No. _____

IN THE SUPREME COURT OF THE UNITED STATES

John L. Lotter,

Petitioner-Appellant,

v.

State of Nebraska,

Respondent-Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEBRASKA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Rebecca E. Woodman
Counsel of Record
Attorney at Law, L.C.
1263 W 72nd Ter.
Kansas City, Missouri 64114
rewlaw@outlook.com
Tel. (785) 979-3672

Jessica E. Sutton
Attorney at Law
30 S. Potomac Street
Baltimore, Maryland 21224
jess.el.sutton@gmail.com
Tel. (208) 503-9381

Counsel for Petitioner

CAPITAL CASE

QUESTIONS PRESENTED

1. Does Nebraska's capital sentencing scheme requiring a three-judge panel, rather than a jury, to impose a sentence of death violate the Eighth Amendment to the United States Constitution?

2. Does Nebraska's capital sentencing scheme violate the Sixth and Fourteenth Amendments to the United States Constitution in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016)?

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES

Federal Cases:

State Cases:

Constitution, Statutes and Rules:

Other Authorities Cited:

OPINIONS BELOW

The decision of the Nebraska Supreme Court affirming the denial of Mr. Lotter's post-conviction motion is reported at *State v. Lotter*, 917 N.W.2d 850 (Neb. 2018), and the slip opinion is reprinted in the Petitioner's Appendix as Pet.App. A. The Nebraska Supreme Court's order denying Mr. Lotter's motion for rehearing is included in the Petitioner's Appendix as Pet.App. B.

STATEMENT OF JURISDICTION

The Nebraska Supreme Court affirmed the district court's denial of Mr. Lotter's post-conviction motion on September 28, 2018. Mr. Lotter filed a timely motion for rehearing, which was denied on November 9, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall

abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A national consensus now finds it unacceptable for a judge, rather than a jury, to impose a death sentence. Since the last time this Court visited the question of whether judge-only capital sentencing violated the Eighth Amendment, in *Spaziano v. Florida*, 468 U.S. 447 (1984), overruled in part in *Hurst v. Florida*, 136 S. Ct. 616 (2016), there has been consistent trend away from judicially-imposed death sentences. Of the nine states that had capital sentencing schemes in which judges alone made the findings necessary to impose a death sentence at the time of *Ring v. Arizona*, 536 U.S. 584 (2002) -- Alabama, Arizona, Colorado, Delaware, Florida, Idaho, Indiana, Montana, and Nebraska -- all of those states except Montana and Nebraska have abandoned the practice, and Montana is functionally abolitionist given that no person has been sentenced to death there in over twenty years. Arizona, Colorado,[1] and Idaho amended their statutes after *Ring* to require jury sentencing on all findings necessary to impose a death sentence. *See* Ariz. Rev. Stat. § 13-752, Colo. Rev. Stat. § 18-1.3-1201; Idaho Code Ann. § 19-2515(5)(b)-(c). Florida, Alabama, and Indiana have abolished judicial override procedures that permitted a judge to

[1] Colorado's three-judge panel capital sentencing statute was first enacted by the Colorado General Assembly in 1995, relying on this Court's decision in *Walton v. Arizona*, 497 U.S. 639 (1990). After *Walton* was overruled in *Ring*, the Colorado Supreme Court declared the statute unconstitutional in *Woldt v. People*, 64 P.3d 256 (Colo. 2003), and the statute was amended to require all findings necessary to impose a death sentence be made by a jury.

override a jury's life verdict -- Indiana modified its statute in 2002 after *Ring*, *see* Ind. Code § 35-50-2-9(f), and Florida and Alabama did so in following *Hurst*. *See Hurst v. State*, 202 So. 3d 40 (Fla. 2016); Fla. Stat. § 921.141 (2017); Ala. Code § 13A-5-46 (2017). Delaware struck down its judge-only capital sentencing scheme after *Hurst*, in *Rauf v. State*, 145 A.3d 430 (Del. 2016), and the legislature did not enact a new provision to replace it.

Nebraska now stands alone as the only active death penalty jurisdiction in the United States that places the death sentencing determination exclusively in the hands of judges. Given the wholesale abandonment of the practice in every other death penalty state -- three states just in the last three years -- Nebraska's capital sentencing is out of step with contemporary standards, in violation of the Eighth Amendment's "evolving standards of decency that mark the progress of a maturing society." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

In addition, as this Court's capital cases have long emphasized, the death penalty "is an expression of society's moral outrage at particularly offensive conduct," *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). Therefore, it is jurors, not judges, who are uniquely capable of reliably determining whether that punishment is appropriate in a specific case, and who thereby "express the 'conscience of the community on the ultimate question of life or death.'" *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Thus, in terms of the penological justification for capital punishment, "jurors possess an important comparative advantage over judges" and "are more attuned to 'the

community's moral sensibility,' *Spaziano*, 468 U.S. at 481, . . . (Stevens, J., concurring in part and dissenting in part), because they 'reflect more accurately the composition and experiences of the community as a whole,' *id.*, at 486, . . ."). *Ring v. Arizona*, 536 U.S. at 615 (Breyer, J., concurring in the judgment).

Petitioner John Lotter is among the tiny fraction of individuals on death row under a solely judge-imposed capital sentence.[2] Mr. Lotter's death sentence was imposed by a three-judge panel, including the trial judge, pursuant to Nebraska's statutory capital sentencing scheme. *See* Neb. Rev. Stat. § 29-2520-§ 29-2525 (1995 reissue). After finding the existence of three statutory aggravating circumstances beyond a reasonable doubt under Neb. Rev. Stat. § 29-2523(1)(b), the panel stated it had given evidence of other, non-statutory mitigating circumstances "such weight, if any, to which it is entitled." Pet.App. C, at 2-11.

The three-judge panel then proceeded to make the additional factual findings required under Neb. Rev. Stat. § 29-2522(1)-(3) to determine whether Mr. Lotter would be sentenced to death or life imprisonment. Pet.App. C, at 12. The panel found that the presence of the aggravating circumstances previously stated was sufficient to justify imposing a sentence of death for each of the murders of which Mr. Lotter had been convicted. Pet.App. C, at 13. With respect to the requisite weighing

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[2] There are 48 persons on death row under exclusively judge-imposed death sentences, with no involvement of a jury: Arizona (40), Idaho (5), Montana (2), and Nebraska (1). In Nebraska, all of the state's 11 death row inmates are under judge-imposed sentences, as explained *infra*, because judges must make factual findings necessary to impose a death sentence; however, Mr. Lotter is the only remaining individual who had no involvement of a jury whatsoever in sentencing.

determination, the panel found that the mitigating circumstances were not of sufficient weight to approach or exceed the weight given to the aggravating circumstances, and that the sentence of death should be imposed for each of the murders. Pet.App. C, at 12-14. In making each of these findings, the panel did not state whether it's finding was unanimous, nor what standard of proof it applied to the finding. Additionally, stating it had reviewed all relevant opinions of the Nebraska Supreme Court, the panel found that the sentence of death "was not excessive or disproportionate to the penalty imposed in similar cases," even after expressly finding there was no appreciable difference in the degree of culpability between Mr. Lotter and his co-defendant, Marvin Nissen, who was sentenced to life. Pet.App. C, at 14-15.

Mr. Lotter's death sentences were affirmed on direct appeal. *State v. Lotter*, 586 N.W.2d 591 (Neb. 1998). His initial state post-conviction motion was pending on appeal when this Court decided *Ring v. Arizona*. Mr. Lotter moved to vacate his death sentences under *Ring*, and the Nebraska Supreme Court ordered supplemental briefing. That court ultimately denied relief, holding that *Ring* was not retroactive to cases on collateral review. *State v. Lotter*, 664 N.W.2d 892, 907-908 (Neb. 2003).[3]

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[3] By the time the Nebraska Supreme Court heard the appeal, the Nebraska Legislature had amended the statutory scheme to provide for a separate "aggravation hearing" in front of a jury for the purpose of determining whether aggravating circumstances existed, but leaving the remainder of the sentencing scheme unchanged. 2002 Neb. Laws, L.B. 1. The Court had also by that time issued an opinion in *State v. Gales*, 658 N.W.2d 604 (Neb. 2003), granting relief to the defendant under *Ring*, but finding that the amendments in L.B. 1 could apply to Gales on remand because they effected only a procedural change in the law. *See*

Mr. Lotter again challenged his death sentence through a state post-conviction motion filed within one year of *Hurst v. Florida*, arguing that the Nebraska capital sentencing scheme, and his judge-imposed death sentence, are unconstitutional in violation of the Sixth Amendment right to a jury trial, the proof beyond a reasonable doubt requirement of the Fourteenth Amendment's Due Process Clause, and the Cruel and Unusual Punishments Clause of the Eighth Amendment.

In its judgment below affirming the trial court's denial of Mr. Lotter's post-conviction motion, the Nebraska Supreme Court concluded the motion was time-barred on the ground that *Hurst* did not announce a new rule but merely applied the analysis of *Ring* to Florida's capital sentencing scheme. In so doing, the Nebraska Supreme Court mistakenly characterized *Hurst*'s central holding requiring a jury, not a judge, to make the weighing determination under Florida's capital sentencing scheme as "fleeting references to the burden of proof and weighing of aggravating and mitigating circumstances." Pet.App. A, slip op. at 143. The Nebraska court then dismissed *Hurst*'s holding out of hand, stating, "We cannot transform these isolated references in the majority's analysis into a holding that a jury must find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances." *Id.* Based on its ruling that Mr. Lotter's *Hurst*-related claim was time-barred, the Nebraska Supreme Court did not address his Eighth Amendment arguments. This timely petition follows.

Gales, 265 Neb. at 630-33. The Court cited the *Gales* case in ruling that Mr. Lotter was not entitled to relief because *Ring* was not retroactive.

REASONS FOR GRANTING THE WRIT

I. Mr. Lotter's death sentence and the Nebraska statutory capital sentencing scheme violate the Eighth Amendment.

The Eighth Amendment draws its meaning from "the evolving standards of decency that mark the progress of a maturing society." *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976). The national consensus rejecting judicially-imposed capital sentences reflects the community's conscience that the Eighth Amendment's demand for accuracy and reliability in the determination of whether death is an appropriate sentence for a particular defendant, *id.* at 305, can only be achieved if the jury makes that ultimate decision. In this new era of jury sentencing, Mr. Lotter's death sentence and the Nebraska capital sentencing scheme violate the Eighth Amendment. This Court has long considered Eighth Amendment protections in the context of capital punishment, recognizing that "the penalty of death is different in kind from any other punishment, *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (opinion of Justices Stewart, Powell, and Stevens), and "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Thus, the Court "has demanded that factfinding procedures aspire to a heightened standard of reliability" in capital proceedings. *Ford v. Wainwright*, 477 U.S. 399, 411 (1986).

While the Eighth Amendment's "standard of extreme cruelty" remains stable over time, "its applicability must change as the basic mores of society change." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Furman v. Georgia*, 408 U.S.

238, 382 (1972) (Burger, C.J., dissenting)). In *Gregg*, this Court articulated two benchmarks for gauging whether a punishment practice has fallen outside these evolving standards: 1) "objective ind[ices] of contemporary values," as evidenced by death penalty legislation and jury verdicts, and 2) whether or not the death penalty "comports with the basic concept of human dignity at the core of the Amendment.'" *Gregg*, 428 U.S. at 180-181.

The Court has utilized this two-part analysis to evaluate the constitutionality of a category of sentences, *see, e.g.*, *Miller v. Alabama*, 567 U.S. 460, 489 (2012) (striking down mandatory life without parole for juveniles); *Graham v. Florida*, 560 U.S. 48, 74 (2010) (striking down life without parole for juveniles who commit non-homicide crimes); *Kennedy v. Louisiana*, 554 U.S. 407, 434-35 (2008) (striking down death penalty for nonhomicide crimes); *Roper v. Simmons*, 543 U.S. 551, 570-71 (2005) (striking down death penalty for juveniles); *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (striking down death penalty for the intellectually disabled); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (prohibiting the death penalty as a punishment for the rape of an adult woman), as well as the adequacy of the procedures used to implement the Eighth Amendment principles contained in its precedent, *see Hall v. Florida*, 572 U.S. 701, 715-721 (2014).

For example, in *Hall*, this Court relied on its two-part test to invalidate Florida's procedure for determining intellectual disability under the Eighth Amendment. First, the Court looked to objective indicia of national consensus, finding that only two states other than Florida had adopted a fixed cut-off for IQ scores that

did not take into account the standard error of measurement. The Court therefore found "strong evidence of consensus that our society does not regard this strict cutoff as proper or humane." *Id.* at 718. *See also Moore v. Texas*, 137 S. Ct. 1039, 1052 (2017) (finding Texas' use of "*Briseno* factors" to determine whether a capital defendant is intellectually disabled violates the Eighth Amendment, in part because "no state legislature has approved the use of *Briseno* factors or anything similar"). Second, the Court's independent judgment supported the conclusion that Florida's procedure for reviewing *Atkins* claims "created an unacceptable risk that persons with intellectual disability will be executed" in violation of the Eighth Amendment. *Id.* at 704. The Court's reasoning in *Hall* demonstrates that, where a state has adopted an outlier procedure that fails to adequately implement the Eighth Amendment principles of heightened reliability and substantive and procedural protections according to contemporary standards of decency, that "rule is invalid under the Constitution's Cruel and Unusual Punishments Clause." *Id.* at 723.

Applying this two-part analysis to Nebraska's capital sentencing procedure, it is clear that Nebraska's statutory scheme falls outside of evolving standards of decency. There is a strong national consensus rejecting judge-imposed death sentences, demonstrating that jury sentencing is critical to achieving the heightened reliability, accuracy, and reflection of the community's judgment that is imperative in imposing a sentence of death.

A. Objective indicia demonstrate a national consensus against judge-imposed capital sentencing.

Over the past four decades, since the birth of the modern era of capital punishment following *Gregg v. Georgia*, there has been an overwhelming trend rejecting judge involvement in determining whether a defendant should live or die. *See Atkins*, 536 U.S. at 315 ("It is not so much the number of these States that is significant, but the consistency of the direction of change"). Today, there is near universal national consensus among states with capital punishment that death sentences should be imposed by juries, and not by judges. Indeed, Nebraska remains an extreme outlier as *the only active death penalty state* that requires judges to make findings necessary to impose a sentence of death.

At the time that *Ring* was decided, 29 of the 38 death penalty jurisdictions (or more than three quarters of all death penalty jurisdictions) already committed sentencing decisions to juries. *Ring*, 536 U.S. at 608, n.6. Following *Ring*, which invalidated the capital sentencing schemes of five states, there was a wave of reform in favor of jury sentencing. Three of the states with all-judge sentencing schemes (Arizona, Colorado, and Idaho) and one state with hybrid sentencing (Indiana) changed their capital sentencing statutes to all-jury sentencing. Ariz. Rev. Stat. § 13-752, Colo. Rev. Stat. § 18-1.3-1201; Idaho Code Ann. § 19-2515(5)(b)-(c); Ind. Code § 35-50-2-9(f). Nebraska passed a new sentencing statute after *Ring*, but that statute continued to require judge-made factual findings necessary to sentence a defendant to death and limited jury involvement to finding the existence of aggravating circumstances. Neb. Rev. St. § 29-2522. Montana provided for a similar aggravation hearing by jury, with judges making the ultimate finding necessary for a death

sentence. Mont. Code Ann. §§ 46-1-401, 46-18-301. Thus, after *Ring* there were only five states allowing for judges to sentence a defendant to death—Nebraska and Montana with statutes requiring judge sentencing, and Alabama, Delaware, and Florida with hybrid schemes.

The next wave of states rejecting judge sentencing followed this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616. In *Hurst*, this Court held that Florida's capital sentencing scheme violated the Sixth Amendment because a defendant was not eligible for death until the trial judge alone made factual findings that "sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." 136 S. Ct. at 622. The Court reasoned that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Id.* at 619.

Following that decision, the Florida Supreme Court reviewed its capital sentencing statute and held that "the Sixth Amendment right to a trial by jury mandates that under Florida's capital sentencing scheme, the jury—not the judge—must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty." *Hurst v. State*, 202 So. 3d 40, 53 (Fla. 2016), *cert. denied* 137 S. Ct. 2161 (2017). This prompted Florida to pass a new capital sentencing statute that requires a unanimous jury to find beyond a reasonable doubt the existence of an aggravating circumstance, to weigh aggravators and mitigators, and to determine whether death is the appropriate punishment. Fla. Stat. § 921.141.

The wave of reform continued when, in 2017, Alabama became the forty-eighth jurisdiction to reject judge sentencing by eliminating its judicial override provision. *See* Ala. Code § 13A-5-46 (2017). The sponsor of the bill in the Alabama state senate stated the bill's purpose was to "clean[] up a procedure detrimental to the jury system and that calls into question the integrity of jurisprudence in Alabama." Brian Lyman, *Senate votes to end judicial override in capital cases*, MONTGOMERY ADVERTISER (Feb. 23, 2017), available at http://www.montgomeryadvertiser.com/story/news/politics/southunionstreet/2017/02/23/senate-votes-end-judicial-override-capitalcases/98302650/.

In Delaware, which was perhaps the most similarly situated active death penalty state to Nebraska, the state supreme court struck down its judge-only capital sentencing scheme, *Rauf*, 145 A.3d 430, and then invalidated all remaining death sentences in *Powell v. Delaware,* 153 A.3d 69 (Del. 2016). In holding its capital sentencing scheme unconstitutional, the Delaware Supreme Court reasoned that the Sixth Amendment and the Due Process Clause required jury findings, unanimously and beyond a reasonable doubt, as to the existence of aggravating circumstances and that the aggravating circumstances outweigh the mitigating circumstances. *Rauf*, 145 A.3d at 433-434. Delaware has not reinstated the death penalty.

In this new landscape of capital sentencing, Nebraska and Montana are the last two jurisdictions that leave the ultimate sentencing determination exclusively in the hands of judges—and again, Montana is functionally abolitionist. Thus, Nebraska's judge-imposed capital sentencing lies at the extreme fringe among death

penalty states, and within that lone state, Mr. Lotter sits on death row as the only remaining person in Nebraska to have a death sentence imposed solely by judges, without even a jury determination of the existence of aggravating factors. The scarcity of state laws permitting capital sentencing without a jury penalty verdict is "strong evidence of consensus that our society does not regard this [procedure] as proper or humane." *Hall*, 572 U.S. at 718; *see also Coker*, 433 U.S. at 596 (death penalty for rape of an adult woman held unconstitutional, in part, because Georgia was the only state in the country that authorized such a punishment and therefore the nation's collective judgment on the penalty "obviously weigh[ed] very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman").

B. Judge-imposed death sentences fail to reflect the community's judgment and do not support the Eighth Amendment's heightened reliability requirement for the ultimate punishment.

The second part of the evolving standards of decency analysis involves the Court's exercise of its "'own judgment . . . on the question of the acceptability of the death penalty under the Eighth Amendment.'" *Hall*, 572 U.S. at 721 (quoting *Coker*, 433 U.S. at 597). Judge-imposed death sentences fail in this respect as well.

Indeed, "a jury that must choose between life imprisonment and capital punishment can do little more -- and must do nothing less -- than express the conscience of the community on the ultimate question of life or death." *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968). Requiring judges, rather than juries, to express the collective community conscience in deciding whether to sentence a person to life

or death undermines the very purpose of capital punishment. *Reynolds v. Florida*, 139 S. Ct. 27, 28-29 (2018) (Breyer, J., respecting the denial of certiorari) ("Because juries are better suited than judges to 'express the conscience of the community on the ultimate question of life or death,' the Constitution demands that jurors make, and take responsibility for, the ultimate decision to impose a death sentence").

The severity and irrevocability of a death sentence "argues strongly for procedures that will help assure that, in a particular case, the community indeed believes application of the death penalty is appropriate, not 'cruel,' 'unusual,' or otherwise unwarranted." *Ring*, 536 U.S. at 618 (Breyer, J., concurring in the judgment). Because the jury is "uniquely capable of determining whether, given the community's views, capital punishment is appropriate in the particular case at hand," *id.* (Breyer, J, concurring in judgment), the principle of heightened reliability demands that "the decision to impose the death penalty is made by a jury rather than by a single governmental official." *Spaziano v. Florida*, 468 U.S. 447, 469 (1984), overruled in part by *Hurst v. Florida*, 136 S. Ct. 616 (Stevens, J., concurring in part and dissenting in part).

Mr. Lotter was sentenced to die by three judges with absolutely no involvement of his nevertheless death qualified jury. No jury was allowed to act on their own collective consciences and express the judgement of the community by determining whether the death penalty was appropriate and warranted in his individual case.

Certiorari should be granted in this case because Nebraska's capital sentencing requirement that judges make the ultimate findings necessary to impose a sentence of death is the last of its kind among active death penalty states, representing a blemish in the national consensus that juries can alone reflect the community's judgment and ensure the heightened reliability required to impose the ultimate penalty under the Eighth Amendment. Not only was Mr. Lotter sentenced to death in this outlier state, but his death sentence was imposed solely by judges without any jury involvement, making him the last person in the state to carry such a sentence. Because his judge-imposed sentence is a rare remnant of a now outmoded form of sentencing, Mr. Lotter's death sentence violates the Eighth Amendment's evolving standards of decency.

II. The Nebraska statutory capital sentencing scheme also violates the Sixth and Fourteenth Amendments.

Under the current Nebraska capital sentencing statute, the maximum sentence that a capital defendant can receive based on the jury's verdict alone is life imprisonment. While the jury must make the determination of the presence one or more aggravating circumstances, a death sentence cannot be imposed unless a three-judge panel determines:

> (1) Whether the aggravating circumstances as determined to exist 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 the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Neb. Rev. St. § 29-2522. The statute requires the sentencing panel to make these findings in writing; however, it does not require these facts to be proven beyond a reasonable doubt. *Id.*

The current statute was passed in 2002 in response to *Ring*, which invalidated Nebraska's all-judge capital sentencing statute. Even after the legislature amended the capital sentencing statute and provided for a special "aggravation hearing" at which the jury determines the existence of aggravating circumstances, the provision of Neb. Rev. Stat. § 29-2522 requiring additional findings of fact before a death sentence can be imposed remained the same. The only difference in § 29-2522 following the 2002 amendments is that the legislature removed the option of sentencing by the trial judge to require sentencing by a three-judge panel. The amendments "d[id] not change the statutory definitions of aggravating and mitigating circumstances or the manner in which they are to be balanced." *See State v. Gales*, 658 N.W.2d at 626.

Notably, Mr. Lotter was sentenced under the prior, now-defunct statute, meaning that a three-judge panel, including his trial judge, found the existence of aggravating circumstances in addition to the three supplemental findings above required to impose a death sentence. *Gales*, 658 N.W.2d at 612-14 (setting forth prior version of Neb. Rev. Stat. § 29-2520, § 29-2523). Although Mr. Lotter's jury was death-qualified, they had absolutely no role whatsoever in his sentencing.

In *Hurst v. Florida*, this Court held that "[t]he Sixth Amendment requires a jury, not a judge, to find *each fact necessary* to impose a sentence of death." 136 S. Ct.

at 619 (emphasis added). *Hurst* did more than simply reiterate the principles established in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002). It also clarified for the first time that, where the weighing of facts in aggravation and mitigation is a precursor to a death sentence, the Sixth Amendment requires this determination to be made by a jury, not a judge. *Hurst*, 136 S. Ct. at 621-22.

In *Hurst*, this Court explicitly rejected the State of Florida's contention that the weighing process did not fall within the ambit of *Ring* and *Apprendi* because the defendant was already eligible for the death penalty once the jury implicitly found "at least one aggravating circumstance beyond a reasonable doubt." *Id.* at 622. The Court noted that determinations regarding the sufficiency of aggravating circumstances and the relative weight of aggravating and mitigating circumstances were also factual findings necessary to Hurst's eligibility for a death sentence. *Id.* ("the Florida sentencing statute does not make a defendant eligible for death until 'findings *by the court* that such person shall be punished by death[]' . . . The trial court *alone* must find 'the facts ... [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances'") (citations omitted) (emphasis in original). As a result, the Sixth Amendment applied with equal force to those determinations. *Id.* at 624.

Importantly, the Sixth Amendment's scope is determined wholly by the terms of the statute being analyzed. In making this state-specific inquiry, it is clear that the Nebraska legislature did not make a death sentence permissible merely upon a jury's

determination that one or more aggravating circumstances exist. Rather, the legislature chose to condition a death sentence in Nebraska on additional factual findings made solely by a panel of three judges. Absent these additional factual findings, a defendant must be given a life sentence under Nebraska law. The findings required under § 29-2522 are literally "necessary to impose a sentence of death." *Id.* at 619.

Hurst demonstrates that in a weighing scheme like Nebraska's, as with Florida's scheme at issue in *Hurst*, the Sixth Amendment is not satisfied by a jury finding of an aggravating circumstance beyond a reasonable doubt. *Id.* at 622. While a death sentence may be a *possibility* once the jury finds an aggravating circumstance, a death sentence is not *authorized* and a defendant is not eligible for the death penalty under Nebraska law until a three-judge panel alone makes the findings under § 29-2522 regarding the sufficiency of the aggravating circumstances, [the mitigating circumstances, and that the aggravating circumstances outweigh the mitigating circumstances. *See* Neb. Rev. Stat. § 29 2519(1) (declaring the legislative intent that the death penalty "shall only be imposed in those instances when the aggravating circumstances existing in connection with the crime outweigh the mitigating circumstances, as set forth in sections 29-2520 to 29- 2524").

Therefore, because the Nebraska legislature chose to make factual findings, beyond the finding of an aggravating circumstance, necessary to impose a sentence of death, the Sixth Amendment requires that those findings be made by a jury beyond a reasonable doubt. *Hurst.* 136 S.Ct. at 621. *See also Apprendi*, 530 U.S. at 494.

The Nebraska capital sentencing scheme violates two constitutional requirements made clear from *Hurst*: 1) that all facts, including the sufficiency of aggravating circumstances and the relative weight of aggravating and mitigating circumstances, be found by a jury, 136 S.Ct. at 619; and 2) that, under the Due Process Clause, each of these facts, or elements, be proven beyond a reasonable doubt, 136 S.Ct. at 621. Nebraska's scheme violates the Sixth Amendment because the law conditions the imposition of a death sentence on solely judicial factual findings, absent which a death sentence cannot be imposed, and it violates the Due Process Clause because it fails to require that the critical factual findings necessary to impose a death sentence be made beyond a reasonable doubt.

Hurst also overruled the core precedent that the Nebraska Supreme Court relied on to uphold Nebraska's sentencing scheme after *Ring*. In *Gales*, 658 N.W.2d 604, that court, in addition to considering the constitutionality of judge-made findings of aggravating circumstances after *Ring*, also considered the constitutionality of the ultimate penalty decision under Neb. Rev. Stat. § 29-2522, requiring the judge or panel of judges alone to make the factual findings necessary to impose a sentence of death. Relying on both *Hildwin v. Florida*, 490 U.S. 638 (1989) (*per curiam*) and *Spaziano v. Florida*, 468 U.S. 447 (1984), the Court rejected the argument that "the determination of mitigating circumstances, the balancing function, or proportionality review" under § 29-2522 also had to be undertaken by a jury." 658 N.W.2d at 626-27. *See also id.* at 617 (noting that the Court had specifically relied on *Hildwin* in *State v. Ryan*, 444 N.W.2d 610 (Neb. 1989), in rejecting a similar claim challenging the

constitutionality of § 29-2522). The Supreme Court in *Hurst* overruled both cases, finding them "wrong, and irreconcilable with *Apprendi*." *Hurst*, 136 S. Ct. at 623. *See Apprendi*, 530 U.S. at 490, 494 (holding that the Sixth Amendment and Due Process require that any fact exposing the defendant to a greater punishment than that authorized by the jury's verdict is an "element" that "must be submitted to a jury, and proved beyond a reasonable doubt"). This conclusion in *Gales* does not survive *Hurst*, which abrogated both *Hildwin* and *Spaziano* on this point. *Hurst*, 136 S. Ct. at 623.

In *Rauf v. State*, the Delaware Supreme Court overruled a prior decision similar to this Court's decision in *Gales*, and struck down Delaware's statutory capital sentencing scheme. *See Rauf*, 145 A.3d at 486 (opinion of Holland, J., concurring) ("[j]ust as 'time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*,' the reasoning of *Brice* [*v. State*, 815 A.2d 314] is no longer viable following the decision in *Hurst*") (quoting *Hurst*, 136 S.Ct. at 624). Delaware's former capital punishment statute, like Nebraska's, assigned a fact-finding role in capital sentencing to a judge, rather than a jury. *See* 11 Del. C. § 4209. Upon a conviction of first-degree murder, the jury unanimously determined, beyond a reasonable doubt, the presence of an aggravating circumstance. Once it did so, however, the court alone was required to make additional factual findings authorizing a death sentence. *Id.* The Delaware Supreme Court found this provision, which assigned these determinations to a judge, rather than a jury, violated the fundamental right to a jury trial under Sixth Amendment. *Rauf*, 145 A.3d at 434. Because the weighing

determination in the statutory scheme was a finding "necessary to impose a death sentence" under Delaware's law, this determination, like the finding of a statutory aggravating circumstance, must be made by the jury. *Id.* at 485-487 (opinion of Holland, J., concurring). *See also State v. Whitfield*, 107 S.W.3d 253, 257-58 (Mo. 2003) (en banc) (holding that the Sixth Amendment requires a jury, not a judge, to determine (1) the presence of at least one aggravating factor, (2) whether all of the aggravating factors, taken together, warrant imposition of the death penalty, and (3) whether the evidence in aggravation outweighs the evidence in mitigation.); *Woldt v. People*, 64 P.3d 256, 266 (Colo. 2003) (en banc) (Sixth Amendment requires jury to make all factual findings on which death sentence predicated, including finding that 1) at least one aggravating factor has been proved, and (2) that there are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved).

Like the unconstitutional statutes in Delaware and Florida, Nebraska's capital sentencing statute improperly permits a death sentence solely upon judicial findings under § 29-2522 that, as the Supreme Court's decision in *Hurst* makes clear, the Sixth Amendment reserves for the jury to find unanimously, and beyond a reasonable doubt. Because these judge-made findings of fact are necessary to impose a death sentence in Nebraska, the abrogation of the jury's role in making those critical findings violates the Sixth Amendment. *Hurst*, 136 S. Ct. at 619 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death").

Instead of focusing on the particulars of the Nebraska statutory scheme to determine whether it violated the Sixth Amendment, the Nebraska Supreme Court instead determined, rather backwardly, that because *Ring* was not made retroactive to cases on collateral review, *Hurst* was not retroactive, and therefore Mr. Lotter's claim was time-barred. Pet.App. A, slip op. at 142. This circular reasoning relies on a fundamentally flawed notion: that *Hurst* is merely an extension of *Ring*. In reaching that conclusion, the Nebraska Supreme Court characterized *Hurst*'s holding that each fact necessary to impose a death sentence must be found beyond a reasonable doubt as merely "fleeting references to the burden of proof and weighing of aggravating and mitigating circumstances." *Id.* at 143. The Nebraska Supreme Court claimed further that "[m]ost federal and state courts agree that *Hurst* did not hold a jury must find beyond a reasonable doubt that the aggravating factors outweigh the mitigating circumstances." *Id.* The Nebraska Supreme Court simply missed the point that *Hurst*'s broader rule requiring jury determination of facts necessary to impose a death sentence must be applied to the terms of *each state's statute articulating the necessary findings to impose a death sentence.* The Nebraska Supreme Court supported its mistaken analysis by citing to Arizona and Ohio cases, *id.* at 144, but the sentencing statutes in those states already require a jury to make each finding necessary to impose a death sentence. *See* Ariz. Rev. Stat. § 13-752; Ohio Rev. Code. § 2929.03.

In *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004), this Court found that *Ring* was not retroactive on collateral review because the rule in *Ring* was procedural, not

substantive, and therefore did not fall within *Teague*'s exceptions to non-retroactivity. *See Teague v. Lane*, 489 U.S. 288 (1989). But *Summerlin* does not control the matter of *Hurst*'s retroactivity, because *Hurst*'s holding also implicates the due process proof beyond a reasonable doubt requirement, whereas *Ring* was limited to the Sixth Amendment jury trial right. *See Summerlin*, 542 U.S. at 351 n.1 ("Because Arizona law already required aggravating factors to be proved beyond a reasonable doubt, that aspect of *Apprendi* was not at issue" in *Ring*). The proof beyond a reasonable doubt requirement has always been retroactively applied. *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972). *See also Powell v. Delaware*, 153 A.3d 69 (Del. 2016) (holding its decision in *Rauf* retroactive under state's *Teague*-like retroactivity doctrine, distinguishing *Summerlin* on the ground that *Summerlin* "only addressed the misallocation of fact finding responsibility (judge versus jury) and not . . . the applicable burden of proof").

It was established by the Supreme Court long ago that, as a matter of constitutional due process and fundamental fairness, essential facts to be a found by a jury must be found unanimously and beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). *See Apprendi*, 530 U.S. at 476 (quoting *Winship*). The reasonable doubt standard is vital to the American scheme of criminal procedure, in part because "[i]t is a prime instrument for reducing the risk of convictions resting on factual error." *Winship*, 397 U.S. at 362. *See Rauf*, 145 A.3d at 437 (Strine, J., concurring) ("From the inception of our Republic, the unanimity requirement and the beyond a reasonable doubt standard have been integral to the jury's role in ensuring that no

defendant should suffer death unless a cross section of the community unanimously determines that should be the case, under a standard that requires them to have a high degree of confidence that execution is the just result"); *id.* at 481 (describing the history of the death penalty showing that proof beyond a reasonable doubt was "[p]art of the protective armor the right gave to a defendant against unwarranted imposition of the death penalty").

Courts must give retroactive effect to new substantive rules of constitutional law. *Teague*, 489 U.S. at 311 (1989). *See also Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016) (holding that *Miller v. Alabama*, 567 U.S. 460 (2014), prohibiting mandatory life without parole for juvenile homicide offenders under the Eighth Amendment, announced a new substantive constitutional rule that was retroactive on state collateral review).

Substantive rules are rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Montgomery*, 136 S.Ct. at 729 (internal citation omitted). New substantive rules "apply retroactively because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose on him." *Summerlin*, 542 U.S. at 352 (internal citations omitted). In *Welch v. United States*, 136 S. Ct. 1257 (2016), for example, this Court held the rule in *Johnson v. United States*, 135 S. Ct. 2551 (2015), invalidating the residual clause of the Armed Career Criminal Act as unconstitutionally vague, was retroactive because it announced a new substantive

rule that "affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied." 136 S. Ct. at 1265.

In *Ivan V.*, 407 U.S. at 204-205, this Court held that *Winship*'s beyond a reasonable doubt requirement is substantive and must be applied retroactively. The Court noted that the reasonable doubt standard of *Winship* "provides concrete substance for the presumption of innocence -- that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law [. . .] To this end, the reasonable-doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." *Id.* at 204. *See also Hankerson v. North Carolina*, 432 U.S. 233, 243 (1977) (retroactive application given to *Mullaney v. Wilbur*, 421 U.S. 684 (1975), finding *Ivan V.* controlling on the issue, with Court stating "[w]e have never deviated from the rule stated in *Ivan V.* that where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule is given complete retroactive effect") (internal quotation marks omitted).

Ivan V. and *Hankerson* explain why *Hurst*'s requirements of jury findings of each fact necessary under a state's capital sentencing scheme to impose a sentence of death unanimously and beyond a reasonable doubt are substantive: the absence of proof beyond a reasonable doubt "necessarily carr[ies] a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a

punishment that the law cannot impose on him." *Montgomery*, 136 S. Ct. at 352. As this Court made clear in both cases, the proof beyond a reasonable doubt requirement is essential to the fact-finding process.

Indeed, *Hurst*'s proof beyond a reasonable doubt requirement is central to an accurate determination that death is a legally appropriate punishment in accordance with the "heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate." *Sumner v. Shuman*, 483 U.S. 66, 72 (1987). Sentencing an individual to death based on factual findings that have not been made beyond a reasonable doubt is fundamentally unfair. *Winship*, 397 U.S. at 363. And courts have long emphasized the role of unanimity in ensuring reliability, particularly in capital cases. *See Rauf*, 145 A.3d at 468, 481 ("[P]erhaps the most fundamental protection of the Sixth Amendment" was "the right to be put to death only if twelve members of [the defendant's] community agree that should happen"; historically, "the beyond a reasonable doubt standard was, along with the unanimity requirement, a critical feature in ensuring that no one was executed unless the jury was highly confident that that was the equitable result").

The requirements of *Hurst* under the Sixth Amendment and Due Process Clause are substantive. Nebraska's statutory capital sentencing scheme violates both constitutional requirements by failing to ensure that each critical factual finding necessary to impose a death sentence is made by a jury and found unanimously upon proof beyond a reasonable doubt.

CONCLUSION

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

Respectfully submitted,

Rebecca E. Woodman
Attorney at Law, L.C.
1263 W 72nd Ter.
Kansas City, Missouri 64114
rewlaw@outlook.com
Tel. (785) 979-3672

Jessica E. Sutton
Attorney at Law
30 S. Potomac St.
Baltimore, Maryland 21224
jess.el.sutton@gmail.com
Tel. (208) 503-9381

Counsel for Petitioner

**Counsel of Record*

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