No. 22-6191

IN THE SUPREME COURT OF THE UNITED STATES

JOHN L. LOTTER,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

On Petition for Writ of Certiorari
To the Nebraska Supreme Court

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. Factual Background

The Petitioner John L. Lotter was convicted by a jury of three counts of first-degree murder in Nebraska state court and sentenced to death on each count in February 1996. Lotter's murder convictions and capital sentences were affirmed on direct appeal and became final in 1999. *State v. Lotter*, 586 N.W.2d 591 (Neb. 1998), opinion modified on denial of reh'g, 587 N.W.2d 673 (Neb. 1999), cert. den. 526 U.S. 1162 (1999). Over the next 23 years, Lotter has pursued a smorgasbord of unsuccessful Nebraska state and federal court collateral challenges to his judgment. This current one is Lotter's fifth successive postconviction proceeding under Nebraska's Postconviction Act. Lotter has also filed two prior unsuccessful federal habeas cases which were dismissed with prejudice by Nebraska's federal district court. Lotter has also filed other unsuccessful additional collateral attacks on his convictions and sentences under Nebraska law. Lotter's history of his state and federal collateral attacks is summarized and cited in the Nebraska Supreme Court opinion that is the subject of his current certiorari petition. See, *State v. Lotter*, 311 Neb. 878, 883, 976 N.W.2d 721 (2022), found at Pet. Appendix A, collateral attack history at Pet. Appendix, p6a.

One of the most thorough summaries of the facts of Lotter's convictions, sentences, and procedural history (as of over a decade ago) can be found in the Nebraska Federal District Court's opinion denying Lotter's first habeas proceeding

Lotter v. Houston, 771 F.Supp.2d 1074 (D.Neb. 2011), which concluded with this statement by the Federal District Judge Richard G. Kopf:

> Following careful consideration of the record developed in the Nebraska courts and despite the superb work of federal postconviction counsel, I find and conclude that Lotter is not entitled to relief. Legally speaking, if Nebraska carries out the sentence, there need be no "second thoughts."
> *Lotter v. Houston*, *supra*, at 1115.

B. Procedural History of Lotter's Current Collateral Attack

Lotter's current postconviction collateral attack claims he is intellectually disabled and therefore cannot be executed. This Court established the new constitutional rule over 20 years ago in *Atkins v. Virginia*, 536 U.S. 304 (2002), that an intellectually disabled or mentally retarded criminal is ineligible for the death penalty. Lotter did not claim he was intellectually disabled in any of his four prior Nebraska postconviction proceedings nor in either of his two prior federal habeas proceedings. It was not until Lotter filed his current fifth Nebraska postconviction proceeding in 2018 that Lotter claimed he is intellectually disabled.

Lotter's counsel admitted that Lotter previously claimed intellectual disability as a bar to execution in on of this prior federal habeas proceedings when Lotter's counsel stated to the trial court during the current fifth postconviction proceeding:

> 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.
> *State v. Lotter*, 311 Neb. 878, 902; Pet. Appendix, p25a.

Of additional interest, Nebraska law has long provided since 1998 that the death penalty cannot be imposed upon any person who is mentally retarded, subsequently defined by the current clinical term of intellectually disabled. The Nebraska Supreme Court's opinion for the current certiorari petition pointed out this aspect of Nebraska law and that it has existed since Lotter's case was pending on direct appeal prior to any final judgment in Lotter's direct appeal. See, Pet. Appendix, p019a-21a. The Nebraska Supreme Court's opinion also noted that Nebraska law has not had a fixed IQ cut-off number defining intellectual disability above which IQ number a person would be eligible for execution. See, Pet. Appendix, pp19a-21a.

Not surprisingly, the Nebraska Supreme Court affirmed the denial of postconviction relief for Lotter's current fifth postconviction proceeding on the grounds that his current claim of intellectual disability is both time-barred and procedurally barred. Pet. Appendix, pp1a-41a.

REASONS FOR DENYING THE PETITION

1. *Hall* and *Moore I* did not announce a new substantive constitutional rule retroactive to cases on collateral review, nor do those cases apply to Lotter.

Lotter's certiorari petition argues that *Hall v. Florida*, 572 U.S. 701 (2014), and *Moore v. Texas*, 581 U.S. 1 (2017), the latter decided three years after *Hall*, combine to announce a new substantive constitutional rule retroactive to cases on collateral review. Lotter's argument is misplaced.

It was *Atkins v. Virginia*, 536 U.S. 304 (2002), which announced the new constitutional rule that executions of mentally retarded criminals were "cruel and unusual punishments" prohibited by Eighth Amendment, abrogating and overturning *Penry v. Lynaugh*, 492 U.S. 302 (1989). Both *Hall* and *Moore* had the later fatal constitutional flaw of states who defined mental retardation or intellectual disability by either a fixed IQ score cutoff or by a definition of intellectual disability which departed from accepted prevailing clinical standards. The states' flawed definitions in *Hall* and *Moore* created an unacceptable risk of the death penalty being imposed on persons who were intellectually disabled, all contrary to *Atkins*.

Unlike *Hall* and *Moore*, Nebraska has never defined mental retardation or intellectual disability by the flawed definitions used by the state of Florida in *Hall* or the state of Texas in *Moore*. Lotter makes no claim that Nebraska's definition of mental retardation or intellectual disability was or is constitutionally flawed. Rather, he appears to only make the claim that he could have made years ago, which is that he is intellectually disabled. Lotter could have asserted this claim per *Atkins* in any

of his multitude of prior state and federal collateral attack proceedings or even made the claim in his direct appeal per Nebraska law. His claim is long since procedurally barred as well as time barred.

The effect of Lotter's claim, made decades later after so many failed collateral attack proceedings, is that the United States Constitution and federal law allows a condemned inmate to collaterally attack a death sentence at any time if the inmate can eventually find a mental health professional anywhere who will diagnose the inmate as being intellectually disabled.

2. **No genuine conflict among federal circuits or state high courts.**

The Nebraska Supreme Court's opinion stated that "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." The opinion provides a string cite of supporting authority for this conclusion at footnote 91, Pet. Appendix, p28a.

White v. Commonwealth, 500 S.W.3d 208 (Ky. 2016), as modified (Oct. 20, 2016), and *abrogated by Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018), is relied on by Lotter to create the impression of a split of authority. First, it should be noted that *White* was decided a year prior to this Court's decision in *Moore I*. Second, *White* involved the aspect of Kentucky procedures for evaluating a capital inmate who made an intellectual disability claim when the inmate had refused to be evaluated. *White* stated:

> To summarize succinctly, we do not hold today that because of *Hall* every inmate in Kentucky under the sentence of death is entitled to an evaluation or a hearing on the issue of serious intellectual disability. Nor do we hold that White is entitled to either an evaluation or hearing. . . . Only the mode of examination has been contested.
> *White v. Commonwealth*, 500 S.W.3d at 215

The Nebraska Supreme Court's opinion also cited authority reflecting no conflict among other courts when applying the principles of procedural bar and time bar to untimely or procedurally barred intellectual disability claims by capital inmates. See, Pet. Appendix, pp25-26a, footnotes 86 and 87.

CONCLUSION

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

Respectfully submitted,

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Certificate of Compliance

1. The Respondent's Brief in Opposition to the petition for writ of certiorari complies with the word limit of Rules 33(1)(h) and 33(2)(b) because the document does not exceed 9,000 words or 40 pages.

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BY: **s/ James D. Smith**

Proof of Service

Undersigned counsel of record for the Respondent certifies that on February 14, 2023, copies of this Brief in Opposition to the petition for writ of certiorari were served on all parties required to be served as follows:

A copy was mailed by United States Postal Service, first class mail, addressed to the Petitioner's counsel of record:

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2. An electronic version was also transmitted on the same date to the Petitioner's counsel at his above email addresses.

BY: **s/ James D. Smith**