**THIS IS A CAPITAL CASE**

No. _____

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

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JORGE GALINDO, Petitioner,

v.

STATE OF NEBRASKA, Respondent.

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

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# PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

## QUESTIONS PRESENTED FOR REVIEW

One of the foundational principles of this Court's post-*Furman* death penalty jurisprudence bans states from excluding consideration of youth as mitigation. Nebraska has done just that by limiting construction of the statutorily prescribed mitigating circumstance of "age" to advanced age or senility. Nebraska's refusal to consider youth and this Court's precedents presents the following questions:

1. May a state categorically exclude youth as a mitigating factor in a capital case?

2. Must a state court follow this Court's jurisprudence of *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), *Stanford v. Kentucky*, 492 U.S. 361 (1989), *Johnson v. Texas*, 509 U.S. 350 (1993), and *Tennard v. Dretke*, 542 U.S. 274 (2004), or may it ignore it?

3. Can appellate counsel be ineffective for failing to raise such a claim on direct appeal given this Court's clear precedent establishing error?

## PROCEEDINGS DIRECTLY RELATED TO THIS CASE

1. Madison County District Court Sentencing Opinion: *State v. Galindo*, Case No. CR-02-235, Journal Entry (Nov. 10, 2004);

2. Nebraska Supreme Court's Direct Appeal Opinion: *State v. Galindo*, 278 Neb. 599 (2009);

3. United States Supreme Court denial of certiorari: *Galindo v. Nebraska*, 559 U.S. 1010 (2010);

4. Madison County District Court Order Denying Galindo's Amended Post-conviction Petition: *State v. Galindo*, Case No. CR-02-235, Journal Entry (April 28, 2021);

5. Nebraska Supreme Court's Post-Conviction Appeal Opinion: *State v. Galindo*, 315 Neb. 1 (2023).

## LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Mr. Jorge Galindo is the petitioner in this case and was represented in the Court below by Mr. Adam J. Sipple. In the instant action, the Capital Habeas Unit of the Federal Defender's Office for the Western District of Missouri provides representation.

The State of Nebraska is the Respondent. Nebraska was represented in the Court below by Assistant Nebraska Attorney General Mr. James D. Smith.

Pursuant to Rule 29.6, no parties are corporations.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Jorge Galindo respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Nebraska denying post-conviction relief.

## OPINION BELOW

The September 1, 2023, opinion of the Supreme Court of Nebraska denying the post-conviction appeal is reported at *State v. Galindo*, 315 Neb. 1 (2023), and appears in the Appendix at App. 1a through App. 30a. The Supreme Court of Nebraska's November 29, 2023, order denying rehearing is unpublished and appears in the Appendix as App. 31a.

## JURISDICTION

The Nebraska Supreme Court issued its judgment on September 1, 2023, and subsequently denied rehearing on November 29, 2023. Under 28 U.S.C. § 2201(c) and Rule 13.1, the present petition was required to be filed within ninety days. Upon application of Petitioner under Rule 13 in Case No. 23A772, Associate Justice and Eighth Circuit Justice Brett M. Kavanaugh extended the time for filing a petition for writ of certiorari in this case up to and including April 27, 2024. App. 67a. Pursuant to Rule 30.1, the first business day of the Court is April 29, 2024. This petition is timely under Rule 13.1.

This Court has jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment of the United States Constitution states in relevant part: "nor cruel and unusual punishments inflicted."

The Fourteenth Amendment of the United States Constitution states in relevant part, "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves a provision of the Nebraska death penalty statute, Neb. Rev. Stat. Ann. § 29-2523(2)(d), which provides, in pertinent part:

> The aggravating and mitigating circumstances referred to in sections 29-2519 to 29-2524 shall be as follows:
>
> ***
>
> (2) Mitigating Circumstances:
>
> ***
>
> (d) The age of the defendant at the time of the crime;

## STATEMENT OF THE CASE

### A. Introductory Statement.

This Court has consistently defined the mitigating factor of "age" to include youth. Every other jurisdiction to consider the issue has followed this Court's post-*Furman* authority treating youthful age as a mitigating circumstance. Every polity, acting either through their Legislatures or their courts, include youth within the definition of age as a mitigator. This even held true in the pre-*Furman* practices of jurisdictions that no longer allow imposition of a death penalty.

Outlier is a term often overly used in litigation. However, in this case, Nebraska literally stands alone in its exclusion of youth as a mitigator in capital cases. Nebraska's statute has been interpreted by the Nebraska Supreme Court to

categorically exclude youth, contrary to this Court's longstanding precedent and that of every other death penalty jurisdiction.

### B. The Offense.

This case arises from the botched bank robbery that tragically left five people dead, Ms. Lisa Bryant, Ms. Lola Elwood, Ms. Jo Mausbach, Mr. Samuel Sun and Ms. Evonne Tuttle, on September 26, 2002, in Norfolk, Nebraska. It is undisputed that Mr. Galindo fired the weapon causing the death of one bank employee, Ms. Elwood, and fired in the direction of a customer fleeing the bank, Ms. Micki Koepke. The shooting began when the group's older and charismatic leader, Jose Sandoval, unexpectedly shot and killed three bank employees at the front counter almost immediately after entering the bank.

After fleeing the botched bank robbery, Mr. Galindo and his co-defendants, Erick Vela and Jose Sandoval, broke into an occupied residence, stealing a car, and then another unoccupied residence, stealing another car. They were apprehended later that day. While Vela and Sandoval remained silent, Mr. Galindo admitted his role immediately to police, helped them locate guns that had been discarded along a highway, and demonstrated remorse. Mr. Galindo also assisted the police in locating the body of Travis Lundell, who was killed approximately a month before the bank robbery and whose death was introduced as an aggravating factor.

Along with Vela and Sandoval, Mr. Galindo was convicted of five counts of first-degree murder, six counts of use of a deadly weapon, one count of robbery, and one count of burglary. Mr. Galindo was sentenced to death.

During the sentencing mitigation hearing, trial counsel introduced evidence of Mr. Galindo's youth and immaturity as compared to the older, mature, and charismatic Sandoval, who planned the bank robbery and unexpectedly killed three of the bank employees. In support of the theory, Mr. Galindo's counsel presented evidence Mr. Galindo was immature and easily influenced by others, including Sandoval, who was two years older. Tr. 4436-4437. A teacher, Ms. Marilyn Moyer, testified that when Mr. Galindo was a student in her class, "he was quite immature" and "exhibit[ed] some signs of a younger child emotionally." Tr. 3565-3566. At the age of twelve, Mr. Galindo played with toys and carried a childish backpack. *Id.* Mr. Galindo also presented expert testimony that he was cognitively immature and demonstrated an elevated risk of undue influence by others because of his "dampened intellect." Tr. 3827-3830.

### C. Sentencing Court Refused to Consider Youth as a Mitigating Factor.

The sentencing panel explicitly rejected the consideration of youth as either a statutory or non-statutory mitigating circumstance. Specifically, the three-judge panel relied upon Nebraska Supreme Court precedent holding that Nebraska's statute allowing consideration of the "defendant's age" in mitigation, Neb. Rev. Stat. § 29-2523(2)(d), is applicable only "to a person of advanced years, where senility may be involved." Sentencing Order Pg. 8 (App. 39a). The panel then addressed other non-statutory mitigation arguments without acknowledging or considering Mr. Galindo's youth. *Id.* Pg. 9-10 (App. 40a-41a). As such, the panel categorically excluded youth as relevant mitigation.

### D. Nebraska Supreme Court Doubles Down On Nebraska's Refusal to Consider Youth as a Mitigating Factor.

In state post-conviction proceedings, Mr. Galindo raised an ineffectiveness of appellate counsel claim based upon appellate counsel's failure to raise the *Lockett*/*Eddings* error on direct appeal. Without an evidentiary hearing, the new state post-conviction judge—who did not preside over the trial—denied relief, accepting verbatim the proposed findings of fact and conclusions of law submitted by the Attorney General.

On appeal, the Nebraska Supreme Court accepted the post-conviction court's denial of an evidentiary hearing and reaffirmed its skewed reading of the Nebraska statute to exclude the consideration of youth as a mitigating factor. Thus, Nebraska established itself as the only jurisdiction to categorically exclude consideration of youth as a mitigating factor in death penalty cases.

The Nebraska Supreme Court explained that "§ 28-105.01 narrowed the application of the mitigating circumstance in § 29-2523(2)(d) to persons of advanced years. We concluded that only a capital defendant who was a person of advanced years at the time of the homicide could receive the benefit of this statutory mitigating circumstance." *Galindo*, 315 Neb. at 34. The court went on to justify non-compliance with this Court's precedent on the basis that: "the sentencing panel correctly read *Lotter* in deciding that the mitigating circumstance in § 29-2523(2)(d) did not exist in Galindo's case because he was not a person of advanced years."

*Galindo*, 315 Neb. at 35.[1] In denying the claim, the Nebraska Supreme Court again held that youth is not mitigating in Nebraska.

## REASONS FOR GRANTING THE WRIT

### I. This Court's precedent should be respected by a state court.

Even though Mr. Galindo was barely 21 and presented evidence of being immature and easily influenced by his peers, the record in this case reflects *no consideration* of his youth in mitigation, ever—not by the trial court sentencing panel, not on direct appeal, not by the trial court in post-conviction, nor by the Nebraska Supreme Court's appellate review of the post-conviction proceedings. This refusal to consider Mr. Galindo's youth as a mitigating factor is in direct contravention of this Court's decades of precedent and reveals Nebraska's status as an outlier from every other jurisdiction in the United States.

*Lockett v. Ohio* involved a statute that restricted the sentencer's ability to evaluate mitigating factors, specifically the person's age when the crime was committed. 438 U.S. 586, 594 (1978). Ms. Lockett, who was described as "a 21-year-old with low-average or average intelligence," was sentenced to death without consideration of her age because the trial judge proclaimed that "he had 'no alternative, whether [he] [liked] the law or not' but to impose the death penalty." *Id.*

This Court held that the statute violated the Eighth and Fourteenth Amendments because it prevented the sentencer from considering all relevant mitigating factors, which included age. *Id.* at 609. This Court stressed, "[in]

[1] *State v. Lotter*, 255 Neb. 456 (1998).

discharging his duty of imposing a proper sentence, the sentencing judge is authorized, *if not required*, to consider all of the mitigating and aggravating circumstances involved in the crime." *Id.* at 603 (quoting *Williams v. Oklahoma*, 358 U.S. 576, 585 (1959) (emphasis added)).

Similarly, in *Eddings v. Oklahoma*, this Court further emphasized that the sentencing judge must consider all mitigating circumstances about a person's character or background that are offered as the basis for a sentence less severe than death. 455 U.S. 104, 115 (1982). The Court in *Eddings*, however, was faced with a sentencing judge who erroneously treated youth as the *only* mitigating factor and refused to also consider Mr. Eddings' violent upbringing and family history. *Id.*

This Court ultimately reversed Mr. Eddings' death sentence and held that a person's age is indisputably a relevant mitigating factor, especially given the immaturity and susceptibility to influence that are characteristic of youth. *Id.* This Court recognized the indisputability of youth as a mitigator: "[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults." *Id.*

Additionally, this Court considered testimony that illustrated that Mr. Eddings' "mental and emotional development were at a level several years below his chronological age." *Id.* at 116. This Court emphasized that, "the imposition of the ultimate penalty [of death]" necessitates a consideration of both a person's

"chronological age" as well as their mental and emotional development. *Id.*[2]

*Eddings* underscores the principle that, in capital cases, the sentencer must not be barred from considering any aspect of the person's character or background that could mitigate their culpability or justify a less severe sentence. This includes not just a person's age but also their youth and the impetuousness that inherently accompanies youth. *Id.*

This Court reversed the death sentence in *Roberts v. Louisiana* where the statute did not allow consideration of mitigating factors particular to the person being sentenced, specifically the person's "youth." 431 U.S. 633, 637 (1977). Again, this Court expressed the principle that "it is essential that the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense." *Id.*

This Court confirmed the same a decade later. This Court again noted that "one of the individualized mitigating factors that sentencers must be permitted to consider is the defendant's age[.]" *Stanford v. Kentucky*, 492 U.S. 361, 375 (1989).

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[2] Of course, youth is also particularly relevant in juvenile sentencing decisions. This Court in *Miller v. Alabama*, 567 U.S. 460, 476 (2012), held that a sentencer must have the opportunity to consider a person's youth and its attendant characteristics before imposing a sentence of life without parole for offenses committed before age 18. Throughout the opinion, this Court repeatedly cited to both *Lockett* and *Eddings* and noted that it is "[o]f special pertinence … that a sentencer have the ability to consider the 'mitigating qualities of youth.'" *Id.*; *see also Jones v. Mississippi*, 141 S. Ct. 1307, 1316 (2021) ("Youth matters in sentencing. And because youth matters, *Miller* held that a sentencer must have discretion to consider youth before imposing a life-without-parole sentence, just as a capital sentencer must have discretion to consider other mitigating factors before imposing a death sentence.").

Moreover, this Court in *Johnson v. Texas* asserted that "youth is a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury if a death sentence is to meet the requirements of *Lockett* and *Eddings*." 509 U.S. 350, 367 (1993). Although the death sentence was ultimately upheld in that case, this Court nonetheless reiterated that "[a] sentencer in a capital case must be allowed to consider the mitigating qualities of youth in the course of its deliberations over the appropriate sentence." *Id.*

The Court in *Burger v. Kemp* discussed youth more broadly and determined that a person's actual age as well as their mental age can be relevant mitigating factors because they both stem from the "diverse frailties of humankind." 483 U.S. 776, 821 (1987) (citations omitted). There, the Petitioner "had an IQ of 82 and functioned at the level of a 12-year-old child." *Id.* at 779. The Court pointed out that youth, "measured by chronological, emotional, or intellectual maturity … [is] extraordinarily germane to the individualized inquiry that the sentencing jury constitutionally is required to perform." *Id.* at 821; *see also Tennard v. Dretke*, 542 U.S. 274, 288 (2004) (citing to *Burger* and emphasizing that youth is a fundamental aspect of a person's characteristics and cognitive capabilities and is therefore essential to consider when imposing the death penalty).

In the capital context, the Eighth and Fourteenth Amendments forbid the categorical exclusion of any form of mitigating evidence. As this Court noted in *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986), "[t]here is no disputing that this Court's decision in *Eddings* requires that in capital cases" the sentencer cannot be

prevented from considering any relevant mitigating factor offered as a basis for a sentence less severe than death. Youth is among the mitigating factors that must be considered in capital sentencing. Decades of this Court's precedent regarding youth as mitigating evidence underscores that this is a firmly embedded principle within the Court's jurisprudence. Thus, sentencing procedures cannot allow only for the consideration of a person's advanced age while excluding consideration of a person's youth.

The proceedings below are inconsistent with the foregoing firmly embedded principle and the Nebraska Supreme Court has decided an important federal question in a way that conflicts with relevant decisions of this Court. *See* Sup Ct. R. 10(c). Though Mr. Galindo's chronological age of 21 is undisputed, and he presented evidence he was less mature than his same-aged peers, the panel's decision reflects *no consideration* of Mr. Galindo's youth as a mitigating circumstance. Rather, it explicitly refused to consider it as any form of mitigation.

This case presents the right vehicle for acting. There are no jurisdictional problems, no preservation issues, and no factual disputes. The record is not voluminous. The record is clear that a category of mitigating evidence was excluded from consideration of whether Mr. Galindo should be sentenced to die. And the question presented is outcome determinative. Had the Nebraska Supreme Court followed this Court's 50 years of precedent and that of every other jurisdiction, the post-conviction trial court would have reviewed Mr. Galindo's death sentence and assessed the effectiveness of appellate counsel. But the Nebraska Supreme Court

rejected that approach and affirmed a death sentence on the basis of law prohibited by this Court, foreclosing such review. It is hard to imagine a better vehicle for resolving the Nebraska Supreme Court's obstinance.

## II. Nebraska's split from every other jurisdiction should be resolved.

It is not an exaggeration to contend that the ruling below creates a split between Nebraska and every other jurisdiction that has defined "age" in the context of capital sentencing mitigation. Nebraska's refusal to consider youth as mitigation stands alone—and fails to hold up under this Court's precedent.

Including federal and military court systems, there are **29** jurisdictions that currently have the death penalty. Of those jurisdictions, **28** allow consideration of youth as a mitigating factor. Nebraska is the ***only*** modern death penalty jurisdiction that has not authorized consideration of youth in mitigation.

After *Furman v. Georgia*, 408 U.S. 238 (1972) and *Gregg v. Georgia*, 428 U.S. 153 (1976), **14** jurisdictions retained or reinstated the death penalty and then later abolished it as a potential penalty. Every single one of those jurisdictions either explicitly considered youth as mitigation or did not object to its consideration prior to abolition.[3]

Finally, there are **10** jurisdictions that allowed the death penalty pre-*Furman* but did not reinstate it after *Gregg*. To the extent data about these jurisdictions is available, every single one of those jurisdictions considered youth as mitigation. The

[3] Neither Rhode Island nor the District of Columbia utilized the death penalty after *Furman* although they did not abolish it until after *Gregg*, so the modern aggravation/mitigation framework was not utilized in those jurisdictions.

jurisdictions did so even prior to the decisions in *Lockett* and *Eddings*. As it stands contrary to both this Court's binding precedent and the approach of every other jurisdiction to have considered the issue in the Nation's history—all 52 of them—Nebraska is decidedly an outlier.

| Post-*Gregg* Jurisdictions that Currently Allow the Death Penalty | | | |
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| **State** | **Statute** | **Law** | **Is Youth Mitigating?** |
| Alabama | "Mitigating circumstances shall include …[t]he age of the defendant at the time of the crime." ALA. CODE § 13A-5-51 (2024). | *Jackson v. State*, 133 So. 3d 420, 442 (Ala. Crim. App. 2012)("The trial court found one statutory mitigating circumstance: that Jackson was 18 years old at the time of the offense"). | Yes |
| Arizona | "The trier of fact shall consider as mitigating circumstances …[t]he defendant's age." ARIZ. REV. STAT. ANN. § 13-751 (2024). | *State v. Tucker*, 215 Ariz. 298, (2007) (finding the defendant's age of 18 at the time of the murder to be one of the most compelling mitigating circumstances). | Yes |
| Arkansas | "A mitigating circumstance includes … [t]he youth of the defendant at the time of the commission of the capital murder." ARK. CODE ANN. § 5-4-605 (West 2024). | *Giles v. State*, 261 Ark. 413, (1977) ("Any hard and fast rule as to age would tend to defeat the ends of justice, so the term youth must be considered as relative and this factor weighed in the light of varying circumstances."). | Yes |
| California | "In determining the penalty, the trier of fact shall take into account…[t]he age of the defendant at the time of the crime." CAL. PENAL CODE § 190.3 (West 2024). | *People v. Burney*, 47 Cal. 4th 203 (2009) ("The trial court did instruct the jury that defendant's age could not be considered as an aggravating factor, and the instructions as a whole permitted the jury to consider defendant's youth as a mitigating factor."). | Yes |

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| Florida | "Mitigating circumstances shall be the following… "[t]he age of the defendant at the time of the crime." FLA. STAT. ANN. § 921.141 (West 2024). | *Campbell v. State,* 679 So. 2d 720, 725-26 (Fla. 1996) (finding trial court erred in failing to give a requested jury instruction on age as a mitigating factor when expert psychological testimony linked the defendant's age of twenty-one with his significant emotional immaturity). | Yes |
| Georgia | No statutory mitigating circumstances. *See* GA. CODE ANN. § 17-10-30 (West 2023). | *Sears v. Humphrey*, 294 Ga. 117, 124, 135 (2013) (noting that the defense asked the jurors to consider "Sears' youth and immaturity at the time of the crimes" as a mitigating factor when considering whether to sentence him to death). | Yes |
| Idaho | No statutory mitigating circumstances. *See* IDAHO CODE § 19-2515 (West 2024). | *State v. Beam*, 109 Idaho 616, 619, 624 (1985) (finding that the trial court properly determined that the aggravating factors were not outweighed by possible mitigating factors, including "defendant's age of twenty-one years"). | Yes |
| Indiana | "The mitigating circumstances that may be considered under this section are as follows…any other circumstances." IND. CODE ANN. § 35-50-2-9 (West 2023). | *Gross v. State*, 769 N.E. 2d 1136, 1140-41 (Ind. 2002) ("Upon independent review, we find evidence of Gross' difficult childhood, his age of eighteen at the time of the crime, his graduation from high school, his conduct at Boy's School and at a youth center, his tutoring of other inmates while incarcerated at the Marion County Jail, and his expression of remorse."). | Yes |

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| Kansas | "Mitigating circumstances shall include …[t]he age of the defendant at the time of the crime." KAN. STAT. ANN. § 21-6625 (West 2024). | *State v. Spain,* 263 Kan. 708, 720-21 (1998) ("'The age of the defendant at the time of the crime' is one of the mitigating circumstances identified by the legislature … The trial judge expressed the opinion that the legislature intended 'there be established a special reason why…age should be considered.' The examples he offered were when a defendant is quite young or older than most murder defendants."). | Yes |
| Kentucky | Mitigating circumstances include "[t]he youth of the defendant at the time of the crime." KY. REV. STAT. ANN. § 532.025 (West 2023). | *Moore v. Commonwealth*, 634 S.W.2d 426, 434-35 (Ky. 1982) ("Rev. Wilson testified about the relative youth of the appellant at the time of the crimes (21 years old) and his lack of criminal background. Both of these items appear in the statute as potential mitigating circumstances. Even though the testimony may have been cumulative, and even though he had only a brief acquaintance with appellant, the exclusion of this testimony specifically ruled out what the statute specifically allows."). | Yes |
| Louisiana | "The following shall be considered mitigating circumstances…[t]he youth of the offender at the time of the offense." LA. CODE CRIM. PROC. ANN. Art. 905.5 (2023). | *State v. LaCaze*, 824 So. 2d 1063, 1083-84 (urging consideration of youth as a mitigating factor in death penalty case where defendant was eighteen at the time of the murder). | Yes |
| Mississippi | "Mitigating circumstances shall be | *Garcia v. State*, 300 So. 3d 945, 952 (Miss. 2020) (finding | Yes |

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| | the following… the age of the defendant at the time of the crime." MISS. CODE ANN. § 99-19-101 (West 2024). | the mitigating circumstances of "Garcia's lack of significant criminal history, relatively young age, and difficult childhood" to be outweighed by the aggravating circumstances). | |
| Missouri | "Statutory mitigating circumstances shall include the following… [t]he age of the defendant at the time of the offense." MO. ANN. STAT. § 565.032 (West 2023). | *State v. Reuscher*, 827 S.W.2d 710, 716 (Mo. 1992) (noting that "appellant is correct in noting that his age and alleged lesser participation in the crime could be viewed as mitigating circumstances" where appellant was eighteen at the time of the crime). | Yes |
| Montana | "Mitigating circumstances are any of the following …any other factor." MONT. CODE ANN. § 46-18-304 (2)(West 2024). | *State v. Keith*, 231 Mont. 214, 232 (1988) (citing with approval *Lockett* and *Eddings* regarding no limitations on mitigation). | Yes |
| Nebraska | NEB. REV. STAT. ANN. § 29-2523 (West 2024). | *State v. Galindo*, 315 Neb. 1, 35 (2023)(finding that youthful age is not a statutory mitigator, only advanced age). | No |
| Nevada | "Murder of the first degree may be mitigated by any of the following circumstances…[t]he youth of the defendant at the time of the crime. Nev. Rev. Stat. Ann. § 200.035 (West 2023). | *Emil v. State*, 105 Nev. 858, 868 (1989) ("Clearly, the youth of the defendant at the time of the commission of a crime is a mitigating circumstance in a capital murder case. *See* NRS 200.035(6)."). | Yes |
| North Carolina | "Mitigating circumstances that may be considered include …the age of the defendant at the time of the crime." N.C. Gen. Stat. Ann. . § 15A-2000 (West 2023). | *State v. Gainey*, 335 N.C. 73, 105 (2002) (noting that the defendant's "immaturity, youthfulness, or lack of emotional or intellectual development" is relevant to determining whether the mitigating factor of age | Yes |

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| | | exists) (*quoting State v. Bowie*, 340 N.C. 199, 203 (1995)). | |
| Ohio | "[T]he court, trial jury, or panel of three judges shall consider… the youth of the offender." OHIO REV. CODE ANN. § 2929.04 (West 2021). | *State v. Graham*, 164 Ohio St. 3d 187, 229-34 (Ohio 2020) (weighing youth as a mitigator when finding death sentence inappropriate.) | Yes |
| Oklahoma | No statutory mitigating circumstances. See OKLA. STAT. tit. 21, § 701.10 (West 2013). | *Revilla v. State*, 877 P.2d 1143, 1154 n.3, 1156 (Ok. 1994) (instructing the jury to consider whether mitigating evidence of Revilla's youthful age existed, and appellate court considered youth of appellant). | Yes |
| Oregon | "The court shall instruct the jury to consider…any mitigating circumstances offered in evidence, including but not limited to the defendant's age…" OR. REV. STAT. ANN. § 163.150 (West 2019) | *State v. Farrar,* 309 Or. 132, 135 (1990) (noting that the prosecuting attorney described a previous case by saying he entered into negotiations with defense counsel offering something other than death "because of that particular defendant's young age, 20 years old…"). | Yes |
| Penn. | "Mitigating circumstances shall include the following … [t]he age of the defendant at the time of the crime." tit. no. 42 PA. CONS. STAT. ANN. § 9711 (West 2024). | *Commonwealth v. Lesko*, 609 Pa. 128, 233 (2011) (finding that the trial court properly instructed the jury to consider age/youth when Mr. Lesko was 21 at the time of the crime). | Yes |
| South Carolina | "Mitigating circumstances…[t]he age or mentality of the defendant at the time of the crime." S.C. CODE ANN. § 16-3-20 (2024). | *State v. Morgan*, 433 S.C. 435, 438 (Ct. App. 2021) ("Judge Cole presided over Morgan's capital proceedings and his 2006 resentencing … Judge Cole testified he also considered factors related to youth, including Morgan's age at the time of the crimes, Morgan's maturity level, and | Yes |

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| | | other youth-related characteristics"). | |
| South Dakota | No statutory mitigating circumstances. *See* S.D. CODIFIED LAWS § 23A-27A-1 (2024). | *State v. Page*, 709 N.W.2d 739, 759 (S.D. 2006) ("At the sentencing hearing, the circuit court acknowledged the mitigating circumstances in Page's case, saying: I've considered evidence in mitigation. I've considered your young age and your background…"). | Yes |
| Tennessee | "In arriving at the punishment, the jury shall consider …[t]he youth or advanced age of the defendant at the time of the crime." TENN. CODE ANN. § 39-13-204 (West 2023). | *State v. Hawkins*, 519 S.W.3d 1, 52 (Tenn. 2017), *rev'd on other grounds*, *State v. Enix*, 653 S.W.3d 692 (Tenn. 2022) ("The trial court instructed the [capital] jury on the following mitigating circumstances: (1) the youth of the defendant at the time of the crime."). | Yes |
| Texas | No statutory mitigating circumstances. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 2024). | *Williams v. State*, 273 S.W.3d 200 (Tex. Crim. App. 2008) (giving appellant's youth mitigating effect because "as any parent knows ... '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults….These qualities often result in impetuous and ill-considered actions and decisions.' But these known aspects of youth are precisely what would permit a jury to give mitigating effect to youth within the context of the future dangerousness special issue"). | Yes |
| Utah | "Mitigating circumstances include: …the youth of the | *State v. Nuttall*, 861 P.2d 454, 457 (Utah Ct. App. 1993) (finding that only | Yes |

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| | defendant at the time of the crime." UTAH CODE ANN. § 76-3-207 (4)(e) (West 2023). | "young age — not old age — may be a mitigating factor"). | |
| Wyoming | "Mitigating circumstances shall include the following… [t]the age of the defendant at the time of the crime." WYO. STAT. ANN. § 6-2-102 (West 2024). | *Olsen v. State*, 67 P.3d 536, 557 (Wyo. 2003) ("Defense counsel listed the mitigating circumstances that were unrefutedly established by the evidence…unrefuted that he is young"). | Yes |
| United States of America | Does not reference age as a mitigating factor. See 18 U.S.C. § 3592 (West). | *United States v. Roof*, 2016 WL 8678863 (S.C. Oct. 14, 2016) (Noting Government concedes youth is a proper mitigator). | Yes |
| United States Military Courts | "The accused shall be given broad latitude to present evidence in extenuation and mitigation." R.C.M. 1004(d). | *United States v. Rojas*, 15 M.J. 902, 920-21 (N.M. Ct. Mil. Rev. 1983) (Noting that appellant's age of 20 years old at the time of the offense was offered in mitigation). | Yes |

| Jurisdictions that Abolished the Death Penalty Post-*Gregg v. Georgia* (1976) | | | |
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| **State/Year of Abolition** | **Previous Statute** | **Law** | **Was Youth Mitigating?** |
| Colorado (2020) | "For purposes of this section, mitigating factors shall be the following factors...[t]he age of the defendant at the time of the crime." COLO. REV. STAT. ANN. § 18-1.3-1201 (West 2020) | *People v. Dunlap*, 975 P.2d 723, 738 (Colo. 1999) ("Dunlap [19 years old] told the court that his mitigation evidence would concern only his age, his cooperation with police officers, and his turbulent family history."). | Yes |
| Connecticut (2012) | No statutory mitigating circumstances. | *State v. Ross*, 269 Conn. 213, 371 (2004) ("The defendant claimed the following nine mitigating | Yes |

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| | *See* CONN. GEN. STAT. ANN. § 53a-46a (West 2012). | factors: (1) his mental capacity was significantly impaired at the time of the offense; (2) he was emotionally disturbed; (3) he was of youthful age at the time of the offense because it was committed only five weeks after his eighteenth birthday…"). | |
| Delaware (2016) | No statutory mitigating circumstances. *See* DEL. CODE ANN. tit. 11 § 4209 (West 2016). | *Zebroski v. State*, 715 A.2d 75, 83 (Del. 1998) ("The Superior Court found that there was reliable evidence to support several mitigating circumstances that were relevant to the details of the offenses and to Zebroski's character and propensities. The court listed these circumstances as follows: Zebroski's youth [19 years old]…"). | Yes |
| District of Columbia (1981) | N/A | The District of Columbia did not utilize the death penalty after *Furman*, although it was not officially repealed until 1981; it did not develop a delineated mitigation framework after *Gregg*. *See District of Columbia*, Death Penalty Information Center (last visited Apr. 16, 2024) https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/district-of-columbia | N/A |
| Illinois (2011) | Not providing age or youth as a statutory mitigating circumstance but not precluding its consideration. *See* 720 ILL. COMP. STAT. 5/9-1 (1991). | *People v. Terrell*, 185 Ill. 2d 467, 518 (1998) ("Here, the jury instructions did not violate these constitutional principles. The instructions did not preclude the jury's consideration of any mitigating evidence, including defendant's age [older than 18]. … There is no reasonable likelihood that the jury applied the instructions in a way that prevented the consideration of defendant's age"). | Yes |

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| Maryland (2013) | "[Court] shall consider whether any of the following mitigating circumstances exists…the defendant was of youthful age at the time of the murder." MD. CODE ANN. CRIM. LAW. § 2-303 (2005). | *Bryant v. State*, 374 Md. 585, 631 (2003) ("We hold, as a matter of law, that a defendant who has not attained the age of nineteen as of the date of the crime(s) is entitled to have the youthful age mitigator considered..."). | Yes |
| Mass. (1984) | "In all cases in which the death penalty may be authorized, the mitigating circumstances include[e], but [are] not limited to… any other relevant consideration regarding the age of the defendant at the time of the murder." MASS. ANN. LAWS ch. 279, § 69 (West 1984). | Massachusetts has not issued a death sentence since *Gregg. See Massachusetts,* Death Penalty Information Center (last visited Apr. 11, 2024) https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/massachusetts; *Cf. Commonwealth v. Mattis*, 493 Mass. 216, 224 N.E.3d 410 (2024) (holding it unconstitutional to sentence individuals from eighteen to twenty years of age to life without the possibility of parole). | Never precluded consideration youth as mitigating factor. |
| New Hampshire (2019) | "In determining whether a sentence of death is to be imposed upon a defendant, the jury shall consider mitigating factors, including the following …[t]he defendant was youthful, | Only one person, Michael Addison, has been sentenced to death in New Hampshire since *Gregg* and youth was not relevant to his case. *See New Hampshire*, Death Penalty Information Center (last visited Apr. 11, 2024) https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/new-hampshire; *State v. Addison*, 165 N.H. 381 (2013). | Yes |

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| | although not under the age of 18." N.H. REV. STAT. ANN. § 630:5 (1991). | | |
| New Jersey (2007) | "The mitigating factors which may be found by the jury or the court are…[t]he age of the defendant at the time of the murder." N.J. STAT. ANN. § 2C:11-3 (West 2002). | *State v. Ramseur*, 106 N.J. 123, 275 (1987) ("We believe that age should be recognized as a mitigating factor…only when the defendant is relatively young…, or when the defendant is relatively old, in accordance with the probable legislative intent to recognize our society's reluctance to punish the very young and the very old as severely as it punishes others"). | Yes |
| New Mexico (2007) | "The mitigating circumstances to be considered by the sentencing court or the jury…shall include but not be limited to the following… the defendant's age." N.M. Stat. Ann. § 31-20A-6 (2006). | *State v. Clark*, 990 P.2d 793, 806 (N.M. 1999) ("Clark also lists numerous cases from other jurisdictions which he contends support his assertion that there is no limitation on mitigation evidence, although, as he does note, such evidence must be relevant and material. Most of the examples Clark cites fall squarely within our statute and rule: a defendant's youth, family history, and likelihood of rehabilitation, circumstances of the crime which tend to justify, excuse, or reduce the crime, and a defendant's emotional or psychological history"). | Yes |
| New York (2004) | "Mitigating factors shall include the following…[a]ny other circumstance concerning the crime, the defendant's state | *People v. Davis*, 43 N.Y.2d 17 (1977) (quoting *Roberts v. Louisiana*, 431 U.S. 633 (1977)("But it is incorrect to suppose that no mitigating circumstances can exist when the victim is a police officer. Circumstances such as the youth of the offender…are all examples | Yes |

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| | of mind or condition at the time of the crime, or the defendant's character, background or record that would be relevant to mitigation or punishment for the crime." N.Y. CRIM. PROC. LAW § 400.27 (McKinney 2004) | of mitigating facts which might attend the killing of a peace officer..."). | |
| Rhode Island (1984) | "Every person who shall commit murder while committed to confinement to the adult correctional institutions or the state reformatory for women shall be punished by death." R.I. Gen. Laws § 11-23-2 (1956). | Rhode Island's death penalty statute was deemed unconstitutional in 1979 because it did not allow for consideration of mitigating factors. *See State v. Cline*, 121 R.I. 299 (1979). The death penalty was officially abolished in 1984. *See Rhode Island*, Death Penalty Information Center (last visited Apr. 12, 2024) https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/rhode-island. Therefore, Rhode Island never implemented the mitigating/aggravating statutory scheme mandated by *Gregg*. | N/A |
| Virginia (2021) | "Facts in mitigation may include, but shall not be limited to, the following…the age of the defendant at the time of the capital offense." Va. Code Ann. § 19.2-264.4 (West 2020). | *Jones v. Commonwealth*, 293 Va. 29, 36 (2017) ("Virginia law does not preclude a sentencing court from considering mitigating circumstances, whether they be age or anything else…Nor does Virginia law make "youth (and all that accompanies it) irrelevant" to the court's sentencing discretion."). | Yes |

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| Washington (2023) | WASH. REV. CODE ANN. § 10.95.070 (repealed). | *State v. Benn*, 120 Wash. 2d 631, 683-84 (1993) ("Clark Hazen…was 18 at the time of his crime…Mitigating factors offered were the youth of the defendant, history of his being abused as a child, and an organic brain dysfunction. The death penalty was sought and imposed at trial."). | Yes |

| **Jurisdictions that Abolished the Death Penalty Pre-*Furman*** | | | |
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| **State** | **Non-Capital Statute** | **Law** | **Is Youth Mitigating in Non-Capital?** |
| Alaska (1957) | "The following factors shall be considered by the sentencing court if proven in accordance with this section, and may allow imposition of a sentence below the presumptive range…the conduct of a youthful defendant was substantially influenced by another person more mature than the defendant; the conduct of an aged defendant was substantially a product of physical or mental infirmities resulting from the defendant's age." ALASKA STAT. ANN. § 12.55.155 (West 2024). | *Page v. State*, 657 P.2d 850, 854 (Alaska Ct. App. 1983) ("Page's youth and the fact that his prior crimes did not involve injury to persons militate against characterizing him as a worst offender in a murder case."). | Yes |
| Hawaii (1957) | N/A | *State v. Pacquing*, 129 Haw. 172, 178 (2013) ("[Pacquing], being only 24 years old, is a | Yes |

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| | | mitigating circumstance in his favor."). | |
| Iowa (1965) | N/A | *State v. Lemvan*, No. 99-1987, 2002 WL 181181 (Iowa Ct. App. Feb. 6, 2002) ("While the district court did focus on the nature of Lemvan's offense, the court also considered Lemvan's past criminal history as well as mitigating circumstances such as his youth, the violent conduct of the victims, and the fact a gun was not used."). | Yes |
| Maine (1887) | N/A | *State v. Shortsleeves*, 580 A.2d 145, 150-51 (Me. 1990) ("The court found the defendant's youth and above-average intelligence to be mitigating factors, although their effect was diminished due to his already long criminal record."). | Yes |
| Michigan (1847) | N/A | *People v. Fields*, 448 Mich. 58, 63-78 (1995) (noting that courts should consider factors like a defendant's young age when departing from a mandatory minimum sentence). | Yes |
| Minnesota (1911) | N/A | *State v. Donnay,* 600 N.W.2d 471. 474 (Minn. App. 1999) (finding that the defendant's | Yes |

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| | | amenability to probation justified a downward departure, based on his young age and other mitigating factors). | |
| North Dakota (1973) | N/A | North Dakota did not reinstate the death penalty after *Furman* and did not delineate mitigation in the capital context, but youth is considered mitigating in other criminal contexts. *See, e.g., State v. Garcia*, 561 N.W.2d 599 (N.D. 1997) (Noting youth considered as a sentencing factor) | Yes |
| Vermont (1972) | "Mitigating factors shall include the following…[t]he defendant, because of youth or old age, lacked substantial judgment in committing the murder." VT. STAT. ANN. tit. 13, § 2303 (West 2023). | *State v. Hughs*, 194 A.3d 1181 (Vt. 2018) ("Here, the sentencing court made no explicit refusal to consider any relevant mitigating factors. In fact, the court did mention that defendant "had just previously turned eighteen" after describing his "impulsiv[ity]" and the age of C.H."). | Yes |
| West Virginia (1965) | N/A | *State v. Miller*, 178 W. Va. 618, n. 1 (1987) ("State's Instruction No. 4, with the portions objected to italicized, reads: 'The Court instructs the jury that in determining whether to recommend mercy | Yes |

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| | | you must consider all of the facts and circumstances surrounding the charge, including…the youth of the defendant at the time of the crime' …This language is apparently taken from § 210.6(4) of the Model Penal Code, (Proposed Official Draft, 1962), which relates to mitigating factors in determining whether the death penalty is appropriate."). | |
| Wisconsin (1953) | N/A | *State v. Barbeau*, 370 Wis. 2d 736, n.8 (2016) ("The court considered both aggravating and mitigating circumstances. The court specifically considered 'the character of the defendant,' including his age, recognizing that 'young people cannot always be held responsible for their actions.'"). | Yes |

In Mr. Galindo's case, the sentencing panel accepted the Nebraska Supreme Court's categorical exclusion of youth as a statutory mitigating factor. Sentencing Order Pg. 8 (App. 39a). Thereafter, in its discussion of non-statutory mitigating factors, the panel failed to credit Mr. Galindo's youth—indeed, the panel did not even mention it. *See id.* at Pg. 8-10 (App. 39a-41a). Thus, the Nebraska Supreme

Court's implication that the sentencing panel could have considered Mr. Galindo's youth as a non-statutory mitigating factor, *see Galindo*, 315 Neb. at 34-35, is not supported by the record. Rather, the sentencing panel did not engage in any discussion of Mr. Galindo's youth other than to reject its consideration as mitigation. *See* Sentencing Order Pg. 8-10 (App. 39a-41a). It is clear the panel did not analyze Mr. Galindo's youth as a mitigating factor in any context because the Nebraska Supreme Court forbade it from doing so, contrary to this Court's jurisprudence and that of every other jurisdiction to consider the issue.

The question presented carries high stakes. Had Mr. Galindo faced a death sentence in any of the other 49 states, the federal government, a military tribunal, or the District of Columbia, his youth would have been considered as mitigation. Instead, sentenced in Nebraska, his youth mitigation was categorically excluded from consideration when deciding whether he should die. And the disparity is all the more perverse because *every other jurisdiction respects this Court's precedent* and considers youth as mitigation. A death or life sentence is too important to turn on such geographic happenstance. Nebraska continues to pursue the death penalty and this issue is too important to leave for another day. The Nebraska Supreme Court has decided an important federal question in a way that conflicts with ***every*** other state court of last resort as well as this Court's longstanding precedent. *See* Sup Ct. R. 10(b).[4]

[4] Petitioner was unable to find any federal circuit courts of appeal which followed Nebraska. Thus, Nebraska also stands in stark contrast to federal rulings applying *Lockett* or *Eddings*.

### III. Appellate counsel failed to raise a "dead bang winner."

There can be no credible dispute as to the through-line of this Court's almost 50 years of precedent: youth is mitigating. *Lockett*, 438 U.S. 586; *Eddings*, 455 U.S. 104; *Stanford*, 492 U.S. 361; *Johnson*, 509 U.S. 350; *Tennard*, 542 U.S. 274. This is a through-line reasonable counsel would have raised as constitutional error on direct appeal.

As noted above, the Nebraska Supreme Court improperly denied this claim on the basis that Nebraska law barred it. However, this Court was conscientiously enforcing youth as mitigation in the early 2000s when Mr. Galindo was sentenced. *See e.g. Johnson*, 509 U.S. 350; *Tennard*, 542 U.S. 274. Thus, if the Nebraska Supreme Court had affirmed on direct appeal, certiorari would have been granted and the decision vacated to pull Nebraska in line with everyone else. Appellate counsel were therefore ineffective in failing to raise a dead-bang winner. See *Banks v. Reynolds*, 54 F.3d 1508, 1515 (10th Cir. 1995) (failure to raise "dead-bang winner" claim on appeal constitutes ineffective assistance of appellate counsel even though counsel may have raised other strong but ultimately unsuccessful claims); *Clemons v. Delo*, 124 F. 3d 944 (8th Cir. 1997) (same).

It is premature to discuss the prejudice without an evidentiary hearing and a consideration of the totality of the circumstances. This is especially so given that a new judge reviewing a cold record, rather than the original trial judge, presided over the post-conviction proceedings.

Further, this new post-conviction judge adopted verbatim the Attorney General's findings of fact and conclusions of law. This Court has "criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by statements to the record." *Anderson v. City of Bessemer*, 470 U.S. 564, 572 (1985). Federal and state appellate courts have likewise "repeatedly condemned the ghostwriting of judicial orders." *See, e.g.*, *In re Colony Square Co.*, 819 F.2d 272, 275 (11th Cir. 1987).

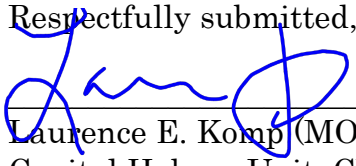
Setting that aside, the failure to consider a critical piece of evidence was prima facie prejudicial to Mr. Galindo. Had the sentencing panel been permitted to consider Mr. Galindo's youth as mitigation, there is a reasonable likelihood, in looking at the totality of the evidence, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. Moreover, had counsel on appeal relied on the foregoing decisions of this Court to raise this issue, it is reasonably likely to have resulted in a reversal on direct appeal. *See Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985) (recognizing the right to effective assistance of appellate counsel).

The Nebraska Supreme Court's denial of Mr. Galindo's appeal ignores this Court's precedent, and the Nebraska Supreme Court has decided an important federal question in a way that conflicts with this Court and ***every*** other state court of last resort. Thus, this Court should accept certiorari pursuant to both Sup Ct. R. 10(b) and (c).

## CONCLUSION

The petition for a writ of certiorari should be granted and the Nebraska Supreme Court's decision summarily reversed, or, in the alternative, the Court should set the case for plenary review.

Respectfully submitted,



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