of IQ scores to determine how the scores relate to the holding of *Atkins*," which "leads to a better understanding of how the legislative policies of various States, and the holdings of state courts, implement the *Atkins* rule." *Id.* at 1993. Examining the medical community's three-criteria definition of intellectual disability -- significantly subaverage intellectual functioning, deficits in adaptive functioning, and onset prior to age 18 -- the Court found that, in the context of formal assessment of intellectual disability, "'[t]he existence of concurrent deficits in intellectual and adaptive functioning has long been the defining characteristic of intellectual disability.'" *Id.* at 1994, quoting Brief for American Psychological Association et al. as *Amici Curiae* ("APA Brief") at 11.

The Court in *Hall* concluded that Florida's definition of intellectual disability disregarded established medical practice. For one thing, the definition takes an IQ score "as final and conclusive evidence of an intellectual capacity," when professionals have long agreed that, "IQ test scores should be read not as a single fixed number but as a range." *Id.* at 1995 Not only does every IQ test have a statistical "standard error of measurement" (SEM), but an individual's IQ test score on any given test may fluctuate for several reasons, including "the test-taker's health;

practice from earlier tests; the environment or location of the test; the examiner's demeanor; the subjective judgment involved in scoring certain questions on the exam; and simple lucky guessing." *Id.* (citing American Association on Intellectual and Developmental Disabilities, R. Schalock et al., User's Guide to Accompany the 11th Edition of Intellectual Disability: Definition, Classification and Systems of Supports 22 (2012) ("AAIDD Manual"); A. Kaufman, IQ Testing 101, pp. 138-139 (2009)). *See id.* (noting SEM is understood as a range of scores, generally ± 5 points on either side of the score; citing, *inter alia*, DSM-5 (stating individuals with intellectual disability have scores of approximately two standard deviations below the mean, *i.e.*, approximately 70, which, adjusted for the SEM, involves a score of 65-75)). And, as the Court noted further, "Even when a person has taken multiple tests, each separate score must be assessed using the SEM, and the analysis of multiple IQ scores jointly is a complicated endeavor [citation omitted]. . . In addition, because the test itself may be flawed, or administered in a consistently flawed manner, multiple examination may result in repeated similar scores, so that even a consistent score is not conclusive evidence of intellectual functioning." *Id.* at 1995-96.

The Court found that "a significant majority of States implement the protection of *Atkins* by taking the SEM into account, thus acknowledging the error inherent in using a test score without the necessary adjustment," which provides "'objective indicia of society's standards' in the context of the Eighth Amendment." *Id.* at 1996, quoting *Roper v. Simmons*, 543 U.S. 551, 563 (2005). As it did in *Atkins*, the Court also considered relevant the "[c]onsistency of the direction of change" and found that "every state legislature to have considered the issue after *Atkins* -- save Virginia's -- and whose law has been interpreted by its courts has taken a position contrary to that of Florida." *Id.* at 1997-98. This evidence provided "strong evidence of

consensus that our society does not regard [Florida's] strict cutoff as proper or humane." *Id.* at 1998.

Further, the Court in *Hall* made clear that, while "States play a critical role in advancing protections and providing the Court with information that contributes to an understanding of how intellectual disability should be measured and assessed . . . *Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection." *Id.* at 1998. Instead, "[t]he clinical definitions of intellectual disability, which take into account that IQ scores represent a range, not a fixed number, were a fundamental premise of *Atkins*[. . .]And those clinical definitions have long included the SEM." *Id.* at 1999. Exercising its independent judgment, as it must when considering whether a punishment is disproportionate under the Eighth Amendment, the Court determined that Florida's strict IQ cutoff "'goes against the unanimous professional consensus,'" *id.* at 2000, confirming that, "Intellectual disability is a condition, not a number." *Id.* at 2001. Thus, the Court agreed with medical experts "that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.*

And just last year, in *Moore v. Texas*, 137 S.Ct. 1039 (2017), the Supreme Court considered the constitutionality of Texas' definition of intellectual disability, specifically the manner in which the Texas Court of Criminal Appeals ("CCA") considered a prisoner's adaptive functioning in evaluating an *Atkins* claim. The Court rejected the CCA's application of so-called "*Briseno* factors" to assess adaptive deficits, which the Court found to be "an invention of the CCA untied to any acknowledged source," violated the Eighth Amendment because they "creat[e] an unacceptable risk that persons with intellectual disability will be executed." *Id.* at

1044, quoting *Hall*, *supra*, 134 S.Ct. at 1990. The CCA had concluded that Moore's IQ scores above 70 were above the range of intellectual disability, but that, even if Moore had proven the subaverage general intellectual functioning prong of intellectual disability, he failed to prove "'significant and related limitations in adaptive functioning,'" even though all the experts agreed that Moore's adaptive functioning test scores fell more than two standard deviations below the mean. *Id.* at 1047, quoting *Ex Parte Moore*, 470 S.W.3d 481, 520-21 (Tex.Crim.App. 2015). The CCA credited the State's expert, who emphasized Moore's adaptive strengths in school, at trial, and in prison. *Id.* (noting the CCA found that Moore had demonstrated adaptive strengths "by living on the streets, playing pool and mowing lawns for money, committing a crime in a sophisticated way and then fleeing, testifying and representing himself at trial, and developing skills in prison," which, "the [CCA] reasoned, undercut the significance of Moore's adaptive limitations").

The Court in *Moore* found first that the CCA's conclusion that Moore's IQ scores showed that he was not intellectually disabled because the scores were above 70 was irreconcilable with *Hall* and current medical standards. In light of Moore's IQ evidence, the CCA was required to move on to consider Moore's adaptive functioning. *Id.* at 1049-50.

Turning to the CCA's consideration of Moore's adaptive functioning, the Court in *Moore* found that the CCA "also deviated from prevailing clinical standards and from the older clinical standards the court claimed to apply." *Id.* at 1050. The CCA erred in relying on evidence of Moore's adaptive strengths, since "the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*." *Id.*, quoting AAIDD-11 at 47 ("'significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills'"), and DSM-5 at 33, 38 ("inquiry should focus on '[d]eficits in adaptive

functioning'; deficits in only one of the three adaptive-skills domains suffice to show adaptive deficits"). Regarding the CCA's emphasis on Moore's improved behavior in prison, the Court explained that "[c]linicians . . . caution against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is." *Id.*, quoting DSM-5 at 38 ("'Adaptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible corroborative information reflecting functioning outside those settings should be obtained'"), and AAIDD-11 User's Guide 20 ("counseling against reliance on 'behavior in jail or prison'"). Moreover, the CCA's discounting of Moore's record of academic failure, along with child abuse and other traumatic suffering, as detracting from a determination that his intellectual and adaptive deficits were related, was a departure from clinical practice because "traumatic experiences . . . count in the medical community as '*risk factors*' *for* intellectual disability" and "[c]linicians rely on such factors to explore the prospect of intellectual disability further, not to counter the case for a disability determination." *Id.* at 1051 (emphasis in original), quoting AAIDD-11 at 59-60. Further, the CCA erred in requiring Moore to demonstrate that his adaptive deficits were not related to a "personality disorder," because mental health professionals recognize that "many intellectually disabled people also have other mental or physical impairments," or "[c]omorbidit[ies]", and "[t]he existence of a personality disorder or mental health issue, in short, is 'not evidence that a person does not also have intellectual disability.'" *Id.* at 1051, quoting Brief for APA *et al.* as *Amici Curiae* ("APA Brief") 19 (other quotations omitted). Stating that the medical community's standards set forth in current manuals, "[r]eflecting improved understanding over time, *see* DSM-5 at 7; AAIDD-11 at xiv, xv . . . 'offer the best available description of how mental disorders are expressed and can be recognized by trained clinicians,'" the Court in *Moore* concluded that such standards "supply one constraint on

States' leeway in this area." *Id.* at 1053 (internal citations omitted). "'If the States were to have complete autonomy to define intellectual disability as they wished,' we have observed, '*Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality.'" *Id.*, quoting *Hall*, *supra*, at 1999.

2. Nebraska Law

Neb. Rev. Stat. § 28-105.01(2) provides that, "Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person with an intellectual disability." Subsection (3) of the same statute defines intellectual disability as follows:

> As used in subsection (2) of this section, intellectual disability is means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of intellectual disability.

§ 28-105.01(3). A third component of the clinical definition of intellectual disability -- onset before age 18 -- is not included in the statutory definition. *See Hall*, *supra*, at 1994 (citing *Atkins*, *supra*, at 308 n. 3; DSM-5 at 33; APA Brief at 12-13). The death penalty is precluded in Nebraska if the court finds, by a preponderance of the evidence, that the defendant is a person with intellectual disability. § 28-105.01(3).

The Supreme Court in *Atkins* included Nebraska as part of the national consensus against executing the intellectually disabled, noting the state legislature had banned the practice in 1998. 536 U.S. at 314. In *Hall*, the Court counted Nebraska among nine states having statutes that could be interpreted as "mandat[ing] a strict IQ cutoff score at 70." 134 S.Ct. at 1997. Such an interpretation violates the Eighth and Fourteenth Amendments because it does not comport with current medical standards. *Id.* at 1990. The Court in *Hall* did note that the Nebraska Supreme Court had accepted the lower district court's interpretation that "'[the defendant's] score of 75 [on the IQ test], considered in light of the standard error of measurement could be considered as

subaverage general intellectual functioning for purposes of diagnosing mental retardation.'" *Id.* at 1996, quoting *State v. Vela*, 279 Neb. 94, 126, 137, 777 N.W.2d 266 (2010).

It is unclear whether the Nebraska Supreme Court's interpretation of the "significantly subaverage intellectual functioning" prong of Nebraska's statutory definition of intellectual disability in *State v. Vela* is consistent with the medical community's consensus and the Supreme Court's decision in *Hall*. *Vela* was decided four years before *Hall* determined that the Eighth Amendment imposed restraints on the States' discretion to define intellectual disability. The Nebraska Supreme Court in *Vela* chose not to address the state's argument that the district court "should not have considered the range of scores produced by the standard error of measurement when determining whether Vela had established that he had significantly subaverage general intellectual functioning." 279 Neb. at 147. The Court declined to address the state's argument because it "agree[d] with the district court that Vela failed to show deficits in his adaptive behavior and thus is not a person with [intellectual disability]." *Id.*

It is clear from the intervening authority of *Hall* that acceptance of the state's interpretation of the "subaverage general intellectual functioning" prong of Nebraska's definition of intellectual disability asserted in *Vela* would violate the Eighth and Fourteenth Amendments. *Hall*, *supra*, at 1990. In addition, the Supreme Court's clarification of the constitutional standard under the Eighth Amendment for evaluating the "adaptive deficits" prong of intellectual disability in *Moore v. Texas* shows that the Nebraska Supreme Court's interpretation of the "deficits in adaptive behavior" prong of Nebraska's definition in *Vela* "creat[es] an unacceptable risk that persons with intellectual disability will be executed." *Moore*, *supra*, at 1044. This is because the Court in *Vela*, like the CCA in *Moore*, relied on evidence of Vela's adaptive strengths, not his deficits, to find that Moore had not proven his intellectual disability. 279 Neb.

at 151-53 (relying on "evidence that Vela had demonstrated normal adaptive behavior in several areas," including his academic record, that he had been employed by a trucker, and his behavior in prison). *Moore* clearly establishes that the adaptive-functioning inquiry for intellectual disability is focused on adaptive *deficits*. In this regard, *Vela* is inconsistent with *Moore* and current medical standards. *See Moore*, *supra*, at 1050, quoting AAIDD-11 at 47; DSM-5 at 33, 38.

3. The preponderance of the evidence establishes that Mr. Lotter is intellectually disabled under Nebraska's statutory definition of intellectual disability, interpreted consistently with current medical standards and the constitutional requirements established in *Atkins*, *Hall*, and *Moore*.

John Lotter meets the standard clinical criteria for intellectual disability. Appendix A at 3-13. Neb. Rev. St. § 28-105.01(3) defines intellectual disability as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior." Intellectual disability must be proved by a preponderance of the evidence, and "[a]n intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of intellectual disability." Neb. Rev. St. § 28-105.01(3)-(4). Mr. Lotter falls within Nebraska's statutory definition.

Nebraska's definition of intellectual disability has two prongs: (1) significantly subaverage general intellectual functioning and (2) deficits in adaptive behavior. Mr. Lotter clearly meets the first prong. On March 6, 2018, Dr. Weinstein administered the Woodcock-Johnson, Fourth Edition to Mr. Lotter, who scored a 67 for General Intellectual Ability. Dr. Weinstein explained that this score "constitutes a full-scale IQ score that is more than two standard deviations below the mean." Appendix A at 2, 8. Dr. Weinstein continues, "To put his 67 IQ score into perspective, Mr. Lotter's general intellectual ability is at the level of someone who is 8 years 7 months old." Appendix A at 8. Mr. Lotter's full-scale IQ score of 67 also

constitutes "presumptive evidence of intellectual disability" under Neb. Rev. St. § 28-105.01(3).

Additionally, Dr. Weinstein notes that Mr. Lotter was IQ tested in May 1981. Mr. Lotter was administered the WISC-R and received a full-scale IQ score of 76. At the time the test was administered, the norms for the WISC-R, which were collected in 1972, were nine years obsolete. Because the population does better on each new revision of these tests by an average of 10 full-scale points per decade (or .3 points per year)—a principle that is referred to as the Flynn effect—Mr. Lotter's score must be adjusted down to a 73. Mr. Lotter's full-scale IQ score of 73 is within the 70-75 range suggested in clinical manuals, given the standard error of measurement. Appendix A at 9. *See also Hall*, *supra*, 572 U.S. at 1996 (noting that the Nebraska Supreme Court accepted a lower court's interpretation that an IQ of 75 could constitute subaverage intellectual functioning in light of the standard error of measurement in *State v. Vela*, *supra*, 279 Neb. at 126, 137). This score of 73 when Mr. Lotter was just under 10 years old also supports that Mr. Lotter's intellectual disability had its onset during the developmental period, or before 18 years old, as required by the AAIDD-11 and DSM-5, though not by Nebraska statute. Appendix A at 9.

The second prong required to prove intellectual disability under the Nebraska statute is "deficits in adaptive behavior." Neb. Rev. St. § 28-105.01(3). Adaptive behavior is "the collection of conceptual, social, and practical skills that have been learned and are performed by people in their every day lives." Appendix A at 5. (quoting AAIDD-11). Dr. Weinstein reviewed social history records, interviewed life history witnesses, and administered an Adaptive Behavior Assessment System, Third Edition (ABAS-3) to assess Mr. Lotter's adaptive functioning over the course of his life. Appendix A at 8. Although this prong may be satisfied with significant limitations in only one of these adaptive skills, Dr. Weinstein found that Mr. Lotter has

significant limitations in all three domains of adaptive behavior. Appendix A at 5, 9.

Mr. Lotter has significant deficits in the Conceptual Domain of adaptive functioning. Appendix A at 9. This set of adaptive skills includes "communication and language, self direction, and functional academic skills, such as reading, writing, and number concepts." *Id.* Mr. Lotter was placed in special education programming throughout his schooling, and "was eventually placed in the highest level of special education for students requiring acute services, such as a modified curriculum, a modified classroom, and someone's one-on-one instruction." Appendix A at 10. Mr. Lotter had significant limitations in reading, writing, and mathematics. *Id.* He also had trouble with ideas and concepts and instead had concrete thinking. *Id.* Mr. Lotter had limited insight and could not learn from his mistakes, think of various potential outcomes of his actions, anticipate or weigh consequences, or plan ahead and have long-term goals. *Id.*

Similarly, Mr. Lotter has significant deficits in the Social Domain of adaptive behavior. Appendix A at 10. These social skills encompass "interpersonal skills, social responsibility, self-esteem, gullibility, naiveté (i.e., wariness), following rules/obeys laws, avoiding being victimized, and social problem solving." *Id.* Mr. Lotter had limitations in many of these areas.

For example, Mr. Lotter had poor interpersonal skills. Witnesses described him as "an outcast, a follower, and socially delayed." Appendix A at 10. Mr. Lotter "didn't fit in with his peers and was bullied and teased." *Id.* He did not understand social cues and did not know how to connect with his peers. *Id.*

Mr. Lotter was also gullible and naive. Witnesses describe Mr. Lotter as child-like and a follower. Appendix A at 11. Mr. Lotter was "not suspicious of people and did not think others had ulterior motives" and "only wanted to 'play.'" *Id.* He thought "if someone spoke to him, that person was his friend." *Id.* Mr. Lotter was desperate to fit in, so others could convince

him to do something for their amusement,even if it meant Mr. Lotter would get into trouble. *Id.*

Because of Mr. Lotter's social impairments, he was targeted and victimized throughout his life. Mr. Lotter's foster siblings bullied and manipulated him. Appendix A at 11. Mr. Lotter was the butt of their jokes. *Id.* Boys from school used to chase Mr. Lotter nearly every day. *Id.* To make matter's worse, Mr. Lotter was neglected at home and was frequently dirty, and had "significant facial and cranial abnormalities, such as large, oddly-shaped ears, a small head compared to his body, and ridges on his scalp where his skull didn't fuse properly as an infant." *Id.* Mr. Lotter was also physically, emotionally, and sexually abused, which not only illustrates the level of victimization he experienced, but also devastated his self-esteem. *Id. See Moore, supra*, 581 U.S. at 1051 (noting that "traumatic experiences . . . count in the medical community as '*risk factors*' *for* intellectual disability" and "[c]linicians rely on such factors to explore the prospect of intellectual disability further" (quoting AAIDD-11 at 59-60)) (emphasis in original).

Finally, Mr. Lotter has significant deficits in the Practical Domain, which includes "activities of daily living, such as personal care, occupational skills, use money, safety, health care, travel/transportation, and schedules/routines." Appendix A at 12. As a child, Mr. Lotter did not know how to wash his clothes or take a bath. *Id.* Even as a teenager, he was unkempt, did not iron his clothes, or comb his hair. *Id.*

Mr. Lotter had difficulty performing daily living tasks that required multiple steps. Appendix A at 12. For example, while in a foster placement Mr. Lotter did not understand his foster mother's instructions to "wash the dishes," and washed only the dinner plates rather than the entire sink of dirty pots and pans, silverware, and plates. *Id.* As an adult, Mr. Lotter could not cook and needed instructions even to warm food in the microwave. *Id.* Nearly all of his jobs involved unskilled labor and he struggled to manage money. *Id.* Witnesses report he did not have

a checking or savings account and did not have bills in his name, but instead lived with friends and family who provided for him. *Id.* Mr. Lotter's childhood psychologist did not believe that Mr. Lotter would be unable to function independently as an adult, as his impairments were so severe as to require an assisted living facility for adults. *Id.*

The evidence clearly shows that Mr. Lotter has "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior." Neb. Rev. Stat. § 28-105.01. While Nebraska statute does not require developmental onset, "Mr. Lotter exhibited very significant deficits and required intervention by professionals that directly and indirectly provided special services and placements early on in his developmental years." Appendix A at 13. In conclusion, Dr. Weinstein reported that Mr. Lotter qualifies for the diagnosis of intellectual disability. *Id.*

CONCLUSION

For the reasons stated herein, Mr. Lotter prays this Court will order an evidentiary hearing, grant his Motion for Postconviction Relief, vacate his death sentence, and grant such other and further relief as equity and justice require.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2017, this Motion for Postconviction Relief was filed electronically with the Clerk of the District Court to be served by Electronic Service on the Richardson County Attorney, and James D. Smith, Nebraska Attorney General's Office.

/s/ Timothy S. Noerrlinger
Timothy S. Noerrlinger #23222

VERIFICATION

STATE OF NEBRASKA)
) SS:
COUNTY OF JOHNSON)

John L. Lotter, being first duly sworn upon oath, deposes and states that he is the Petitioner in the above-entitled motion for postconviction relief, he has read the motion, knows the contents thereof, and that the allegations contained therein are true as he verily believes.

John L. Lotter

SUBSCRIBED AND SWORN to before me this 26th day of March, 2018

GENERAL NOTARY - State of Nebraska
TIMOTHY S. NOERRLINGER
My Comm. Exp. August 8, 2021

Notary Public

CERTIFICATE OF SERVICE

I, Timothy Noerrlinger, hereby certify that on this 26th day of March, 2018, a true and correct copy of the foregoing motion for postconviction relief and verification was served electronically with the Clerk of the District Court to be served by Electronic Service on Douglas Merz, Richardson County Attorney, and James D. Smith, Solicitor General, Nebraska Attorney General's Office.

GENERAL NOTARY - State of Nebraska
TIMOTHY S. NOERRLINGER
My Comm. Exp. August 8, 2021

Timothy Noerrlinger, #23222

Certificate of Service

I hereby certify that on Tuesday, March 27, 2018 I provided a true and correct copy of the Motion-Post Conviction Relief to the following:

State of Nebraska represented by James Smith (Bar Number: 15476) service method: Electronic Service to james.smith@nebraska.gov

Signature: /s/ Timothy S. Noerrlinger (Bar Number: 23222)

DECLARATION OF RICARDO WEINSTEIN

I, Ricardo Weinstein, Ph.D., declare as follows:

1. I am licensed to practice psychology in California, and I specialize in clinical and forensic neuropsychology and psychology. I regularly conduct forensic neuropsychological evaluations, psychological evaluations, and retrospective evaluations for intellectual disability. I am a member of the American Neuropsychiatric Association, the National Academy of Neuropsychology, and the American Association on Intellectual and Developmental Disabilities (AAIDD).

2. I received my Master in Arts degree in Clinical and Humanistic Psychology from the Merril Palmer Institute in 1979. In 1981, I earned a Ph.D. in Clinical Psychology from the International College in Los Angeles. I completed the Post-Doctoral Certificate Program in Neuropsychology at the Fielding Institute in Santa Barbara in 1998, and I was a Quantitive Electroencephalography SABA Diplomat in 2009.

3. I have been in private practice in Encinitas, CA since 2000. Previously, in addition to private practice, I was a psychologist for the Comer Program at Baker Elementary School in San Diego, CA from 1992-2000; a consulting psychologist with Children's Therapeutic Communities from 1988-1989; the SOS Program Director of Home Start Inc. from 1986-1988; and the Director of the Hispanic Outreach Program at the Suicide Prevention Center in Los Angeles from 1979-1983. Additionally, I taught as an Adjunct Professor at San Diego State University.

4. I have given expert testimony in State and Federal Courts, including California, Washington, Oregon, Nevada, Arizona, Utah, New Mexico, Texas, Arkansas, Louisiana, Oklahoma, Georgia, and Florida.

5. I have completed numerous evaluations assessing intellectual disability in my role as a forensic neuropsychologist. I have also published widely, including the following articles: Neuro-Jurisprudence: The Brain and the Law[1]; Before It's Too Late: Neuropsychological Consequences of Child Neglect And Their Implications For Law and Social Policy[2]; Consequences of Child Neglect on Brain Development: A Case Study[3]; QEEG in Death Penalty Evaluations. Abstract[4]; Comparison of Skil QEEG and Neuropsychological Evaluation of Death Row Inmates[5].

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1 Neuro-Jurisprudence: The Brain and the Law. Abstract. XXIXth International Congress on Law and Mental Health, Abstracts (2005).

2 Before It's Too Late: Neuropsychological Consequences of Child Neglect And Their Implications For Law and Social Policy. J. Weinstein, J.D. and R. Weinstein, Ph.D. University of Michigan Journal of Law Reform. Volume 33. Summer 2000.

3 Consequences of Child Neglect on Brain Development: A Case Study. Abstract. Journal of the International Neuropsychological Society. Volume 8, Number 4.

4 QEEG in Death Penalty Evaluations. Abstract. Journal of Neuroptherapy. Volume 7, Number 1 2003.

5 Comparison of Skil QEEG and Neuropsychological Evaluation of Death Row Inmates. Abstract. Ricardo Weinstein, Ph.D. and M.B. Sterman, Ph.D. Journal of Neurotherapy Volume 7, Number 1 2003.

6. I also regularly present on issues of neuropsychology, including the following recent presentations: "Culturally Competent Evaluations in Death Penalty Cases" (2013); "Relevant Neuropsychological Interventions in Death Penalty Cases" (2012); "Neuropsychological Evaluations in Death Penalty Cases (2011); "The Role of a Neuropsychologist as an Expert Witness in Criminal Proceedings (2010); "Neuropsychological Expert Witness Testimony" (2010); "Brain Development and the Law" (2008); "Neuro-Jurisprudence: The Brain and the Law" (2005).

7. My *curriculum vitae* detailing my qualifications is attached.

Overview

8. I was retained by John Lotter's counsel to evaluate Mr. Lotter's intellectual and adaptive functioning. I have reviewed Mr. Lotter's social history records and declarations from life history witnesses, conducted in-person interviews with many of these life history witnesses, and interviewed and administered testing to Mr. Lotter. All of these tasks were conducted to assess Mr. Lotter's intellectual and adaptive functioning.

9. Mr. Lotter's records describe deficits in his cognitive and adaptive functioning throughout childhood and adolescence that carry the hallmarks of intellectual disability. His life history records include IQ and other testing data resulting in IQ scores close to or at least two standard deviations below the mean of the normative sample.

10. I also administered the Woodcock-Johnson, Fourth Edition (WJ-IV), to Mr. Lotter on March 6, 2018. Mr. Lotter scored a 67 for General Intellectual Ability, which constitutes a full-scale IQ score that is more than two standard deviations below the mean. Thus, Mr. Lotter's IQ scores are consistent with mild intellectual disability.

11. Additionally, Mr. Lotter demonstrates significant impairments in adaptive functioning that are indicative of intellectual disability. Adaptive functioning is central to diagnosing intellectual disability, particularly for those with mild intellectual disability,[6] which is not easy to diagnose because it is not associated with the hallmark physical features or identifiable etiology as more severe forms of intellectual disability, such as Down's Syndrome. My interviews with life history witnesses and review of witness declarations

[6] It is important to note that the adjective "mild" can be misleading to the extent that "mild" indicates a non-significant degree of impairment. In fact, as emphasized in the American Association on Intellectual and Developmental Disabilities Manual, "[i]ndividuals with intellectual disability who have higher IQ scores face significant challenges in society across all areas of adult life, and many individuals who may not receive formal diagnoses of intellectual disability . . . share this vulnerability." AMERICAN ASS'N ON INTELLECTUAL AND DEVELOPMENTAL DISABILITY, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT, 151 (11th ed. 2010) [hereinafter "AAIDD-11"]. Mild intellectual disability involves significantly limited abilities and competencies required for adequate coping with normal everyday environments. Most importantly, mild intellectual disability limits the ability to reason abstractly and make sound judgments about everyday activities and responsibilities, thereby limiting one's capacity to consider likely consequences of behaviors and to behave responsibly. Without supports, therefore, most individuals with mild intellectual disability struggle and often fail in maintaining employment, handling money, avoiding exploitation, and conforming to social expectations and legal requirements.

and records has demonstrated that Mr. Lotter has significant impairments in all three domains of adaptive functioning, including conceptual, social, and practical domains. I also administered an adaptive behavior assessment to a social worker who worked closely with Mr. Lotter for many years, which also indicates that Mr. Lotter's adaptive functioning was significantly impaired.

12. In conclusion, it is my opinion, to a reasonable degree of scientific certainty, that Mr. Lotter is intellectually disabled.

Criteria Used to Diagnose Intellectual Disability

13. The Eleventh Edition of the American Association on Intellectual and Developmental Disabilities (AAIDD)[7] Classification Manual (AAIDD-11) and the Fifth Edition of the American Psychiatric Association's (APA) Diagnostic and Statistical Manual (DSM-IV and DSM-5)[8] are the leading resources on intellectual disability and set forth the most prominent clinical definitions. The U.S. Supreme Court quoted both manuals favorably in *Atkins v. Virginia*[9] and relied upon them in *Hall v. Florida*[10] and *Moore v. Texas*.[11]

14. The eleventh edition of the AAIDD manual ("AAIDD-11") provides the following definition of ID: "Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before 18."[12] The DSM-5 tracks the language of the AAIDD-11, defining ID as "a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains."[13] Thus, both the AAIDD-11 and the DSM-5 establish a three-pronged diagnosis of ID; specifically, a) significant limitations in intellectual functioning (previously stated as subaverage general intellectual functioning), b) adaptive behavior deficits, and c) origins in the developmental period, now typically defined as before age 18.

15. Nebraska law provides for a similar definition of "mental retardation" (a term since replaced with "intellectual disability"): "Mental retardation means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An IQ of 70 or below on a reliably administered IQ test shall be presumptive evidence of mental retardation." Neb. Rev. Stat. § 28-105.01.

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[7] The AAIDD has published a manual on the topic of intellectual disability since 1916 and it is the authoritative organization on the topic internationally. The most recent revision in 2010 resulted in the eleventh edition of this resource. AMERICAN ASS'N ON INTELLECTUAL AND DEVELOPMENTAL DISABILITY, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT (11th ed. 2010).
[8] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL (5th ed. 2013) [hereinafter "DSM-5"].
[9] 536 U.S. 304, 308 n.3 (2002).
[10] 134 S. Ct. 1986, 2006, 2009, 2010 (2014).
[11] 137 S. Ct. 1039 (2017).
[12] AAIDD-11, at 1.
[13] DSM-5, AT 33.

16. Thus, the Nebraska statute articulates two "prongs" that must be met: (a) significantly subaverage intellectual functioning; and (b) concurrent deficits in adaptive behavior. While similar versions of these two prongs are encapsulated in the AAIDD-11 and DSM-5 definitions, the Nebraska statute does differ in that it is missing the third prong of the AAIDD-11 and DSM-5 definition, which is the "age of onset" or "developmental" criterion. The third prong is included in most state and clinical definitions, and is referenced by the U.S. Supreme Court, so while it is not included in the Nebraska statute, it is something that I will take into consideration for clinical and diagnostic purposes.

Prong I: Significant Limitations in Intellectual Functioning

17. The diagnosis of intellectual disability requires, as its first criterion, "significant limitations in intellectual functioning."[14] The AAIDD-11 defines this as: "an IQ score that is *approximately* two standard deviations below the mean, considering the standard error of measurement for the specific assessment instruments used and the instruments' strengths and limitations."[15]

18. However, an IQ score alone is not determinative of one's intellectual functioning, both because of factors that may influence the IQ score itself, including standard error of measurement,[16] the Flynn effect,[17] and the practice effect, among others, and because an IQ score is only one part of an interrelated assessment of intellectual functioning that takes into account other factors, such as adaptive behavior. Clinicians are thus instructed to view the general intellectual functioning criterion as a range of scores, not as a precise, immutable single score.[18] The DSM-5 further states that individual cognitive profiles based on neuro-psych testing may be more useful for understanding IQ than a single IQ score.[19]

19. Clinicians have not only espoused a broader understanding and assessment of IQ scores within the intellectual functioning prong, but have also reduced focus on IQ scores alone. While both the AAIDD and DSM have long recognized that a determination of intellectual disability involves evaluation of both intellectual functioning and adaptive deficits, these manuals have increasingly emphasized the significance of adaptive deficits, clinical judgment, and a multidimensional approach to diagnosing intellectual disability, particularly in the case of intellectually disabled individuals with higher IQ scores.

20. In light of this multi-dimensional approach, the field has emphasized that "significant limitations in intellectual functioning is only one of the three criteria used to establish a

[14] AAIDD-11, at 1.
[15] *Id.* at 31 (emphasis added).
[16] The standard error of measurement is the variation around a hypothetical "true score", reflecting the inherent imprecision of the test itself and creating a range of scores on either side of the recorded score.
[17] The "Flynn effect" references the observed rise in IQ scores over time in the general population. When using out-of-date test norms, this results in overly high IQ scores that must be corrected to accurately depict an individual's intellectual functioning.
[18] AAIDD-11, at 31 ("A fixed point cutoff score for intellectual disability is not psychometrically justifiable.").
[19] DSM-5, at 37.

diagnosis of intellectual disability."[20] One concern has been that, in the past, "IQ scores only provided a narrow measure of intellectual functioning related to academic tasks . . . thus ignoring important aspects of intellectual functioning that included social and practical skills."[21] Therefore, "a consistent theme . . . has been the need to move the field of intellectual disability beyond its excessive reliance on IQ, including somewhat arbitrary IQ ceilings" and place greater emphasis on adaptive deficits.[22]

Prong II: Adaptive Behavior

21. Simply put, adaptive behavior is how well a person deals with the demands of everyday life. The AAIDD-11 defines adaptive behavior as "the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives,"[23] and defines this prong of the intellectual disability assessment as significant limitations in *one* of these adaptive skills.[24] The Nebraska statute defines the second prong as simply "deficits in adaptive behavior.[25]

22. Adaptive deficits are crucial to establishing an intellectual disability diagnosis because "intelligence test performances do not always correspond to level of deficiency in total adaptation."[26] The AAIDD describes three domains of adaptive functioning: conceptual, social, and practical. Conceptual skills include "language, reading and writing, and money, time, and number concepts."[27] Social skills encompass "interpersonal skills, social responsibility, self-esteem, gullibility, naiveté (i.e., wariness), following rules/obeys laws, avoiding being victimized, and social problem solving."[28] Finally, the manual describes practical skills as "activities of daily living (personal care), occupational skills, use of money, safety, health care, travel/transportation, schedules/routines, and use of the telephone."[29] The DSM-5 also identifies three parallel domains of adaptive functioning.[30] Significant limitations in all three domains are not required.[31]

The Role of Adaptive Behavior Assessment in

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[20] AAIDD-11, at 35.
[21] *Id.* at 43-44.
[22] Nancy Haydt, Stephen Greenspan, Bushan Agharkar, *Advantages of DSM-5 in the diagnosis of Intellectual Disability: Reduced Reliance on IQ Ceilings in Atkins (Death Penalty) Cases*, 82 U.M.K.C. L. REV. 359 (2014); *see also* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 42 (4th ed. 1994) ("Impairments in adaptive functioning, rather than a low IQ, are usually the presenting symptoms in individuals with Mental Retardation").
[23] AAIDD-11, at 15.
[24] AAIDD-11, at 43.
[25] Neb. Rev. Stat. § 28-105.01.
[26] AAIDD-11, at 44 (quoting Rick F. Heber, A MANUAL ON TERMINOLOGY AND CLASSIFICATION OF MENTAL RETARDATION 61 (1959)) (internal quotations omitted).
[27] AAIDD-11, at 44.
[28] *Id.*
[29] *Id.*
[30] DSM-5, *supra* note 19, at 33, 37-38.
[31] AAIDD-11, at 43.

Diagnosing Intellectual Disability

23. Prong II's assessment of adaptive functioning has become increasingly important to a diagnosis of intellectual disability, particularly for intellectually disabled people with higher IQ scores. The DSM-5 "links deficits in adaptive functioning with co-occurring deficits in intellectual functioning and **requires a careful examination of adaptive behavior for reliable interpretation of IQ scores**."[32] The DSM-5 explicitly states that "IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks [. . .] [f]or example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score."[33]

24. This emphasis on adaptive skills signifies a move away from centralizing IQ scores and using IQ scores ceilings. The U.S. Supreme Court has also moved away from IQ ceilings and towards a greater emphasis on adaptive functioning.[34]

25. This increasing emphasis on adaptive functioning is particularly important in diagnosing those at the upper end of the intellectual disability range, described as mild intellectual disability. The DSM-5 explains that the **"[l]evels of severity are defined on the basis of adaptive functioning and not IQ scores because it is adaptive functioning that determines the level of supports required**."[35] Many of these individuals are able to live independently and achieve successful outcomes with the right supports.[36] Yet persons with intellectual disability and higher IQ scores are often misdiagnosed, undiagnosed, and incorrectly stereotyped due to misconceptions that "individuals [with intellectual disability] never have friends, jobs, spouses, or children or are good citizens."[37]

26. Mild intellectual disability also requires a multi-dimensional assessment because the etiology or cause of mild intellectual disability cannot be specified despite many decades of research. Mild intellectual disability also frequently does not include the physical stigmata associated with those with more severe intellectual disability. These factors make mild intellectual disability more difficult to diagnose, despite the fact that individuals with intellectual disability who have higher IQ scores make up 80-90% of all individuals diagnosed with intellectual disability.[38] Most *Atkins* claimants are situated in the range of mild intellectual disability.

Prong III: Age of Onset

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[32] *Advantages of DSM-5 in the diagnosis of Intellectual Disability: Reduced Reliance on IQ Ceilings in Atkins (Death Penalty) Cases*, 82 U.M.K.C. L. REV. at 379.
[33] DSM-5, at 37.
[34] *See Hall*, 134 S. Ct. 1986; *Moore*, 137 S. Ct. 1039.
[35] DSM-5, at 33.
[36] *Id.*
[37] *Id.*
[38] AAIDD-11, at 151.

27. The third criterion for a diagnosis of intellectual disability is that the disability originates before the age of 18, in the 2010 AAIDD Manual, or during the "developmental period," in the DSM-5. The age of onset is significant to distinguish intellectual from other disabilities that may occur later in life, such as a traumatic brain injury as an adult or dementia. **This criterion does not mean that intellectual disability must be formally identified before age 18, only that it originated during this period.**[39] The AAIDD cap of 18 years is informed by the neurological perspective that the primary time of brain development and change is the prenatal, infancy, and childhood years, and that considerable neurological changes occur during the teen years as well.[40] The DSM-5, however, does not have an age cap.

John Lotter Is Intellectually Disabled

28. I have reviewed the following materials in Mr. Lotter's case:

- Records
  - Trial Transcript, Bill of Exceptions, Exhibits 165-199
  - Nebraska Department of Health and Human Services records
  - Omaha Public School Records
  - Nebraska Psychiatric Institute Records
  - Falls City Family Practice Records
  - Department of Corrections medical and mental health files
  - Buffalo County Jail Records
  - Kearney Youth Development Center Records
  - Johnson County Hospital Records
- Declarations
  - Declaration of Dr. Paul Fine
  - Declaration of Bernice Kopetzsky
  - Declaration of Brandon Johnson
  - Declaration of Chad Buckman
  - Declaration of Michelle Ottens
  - Declaration of Trena Michelle Lotter Wallace
  - Declaration of Mary Ann Greene-Walsh
  - Declaration of Rhonda McKenzie
  - Declaration of Ida Peackock
  - Declaration of Scott Bendler
  - Declaration of Sylvia Lopez
  - Declaration of Diane Acklin
  - Declaration of Dwayne Peacock
  - Declaration of Donna Lotter

29. I conducted the following on Mr. Lotter:

Clinical Interview

[39] *Id.*
[40] *Id.* at 28.

Mental Status Examination
Rey 15 Item Test (Test of effort)
Woodcock Johnson, Fourth Edition, (WJ IV) Tests of Cognitive Abilities
Woodcock Johnson, Fourth Edition, (WJ IV) Tests of Achievement

30. I personally interviewed the following individuals:

Ida Elizabeth Peacock	Cousin
Dwayne Peacock	Married to Cousin
Sylvia Lopez	Foster Mother
Donna Lotter	Mother
Trina (Michelle) Wallace	Younger Sister
Mary Ann Greene-Walsh	Social Worker
Paul Fine, M.D.	Psychiatrist

31. Finally, I administered an Adaptive Behavior Assessment System, Third Edition (ABAS-3) to Mary Ann Greene-Walsh. She was asked to recollect how Mr. John Lotter functioned when he was approximately 10 years old. Ms. Greene-Walsh had extensive contact with Mr. Lotter during that period of his life, as she was his caseworker.

Prong I: John Lotter has significant limitations in intellectual functioning.

32. Mr. Lotter has "significant limitations in intellectual functioning."[41] In other words, Mr. Lotter has IQ scores that are "*approximately* two standard deviations below the mean, considering the standard error of measurement for the specific assessment instruments used and the instruments' strengths and limitations."[42]

33. On March 6, 2017, I administered the WJIV Tests of Cognitive Abilities to Mr. Lotter and obtained the following scores:

	Standard Score	95% Conf. Int.
General Intellectual Ability (Full Scale IQ Score):	67	(61-73)

For a report of all scores obtained see attached Computerized Score Report.

34. Mr. Lotter's testing results represent the most recent measurement of Mr. Lotter's intellectual functioning. Mr. Lotter's General Intellectual Ability score of 67, which is the equivalent of the full-scale IQ score, places him below the contemplated range of two standard deviations below the mean IQ score of 70 for the purposes of an intellectual disability diagnosis according to the AAIDD-11 and DSM-5. To put his 67 IQ score into perspective, Mr. Lotter's general intellectual ability is at the level of someone who is 8 years 7 months old.

[41] AAIDD-11, at 1.
[42] *Id.* at 31 (emphasis added).

35. In addition to Mr. Lotter's general intellectual ability score of 67, Mr. Lotter's records contain additional IQ scores.[43] Among them, in May 1981, when Mr. Lotter was just under 10 years old, he was administered the WISC-R and received an uncorrected full-scale IQ of 76. The WISC-R was published in 1974 and its norms collected in 1972; thus, the corrected IQ score accounting for the Flynn effect was 73.[44] This is within the 70-75 range suggested in clinical manuals, given the standard error of measurement. This score also supports Prong III of the intellectual diagnosis: developmental onset. Although other scores are above the 70-75 range typically seen as approximately two standard deviations below the mean, this does not undermine Mr. Lotter's diagnosis of intellectual disability or contradict the fact that he has significant limitations in intellectual functioning. The leading authorities on intellectual disability as well as prevailing Supreme Court precedent signal a move away from IQ ceilings and cut offs and toward a more holistic approach to diagnosis that places significant weight on adaptive functioning, evidence of brain damage, and other cognitive data aside from IQ scores, among other factors.

36. Mr. Lotter's most recent score of 67 on the Woodcock-Johnson that I administered in March 2018 is below the two standard deviations from the mean of intellectual functioning, and that score, along with his history of IQ scores indicating intellectual disability, satisfies prong I of the intellectual disability assessment.

Prong II: John Lotter has significant limitations in adaptive behavior as expressed in conceptual, social, and practical adaptive skills.

37. Mr. Lotter has significant adaptive deficits in Conceptual, Social, and Practical Skills as described both by the individuals I interviewed and in the declarations I reviewed. He was described as lacking the ability to relate adequately to others, especially children his own age. He was described as a loner. He had problems learning academic skills. He had serious difficulties understanding and following instructions. He was naïve, gullible and easily influenced by others. He was taken advantage of and victimized. He did not learn from experience, he exhibited poor judgment in the choices he made and the behaviors he exhibited. He never learned any real skills and was only able to perform unsophisticated unskilled labor activities.

A. Mr. Lotter has significant limitations in the Conceptual Domain.

38. Mr. Lotter has exhibited deficits in his Conceptual Skills since childhood. The Conceptual Domain of adaptive functioning includes communication and language, self-direction, and functional academic skills, such as reading, writing, and number concepts.[45]

[43] There were no records and or protocols of prior testing performed available for review. Without a proper review of the data is not possible to opine regarding the accuracy and validity of the tests results.
[44] The Flynn Effect takes into account the fact that the population does better on each new revision of these tests by an average of 10 full-scale points per decade (or .3 points per year) and adjust accordingly. Because nine years passed from the time the norms were collected to the time Mr. Lotter took the test, this allows for approximately a three point reduction.
[45] AAIDD-11, at 44.

39. Numerous witnesses described Mr. Lotter's academic limitations. Mr. Lotter was placed in various special education programs as early as the first grade and his teachers and family members report significant limitations in reading, writing, and math.[46] Mr. Lotter's childhood social worker, Mary Ann Greene-Walsh, explained that Mr. Lotter was eventually placed in the highest level of special education for students requiring acute services, such as a modified curriculum, a modified classroom, and sometimes one-on-one instruction. Even at youth detention facilities, Mr. Lotter was placed in separate classrooms where he was given special—and sometimes one-on-one—instruction.

40. Additionally, Mr. Lotter's thinking is very concrete and he has trouble with ideas and concepts. Mr. Lotter struggles to see and understand nuance, connections, and implications. Witnesses reported that they had to give Mr. Lotter concrete examples of concepts before Mr. Lotter could understand.

41. Mr. Lotter also has limited insight. As a child, witnesses report that Mr. Lotter was unable to learn from his mistakes. Mr. Lotter's childhood psychiatrist, Dr. Paul Fine, recalled that despite years of effort, he was unable to get Mr. Lotter to the point where he could think of the various potential outcomes of his actions and weigh the consequences. Instead, Mr. Lotter was constantly surprised when his actions led to a negative outcome, even if he had experienced something similar before. He could not learn the lesson and predict the outcome. Similarly, Mr. Lotter's limitations impair his ability to plan ahead or have long-term goals.

B. Mr. Lotter has significant limitations in the Social Domain.

42. Mr. Lotter has significant deficits in Social Skills, which encompass "interpersonal skills, social responsibility, self-esteem, gullibility, naiveté (i.e., wariness), following rules/obeys laws, avoiding being victimized, and social problem solving."[47] Multiple witnesses have described these deficits in declarations and in my interviews.

43. Mr. Lotter is frequently described as an outcast, a follower, and socially delayed. At nearly every stage of his life, witnesses report that Mr. Lotter didn't fit in with his peers and was bullied and teased. Mr. Lotter was unable to understand social cues, avoid manipulation, and find ways to connect with his peers. Mr. Lotter did not understand when he was doing something that others would find annoying or alienating. Instead, Mr. Lotter acted out in silly and immature ways to try to make others laugh.

44. In addition to his social awkwardness, Mr. Lotter was teased for his physical differences. Mr. Lotter also had significant facial and cranial abnormalities, such as large, oddly-shaped ears, a small head compared to his body, and ridges on his scalp where his skull didn't fuse properly as an infant. Mr. Lotter was also neglected at home and was limited

[46] Mr. Lotter was never diagnosed officially as suffering a Developmental Learning Disability but that was not uncommon because of the stigma and the financial consequences of the diagnosis. The professionals that interacted with him during his developmental years recognize that he qualified for the diagnosis.
[47] *Id.*

in his ability to complete daily tasks (discussed further below), so he was teased for being dirty. As his sister recalled, boys from school used to chase Mr. Lotter nearly every day as a young child.

45. Mr. Lotter was also gullible, naïve, and easily influenced and manipulated. Witnesses frequently described Mr. Lotter as child-like and wide-eyed, even as a teenager and adult. Mr. Lotter's friend from adolescence, Brandon Johnson, recalled that Mr. Lotter was not suspicious of people and did not think others had ulterior motives. He was immature and only wanted to "play." Mr. Lotter thought that if someone spoke to him, that person was his friend. He believed he was friends with people that he had only met once or only ever heard about. Others were put off by his overly friendly attitude when they, in fact, did not know him well.

46. Because Mr. Lotter was desperate to fit in, he was a follower and easily influenced. Numerous witnesses describe instances in which Mr. Lotter was convinced to do something for others' amusement, only to result in Mr. Lotter getting into trouble. This dynamic was worsened by Mr. Lotter's gullibility and poor self-esteem.

47. For example, Mrs. Greene-Walsh also described Mr. Lotter's social struggles at his foster placement. Mr. Lotter's two foster brothers bullied and manipulated Mr. Lotter, who Mrs. Greene-Walsh described as innocent, trusting, and an easy target. He was frequently the butt of the joke. Mr. Lotter wanted to fit in and would do anything his brothers asked. The other kids would set him up, and Mr. Lotter kept falling for it.

48. Since children that were Mr. Lotter's age often bullied him, Mr. Lotter was more comfortable playing with children three to four years younger than him. In fact, Mrs. Greene-Walsh described Mr. Lotter as so severely delayed that he at times acted like a toddler or pre-school aged child. For example, when Mr. Lotter was about 10 years old, he asked his foster mother to give him a bottle and hold him like a baby.

49. Mr. Lotter also has had low self-esteem since childhood. Mrs. Greene-Walsh reported that Mr. Lotter blamed himself for not being good at school work being able to follow directions and complete tasks such as weeding the yard or cleaning up the house. From an early age, Mrs. Greene-Walsh explained, Mr. Lotter had been told that his inability to complete assigned tasks was his fault.

50. Mr. Lotter was also neglected and physically, emotionally, and sexually abused, further devastating his sense of self-worth. Witnesses recalled that Mr. Lotter was particularly vulnerable because he didn't understand when people were taking advantage of him; he was so trusting and gullible.

C. Mr. Lotter has significant limitations in the Practical Domain.

51. Mr. Lotter has significant deficits in practical skills, which encompass activities of daily living, such as personal care, occupational skills, use of money, safety, health care, travel/transportation, and schedules/routines.[48]

52. Mr. Lotter was unable to complete age-appropriate tasks of daily living as a child, adolescent, and adult. For example, as a child Mr. Lotter did not know to wash his clothes or take a bath. Witnesses describe Mr. Lotter as unkempt and even as a teenager he did not iron his clothes or comb his hair.

53. Numerous witnesses report that Mr. Lotter struggled to perform tasks of daily living that involved multiple steps and required step-by-step, concrete instructions. For example, Mr. Lotter's foster mother recalled one instance when she requested that Mr. Lotter do the dishes. There were pots, pans, silverware, and dinner plates in the sink, but Mr. Lotter only washed the dinner plates because he took the concept of "dishes" so literally. He did not realize that he should wash everything in the sink.

54. Many witnesses describe Mr. Lotter's inability to complete tasks of daily living as an adult. For example, Mr. Lotter could not cook, even as an adult. He was only able to microwave items, but even then he had to ask his mother the amount of time needed to microwave his food—even if the amount of time was listed on the food packaging.

55. Throughout adulthood, Mr. Lotter lived primarily with family members who did not charge him rent. He did not have bills in his name. Mr. Lotter struggled to manage money and maintain long-term employment. Nearly all of his jobs involved unskilled labor. Witnesses reported that Mr. Lotter did not have a checking or savings account.

56. Mr. Lotter only ever had one serious romantic relationship and that was with the mother of his child. Mr. Lotter's girlfriend recalled that Mr. Lotter wanted to be a good father, but did not understand what that meant. He was unable to think ahead and remember to feed their baby or contemplate appropriate safety measures for their child.

57. To put Mr. Lotter's impairments into perspective, Dr. Fine believes that Mr. Lotter would be unable to function independently as an adult and successfully undertake adult responsibilities, such as maintaining a job and paying bills. Rather, Dr. Fine reported that Mr. Lotter's impairments are so severe that he would require an assisted living facility for adults.

Adaptive Behavior Assessment System 3

58. On January 25, 2018, I administered the Adaptive Behavior Assessment System 3 to Mrs. Greene-Walsh, who was Mr. Lotter's social worker for several years during his childhood. Mrs. Walsh has a clear recollection of Mr. Lotter and intimate knowledge of his functioning at school, at home, and in the community. Mrs. Walsh reported on Mr. Lotter's adaptive functioning at the age of 10.

[48] *Id.*

59. On the ABAS-3 the following Scores were obtained:

	Standard Score	95% Confidence Interval	Percentile Rank
General Adaptive Composite (GAC)	53	(50-56)	<1
Conceptual	51	(46-56)	<1
Social	57	(52-62)	<1
Practical	59	(54-64)	<1

60. The general adaptive composite compares a person's global adaptive functioning to the adaptive skills of others in the same age group from the standardized sample. Communication, functional academics, and self-direction comprise the Conceptual domain of adaptive behavior. Social and leisure skills comprise the social domain. Self-Care, Home or School Living, Community Use, Health and Safety, and Work make up the Practical domain.

61. The results of the ABAS-3 clearly demonstrate extremely low scores in all three domains of functioning, as well as global adaptive functioning. In all areas, Mr. Lotter scored below the first percentile, meaning that over 99 percent of the community function at a higher level.

Prong III: Developmental Onset

62. Mr. Lotter exhibited very significant deficits and required intervention by professionals that directly and indirectly provided special services and placements early on in his developmental years. Therefore, one can conclude that Mr. Lotter's problems are developmental in nature and were present since childhood.

Conclusion

63. Based on the work performed and test results obtained it is my opinion to a high degree of scientific certainty that Mr. Lotter qualifies for the diagnosis of Intellectual Developmental Disability (formerly Mental Retardation). His intellectual functioning is at least two standard deviations below the mean of a normative population, he exhibits and exhibited concurrent deficits in Social, Practical and Conceptual Skills reflecting adaptive behavior deficits that have been present since early childhood and that persisted at least until the time of the offense for which he was sentenced to death. The scores obtained on the ABAS-3 validate the deficits identified.

64. I declare under penalty of perjury that the content of this declaration is true and correct to the best of my knowledge.

Ricardo Weinstein, Ph.D.

8.26.18
Date

Certificate of Service

I hereby certify that on Tuesday, March 27, 2018 I provided a true and correct copy of the Attachment to the following:

State of Nebraska represented by James Smith (Bar Number: 15476) service method: Electronic Service to james.smith@nebraska.gov

Signature: /s/ Timothy S. Noerrlinger (Bar Number: 23222)

IN THE DISTRICT COURT OF RICHARDSON COUNTY, NEBRASKA

STATE OF NEBRASKA, Plaintiff, V. JOHN L. LOTTER, Defendant.	)	Case Nos. 99-9000001, CR-99-9000002, CR-99-9000003 STATE'S RESPONSE TO DEFENDANT'S AMENDED POSTCONVICTION MOTION

The plaintiff State of Nebraska responds to the defendant's Amended Motion for Postconviction Relief that was filed on March 27, 2018.

DENY WITHOUT AN EVIDENTIARY HEARING

1. The defendant's Amended Motion for Postconviction Relief ("Amended Postconviction Motion") should be denied without an evidentiary hearing for the reasons stated below.

REASONS TO DENY EVIDENTIARY HEARING ON ALL CLAIMS

2. The Amended Postconviction Motion is time barred by Neb. Rev. Stat. § 29-3001(4).

3. The Amended Postconviction Motion can be decided as a matter of law because the Amended Postconviction Motion is based on legal conclusions which are erroneous statements of law.

4. No evidentiary hearing should be held because the Amended Postconviction Motion alleges only conclusions of law or factual conclusions. The Amended Postconviction Motion is more akin to a legal brief that seeks postconviction relief by a combination of irrelevant factual allegations and misstatements of law that

reach erroneous legal conclusions on the issue of whether the defendant's death sentences are constitutionally void or voidable.

5. It is a well-established principle of Nebraska law that a defendant seeking relief under the Nebraska Postconviction Act must show, by factual allegations, that his sentence was obtained in violation of his constitutional rights so as to make his sentence void or voidable.

6. The Amended Postconviction Motion makes no allegations of fact justifying an evidentiary hearing for postconviction relief nor factual allegations that are not time barred.

7. No evidentiary hearing should be held because the case files and records affirmatively show that the defendant is entitled to no relief.

8. No evidentiary hearing should be held because the Amended Postconviction Motion's allegations are procedurally barred by raising claims which could have been raised in his previous postconviction proceeding.

THE SPECIFIC POSTCONVICTION CLAIMS

Amended Postconviction Motion Claims A.1-5
(Alleged 8th Amendment violations, pp.2-8 and 11-32)

1. Amended Postconviction Motion Claims A.1-5 (pp. 2-8 and 11-32) are all based and rely upon the erroneous claims that Section 23 of L.B. 268, passed by the Legislature in 2016, retroactively changed judicial judgments imposing death sentences to life imprisonment, or that the involvement of the Governor of Nebraska

and the State Treasurer involvement in the statewide referendum on the death penalty violated the Eighth Amendment.[1]

2. The defendant's death sentences have remained in effect and have been final since the Nebraska Supreme Court affirmed the defendant's death sentences on direct appeal by *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), modified on denial of rehearing 255 Neb. 889, 587 N.W.2d 673 (1999), cert. denied, 526 U.S. 1162, 119 S.Ct. 2056 (1999).

3. For two alternative reasons, the Postconviction Motion's reliance on Section 23 of L.B. 268 is misplaced.

A.) First, L.B. 268 never went into effect because it was suspended, as a matter of law by voter referendum by Neb. Const. art. III, § 3, which constitutional provision means that a Legislative act is "suspended until approved by the voters." *Pony Lake Sch. Dist. 30 v. State Comm. for Reorg. of Sch. Districts*, 271 Neb. 173, 187 (2006). Nebraska's voters then rejected the Legislature's attempt at repealing the death penalty.

B.) Second, the Legislature does not have the power to enact statutes retroactively changing final criminal sentences. Under Nebraska law, only the Nebraska Board of Pardons has authority to commute a final sentence because the power of commutation of sentence is vested solely in the Board of Pardons under the provisions of Neb. Const. art. IV, §

[1] Page 12 of Defendant's Amended Postconviction Motion groups his claims concerning the initiative petition by alleging the claims "would violate the Eighth Amendment".

13. See also, *State v. Bainbridge*, 249 Neb. 260, 543 N.W.2d 154 (1996); *Johnson & Cunningham v. Exon*, 199 Neb. 154, 256 N.W.2d 869 (1977). If section 23 of LB268 had ever taken effect, which it did not, it would have been unconstitutional under Nebraska law because the defendant's final death sentences have remained in effect since his death sentences were affirmed by the Nebraska Supreme Court in 1999.

4. As a matter of law, participation by the Nebraska Governor or the State Treasurer in a statewide referendum concerning the Legislature's attempt to repeal the death penalty did not violate the defendant's Eighth Amendment constitutional rights. There is no authority for such a constitutional claim.

Amended Postconviction Motion Claim B
(Alleged Due Process violation, pp. 32-39)

5. Amended Postconviction Motion Claim B (pp. 32-39) relies upon the erroneous claim that Section 23 of L.B. 268, passed by the Legislature in 2016, retroactively changed judicial judgments imposing death sentences to life imprisonment and that the voter referendum then reinstated the defendant's death sentences. The defendant's due process claim relies upon the erroneous legal theory that he was entitled, by due process, to another individual resentencing hearing after the voter referendum.

6. The defendant's death sentences have remained in effect since the Nebraska Supreme Court affirmed the defendant's death sentences on direct appeal by *State v. Lotter*, *supra*. L.B 268 and the subsequent voter referendum did not

change the fact that the defendant's death sentences have remained in effect since they were final in 1999.

Amended Postconviction Motion Claim C
(Alleged Bill of Attainder Constitutional Violation, pp. 39-45)

7. Amended Postconviction Motion Claim C (pp. 39-45) again relies upon the erroneous claim that Section 23 of L.B. 268, passed by the Legislature in 2016, retroactively changed judicial judgments imposing death sentences to life imprisonment and that the voter referendum then reinstated the defendant's death sentences.

8. The defendant's death sentences have remained in effect since the Nebraska Supreme Court affirmed the defendant's death sentences on direct appeal by *State v. Lotter, supra.* L.B 268 and the subsequent voter referendum did not change the fact that the defendant's death sentences have remained in effect since they were final in 1999.

9. The voter referendum did not constitute an unconstitutional Bill of Attainder.

Amended Postconviction Motion Claim D
(Alleged Due Process "Actual Innocence of Death Penalty" and Eighth Amendment claims of Intellectual Disability constitutional violations, pp. 9-11 and 45-59)

10. The defendant's Claim D alleges due process "actual innocence of death penalty" and related Eighth Amendment claims that the defendant's death sentences are cruel and unusual punishment and violate due process because he is and has been intellectually disabled.

11. To the extent the defendant relies upon § 28–105.01(2), a statute that was enacted in 2013, the defendant's postconviction claim should be denied without an evidentiary hearing for either of the following reasons:

A) The claim is a statutory claim, not a constitutional claim. The Nebraska Postconviction Act is limited to constitutional claims which make a judgment or sentence void or voidable. See, Neb. Rev. Stat. § 29-3001.

B) The claim is time barred by Neb. Rev. Stat. § 29-3001(4) because the Amended Postconviction Motion does not affirmatively allege that the factual predicate of the claim could not have been discovered through the exercise of due diligence within the one-year period of limitation when the constitutional claim itself has been recognized by the United States Supreme Court for over 15 years since *Atkins v. Virginia*, 5336 U.S. 304 (2002).

12. The claim is time barred by Neb. Rev. Stat. § 29-3001(4).

13. If this Court concludes that the factual allegations concerning Dr. Ricardo Weinstein's evaluation are sufficient to warrant an evidentiary hearing on the constitutional claim of intellectual disability, the Court is advised that Dr. Weinstein has been described by courts as having a "checkered history".[2]

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[2] *U.S. v. Jimenez-Bencevi*, 934 F. Supp. 2d 360, 363 at FN 2 (D.P.R. 2013):

> As an expert witness in *Atkins* proceedings, Dr. Weinstein has a checkered history. The Fifth Circuit Court of Appeals was 'troubled' with Dr. Weinstein's complete inability to explain his irregular methodology, including his failure to 'report partial conclusions' 'that contradicted the findings he

CONCLUSION

The plaintiff State of Nebraska requests that this Court deny the defendant's Amended Motion for Postconviction Relief without an evidentiary hearing.

STATE OF NEBRASKA, Plaintiff

BY DOUGLAS J. PETERSON, #18146
Nebraska Attorney General

BY **/s/ James D. Smith**, # 15476
Solicitor General
2115 State Capitol
Lincoln, NE 68509-8920
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submitted to the court. *Maldonado v. Thaler*, 625 F.3d 229, 239 (5th Cir.2010). In *Ortiz v. United States*, the district court found Dr. Weinstein's expert testimony "unreliable" and said that he "appears more concerned with legal culpability than with an objective assessment of intellectual capability." *Ortiz v. United States*, 2007 WL 7686126 at *2–7 (W.D.Mo. Dec. 14, 2007). In *Pizzuto v. Blades*, the district court stated that Dr. Weinstein's findings, at best, were "ambiguous" and that it found it could not "credit" his comprehensive IQ scores. *Pizzuto v. Blades*, 2012 WL 73236 at *14 (D.Id. Jan. 10, 2012).

Certificate of Service

I hereby certify that on Tuesday, May 29, 2018 I provided a true and correct copy of the Response to the following:

Lotter,John,L represented by Timothy S. Noerrlinger (Bar Number: 23222) service method: Electronic Service to tim@naylorandrappllaw.com

Signature: /s/ James Smith (Bar Number: 15476)

IN THE DISTRICT COURT OF RICHARDSON COUNTY, NEBRASKA

STATE OF NEBRASKA,	)	
	)	
Plaintiff,	)	
	)	Case Nos. CR-99-9000001,
v.	)	CR-99-9000002, CR-99-9000003
	)	
JOHN L. LOTTER,	)	
	)	
Defendant.	)	

REPLY TO STATE'S RESPONSE TO DEFENDANT'S AMENDED MOTION FOR POSTCONVICTION RELIEF

Defendant, John L. Lotter, through undersigned counsel below, submits this Reply to the State's Response to Defendant's Amended Motion for Postconviction Relief in accordance with the Court's Order filed in this case on April 3, 2018.[1]

1. In its response to Mr. Lotter's Amended Motion for Postconviction Relief, the State alleges that no evidentiary hearing is required on Mr. Lotter's claims because the amended motion is time-barred under Neb. Rev. Stat. § 29-3001(4), that the amended motion "is based on legal conclusions which are erroneous statements of law," that the amended motion "alleges only conclusions of law or factual conclusions," and that the amended motion "seeks postconviction relief by a combination of irrelevant factual allegations and misstatements of law that reach erroneous legal conclusions on the issue

[1] Concurrently with this reply, Mr. Lotter is also filing an unopposed motion requesting this Court to stay these proceedings pending the outcome of his consolidated appeals in the Nebraska Supreme Court, Case Nos. S-17-325, S-17-338, S-17-339, S-17-1126, S-17-1127, S-17-1129.

of whether the defendant's death sentences are constitutionally void or voidable." State's Response filed May 29, 2018, at 1.

2. The State's allegations in response to the amended motion only demonstrate that an evidentiary hearing is required on Mr. Lotter's claims. Under Neb. Rev. Stat. § 29-3001(2), an evidentiary hearing must be granted when the motion contains factual allegations that, if proved, constitute an infringement of the defendant's rights under the Nebraska or United States Constitution. *State v. Williams*, 295 Neb. 575, 587, 889 N.W.2d 99 (2017). Mr. Lotter's amended postconviction motion does precisely that with respect to all of his claims set forth in the motion. Those factual allegations, if proved, constitute an infringement of Mr. Lotter's rights under both the Nebraska and U.S. constitutions. *See* Amended Motion for Postconviction Relief filed March 27, 2018, at 2-59. The State does not, and cannot, respond that Mr. Lotter's amended motion fails to meet this standard. Instead, the State merely *takes issue* with either the factual allegations or legal arguments set forth in the amended motion and the legal conclusions therefrom, which does not obviate the requirement of an evidentiary hearing, but only points to the need for one under the standards governing motions for postconviction relief. *Williams*, *supra*, 295 Neb. at 587.

3. **Amended Claims A through C:** Concerning the constitutional violations under the Nebraska and U.S. constitutions related to the vacatur of Mr. Lotter's death sentence under LB 268, its purported reinstatement through the referendum process, and the specific targeting of Defendant's execution in the reinstatement effort, Mr. Lotter's amended motion sets forth in detail the factual allegations and legal arguments that entitle him to relief under the Nebraska and U.S. constitutions. Amended Motion for

Postconviction Relief filed March 27, 2018, at 2-45. In response, the State contends only that Mr. Lotter's claims rely on an "erroneous claim" or "erroneous legal theory". State's Response at 2-5. The State makes no argument as to why Mr. Lotter's allegations, if proved, would not entitle him to relief. Indeed, it is the State, not Mr. Lotter, who relies on bare legal conclusions. The question of whether Mr. Lotter is ultimately entitled to relief on his claims is wholly dependent on resolution of the issues of fact and law alleged in his amended motion. Under these circumstances, an evidentiary hearing is required. *Williams*, *supra*.

Moreover, amended claims A through C are timely filed under Neb. Rev. Stat. § 29-3001(4), and the State's response offers no reasons in support of its conclusory assertion otherwise. Amended Claims A.4, B, and C were raised in Mr. Lotter's original postconviction motion filed with this Court on December 4, 2017. As was set forth in the original motion, these claims were filed within one year of the time the claims could have been discovered. Mr. Lotter would not have been able to develop and file such claims until after the referendum repealing LB268 went into effect and reinstated the death penalty in Nebraska. Pursuant to Nebraska's election laws, the referendum went into effect on December 5, 2016, following the state canvassing board's certification and Governor's proclamation of the election results. Neb. Rev. Stat. § 32-1414(4). The postconviction motion was filed within one year of the Governor's proclamation of election results on December 5, 2016, which purported to reinstate Mr. Lotter's death sentence. *See* Motion for Postconviction Relief filed December 4, 2017 at 6.

Claims A.1, A.2, and A.3 are also timely filed. As Mr. Lotter detailed in his amended postconviction motion, *see* Amended Motion for Postconviction Relief at 11-

12, Mr. Lotter and other similarly situated persons brought these claims in a Declaratory Judgment Action in Lancaster County (Case No. 17-4302), and did not know until the district court's order denying the claims that they were cognizable in a postconviction motion. The order of dismissal by the district court in the declaratory judgment action on February 12, 2018 held that the equally serviceable remedy of postconviction relief was available for those claims. *See* Reply Appendix A.[2] The judgment held that if, as Defendant alleged, the State had no authority to execute him (because the referendum purporting to reinstate LB 268 went into effect on August 30, 2015, before it was suspended on October 16, 2015, or because the referendum itself was defective), then his execution would violate the Eight Amendment. Reply Appendix A, at 6-7 (citing *Lewis v. Jeffers*, 497 U.S. 764, 282 (1990); *Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006); *Lowenfeld v. Phelps*, 484 U.S. 231, 244 (1988)). Mr. Lotter amended his postconviction motion to raise claims A.1, A.2, and A.3 less than one month after the district court's judgment in the declaratory judgment action. The claims relate back to his original postconviction motion filed on December 4, 2017, inasmuch as they arise from the same core set of operative facts surrounding the vacatur of Mr. Lotter's death sentence under LB 268, its purported reinstatement through the referendum process, and the specific targeting of Mr. Lotter's execution in the reinstatement effort.

4. **Amended Claim D:** In response to Mr. Lotter's amended Claim D, the State first argues that the claim is a statutory claim, not a constitutional claim. State's Response

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[2] Mr. Lotter intended to attach the Lancaster County District Court's order of dismissal as an appendix to his amended postconviction motion, but neglected to do so. The order is attached hereto as Reply Appendix A. It should also be noted that the declaratory judgment action remains pending on appeal in the Nebraska Supreme Court as of the date of filing this reply brief (Appeal No. S-18-000390).

at 6. This contention is absurd on its face, as amended Claim D specifically argues that: "Mr. Lotter is Intellectually Disabled, and Therefore Actually Innocent of the Death Penalty, as He Belongs to the Class of Offenders for Whom Execution is Categorically Prohibited Under the Eighth and Fourteenth Amendments." Amended Motion for Postconviction Relief at 45. The amended motion sets forth an extensive factual basis for Mr. Lotter's claim that he is intellectually disabled and thus categorically exempt from the death penalty under the Eighth and Fourteenth Amendments. Those factual allegations, if true, entitle Mr. Lotter to relief, and an evidentiary hearing is required. *Williams*, *supra*; Neb. Rev. Stat. § 29-3001(2). The State refutes none of these factual allegations, nor challenges Dr. Weinstein's expert qualifications, but merely states that, "in the event the Court concludes that the factual allegations concerning Dr. Ricardo Weinstein's evaluation are sufficient to warrant an evidentiary hearing on the constitutional claim of intellectual disability, the Court is advised that Dr. Weinstein has been described by courts as having a 'checkered history.'" State's Response at 6.[3] To the

[3] The State, in a footnote, extracts a footnote from *U.S. v. Jiminez-Bencevi*, 934 F.Supp.2d 360 (D. Puerto Rico 2013) to make this assertion. In that case, the diagnosis of mental retardation was hotly disputed, and the federal district court chose to credit the government experts over the defense experts in finding that the defendant was not mentally retarded. Moreover, *Jiminez-Bencevi* predates both *Hall v. Florida*, 134 S.Ct. 1986 (2014) and *Moore v. Texas*, 137 S.Ct. 1039 (2017) (and the use of the term "intellectual disability"). A review of the case shows that the court's analysis of the mental retardation claim did not comport with clinical standards on either the intellectual functioning or adaptive deficits prong of intellectual disability, and the court's judgment is thus questionable after *Hall* and *Moore*. The same is true of *Maldonado v. Thaler*, 625 F.3d 229 (5th Cir. 2010). Furthermore, the court in *Maldonado* applied the Texas definition of mental retardation/intellectual disability that was subsequently found to be unconstitutional by the Supreme Court in *Moore v. Texas*. The judgment in *Ortiz v. United States*, 2007 WL 7686126 (W.D. Mo. Dec. 14, 2007), was vacated and remanded by the Eighth Circuit Court of Appeals because of flaws in the district court's analysis of the mental retardation/intellectual disability claim, *Ortiz v. U.S.*, 664 F.3d 1151, 1166 (8th Cir. 2011), and also predates *Hall* and *Moore*. Likewise for *Pizzuto v. Blades*, 2012

extent the State's "advice" is intended to suggest to the Court that it should prejudge Mr. Lotter's claim, it is wholly inappropriate. To the extent the State's response registers its disagreement with the factual allegations and Dr. Weinstein's expert opinion, such disagreement only reinforces the need for, and the requirement of, an evidentiary hearing.

Amended Claim D is also timely, contrary to the State's assertion. State's Response at 6. First, Mr. Lotter's counsel was notified of Mr. Lotter's intellectual disability only after Dr. Weinstein's evaluation of Mr. Lotter and testing for intellectual disability on March 6, 2018, and Mr. Lotter filed his amended postconviction motion raising the constitutional claim as soon as possible thereafter, on March 27, 2018. Second, the Supreme Court's decision in *Moore v. Texas*, 137 S.Ct. 1039 (2017), clarified the standards for determining a claim of intellectual disability under the Eighth Amendment in significant ways relevant to Mr. Lotter's claim, and in terms of Nebraska's own definition of intellectual disability. Specifically, the Court in *Moore* held not only that preclusion of a finding of intellectual disability based on a strict IQ cutoff score of 70 is irreconcilable with *Hall v. Florida*, 134 S.Ct. 1986 (2014) and current medical standards, but that consideration of adaptive functioning must also comport with prevailing medical standards, and that those standards focus the inquiry on adaptive *deficits*, not adaptive strengths. Mr. Lotter explained these prevailing standards at length in his amended postconviction motion, and demonstrated that case law in Nebraska interpreting the adaptive-functioning prong of intellectual disability is irreconcilable with the Supreme Court's decision in *Moore* and current medical standards. *See* Amended

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WL 73236 (D. Idaho Jan. 10, 2012), an opinion that was vacated and remanded by the Ninth Circuit in light of *Hall v. Florida*. *Pizzuto v. Blades*, 785 F.3d 1178 (Mem) (9th Cir. 2014).

Motion for Postconviction Relief at 50-55 (citing *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010). Finally, the factual allegations set forth by Mr. Lotter in Claim D, if true, categorically prohibit his execution under the Eighth Amendment, and he is "actually innocent" of the death penalty, a claim clearly cognizable in a successive postconviction motion. *See* Amended Motion for Postconviction Relief at 45-46 (and cases cited therein).

CONCLUSION

For the reasons set forth herein, and for the reasons set forth in his Amended Motion for Postconviction Relief, Mr. Lotter prays this Court will order an evidentiary hearing, grant his Motion for Postconviction Relief, vacate his death sentence, and grant such other and further relief as equity and justice require.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2018, this Reply to State's Response to Amended Motion for Postconviction Relief was filed electronically with the Clerk of the District Court to be served by Electronic Service on the Richardson County Attorney, and James D. Smith, Nebraska Attorney General's Office.

/s/ Timothy S. Noerrlinger
Timothy S. Noerrlinger #23222

Certificate of Service

I hereby certify that on Wednesday, June 27, 2018 I provided a true and correct copy of the Miscellaneous Document to the following:

State of Nebraska represented by James Smith (Bar Number: 15476) service method: Electronic Service to james.smith@nebraska.gov

Signature: /s/ Timothy S. Noerrlinger (Bar Number: 23222)