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IN THE SUPREME COURT OF THE STATE OF DELAWARE

BENJAMIN RAUF,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 39, 2016
	)	
STATE OF DELAWARE,	)	
	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON CERTIFICATION OF QUESTIONS OF LAW
FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

APPELLANT'S REPLY BRIEF

SANTINO CECCOTTI (#4993)
ROSS A. FLOCKERZIE (#5483)
DAVID C. SKORANSKI (#5662)
Assistant Public Defenders
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801
(302) 577-5200

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I. UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION A SENTENCING JUDGE IN A CAPITAL JURY PROCEEDING INDEPENDENT OF THE JURY, MAY NOT FIND THE EXISTENCE OF "ANY AGGRAVATING CIRCUMSTANCE," STATUTORY OR NON-STATUTORY, THAT HAS BEEN ALLEGED BY THE STATE FOR WEIGHING IN THE SELECTION PHASE OF THE CAPITAL SENTENCING PROCEEDING.

The State's brief presents a narrow and incomplete analysis of the Court's certified question 1 and, therefore, reaches an incorrect conclusion. The State's argument is, in essence, that *Hurst v. Florida*, 136 S.Ct. 616 (2016), is indistinguishable from *Ring v. Arizona*, 536 U.S. 584 (2002). The State claims that, since this Court concluded, over a decade ago and without the benefit of *Hurst*, that *Ring* did not require a jury determination of each aggravating factor, statutory and non-statutory, that supports a death sentence, the same must be true today. *See* State's Answering Brief at 14, citing *Brice v. State*, 815 A.2d 314, 322 (Del. 2003). This analysis is faulty and incomplete. By selectively citing narrow language from *Hurst* that obscures the thrust of the Court's opinion, the State ignores the broader constitutional rule explicated therein and entirely fails to respond to the arguments in Rauf's opening brief. See *Id*. at 12, quoting *Hurst*, 136 S.Ct. at 624.

Contrary to the impression created by the State's incomplete analysis,

in *Hurst*, the United States Supreme Court identified constitutional infirmities in Florida's capital sentencing scheme extending beyond the judicial determination of a single aggravating factor. The Court clearly noted that, under the Florida statute, the judge made multiple findings that were statutorily necessary to a death sentence:

> [T]he Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla. Stat. § 775.082(1) (emphasis added). 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." § 921.141(3); *see* [*State v.*] *Steele*, 921 So.2d [538,] 546 [(Fla. 2005)].

Hurst, 136 S.Ct. at 622. All of these findings combined to establish the factual prerequisite for a death sentence in Florida. As a result, it was impermissible for the judge, rather than the jury, to make them. *Id.*

As explained more fully in the opening brief, *see* Appellant's Opening Brief at 9-14, the State's cited language from *Hurst*, "Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional," *Hurst*, 136 S.Ct. at 624, is not the beginning and end of its import. This language resolved the precise challenge raised by the petitioner, which focused on the court's determination of an aggravating circumstance, but did not define the scope of the constitutional rule the Court applied to do so. That rule, which has

much broader impact, is plain: "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Id*. at 619 (emphasis added).

To conclude that the *Hurst* opinion is simply a regurgitation of *Ring v. Arizona* perverts and improperly minimizes its significance. It also creates a false internal conflict between the specific holding of *Hurst*, which pointedly resolved the question presented, and its explication of the constitutional basis for that holding, that the Florida statute impermissibly allocated to the court several factual findings necessary to a death sentence, including the finding that there were "sufficient aggravating circumstances" to justify a death sentence and "insufficient mitigating circumstances to outweigh the aggravating circumstances." *Id*. at 622. Because the State's interpretation of *Hurst* cannot explain or account for this aspect of the decision, it essentially asks this Court to ignore it. However, *Hurst* is not just a restatement of *Ring*. Instead, it has illuminated the breadth of what the Sixth Amendment requires in a death penalty case.

Many of the same constitutional infirmities present in the Florida sentencing scheme are also found in the Delaware statute. Although the statute requires the jury to find a single statutory aggravating circumstance beyond a reasonable doubt, the court must make several additional findings

before the defendant is death-eligible. 11 *Del.C.* § 4209. Specifically, the court:

> shall impose a sentence of death if the Court finds by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that the aggravating circumstances found by the Court to exist outweigh the mitigating circumstances found by the Court to exist.

Id. (emphasis added). Under the statute, the court makes independent findings about statutory and non-statutory aggravating circumstances, as well as the relative weight of the aggravating and mitigating circumstances. *Id*. The court is not limited to considering those aggravating circumstances found by the jury, nor does the jury return any verdict at all regarding the relative weight of aggravating and mitigating circumstances. *Id*. This the Sixth Amendment does not permit.

The State claims that, once a single aggravating factor is found by the jury, the death sentencing decision is just like any other sentencing determination a court is permitted to make. State's Answering Brief at 14-15. This contention, however, ignores the structure of the Delaware statute itself. Section 4209 clearly and unambiguously states that, even where the jury has determined aggravating circumstances exist, life imprisonment must be imposed unless the court makes additional factual findings. It is entirely

unlike a typical sentencing determination, where the court has unfettered discretion to decide where within a range of penalties, supported by the jury's guilty verdict, the sentence should lie. Here, the jury's verdict, standing alone, permits only one penalty: life in prison. *Id*. To impose a sentence of death, additional findings of fact are required and these findings, under the statute, are made by a judge and not the jury. *Id*. The defendant cannot receive the increased punishment of death until the court makes additional findings not made by the jury. This violates the Sixth Amendment.

As noted in *Hurst*:

> As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with *Ring*, a judge increased Hurst's authorized punishment based on her own factfinding. In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment.[1]

So too here in Delaware. Perhaps this is why the State makes no effort to explain how the structure of the Delaware statute, and its required factual findings, are distinguishable from the Florida statute, and the impermissible judge-made findings the Supreme Court identified therein. The State's incomplete response begs the question: If it is constitutionally impermissible for a Florida judge to make independent findings that (1) aggravating factors

1 *Hurst v. Florida*, 136 S.Ct 616, 622 (2016).

exist, (2) those aggravating factors are sufficient to justify a death sentence, and (3) there are insufficient mitigating circumstances to outweigh the aggravating circumstances, *see Hurst*, 136 S.Ct. at 622, how can a Delaware judge do so? Because it advances a position that is untenable in light of *Hurst*, the State cannot and does not respond.

In addition to attempting to reduce constitutionally-required jury findings to the determination of a single aggravating factor, the State implies in its response that the jury's advisory sentencing recommendation somehow bolsters the constitutionality of the Delaware statute. State's Answering Brief at 14-15. But the Supreme Court soundly rejected Florida's reliance on a similar jury determination in *Hurst*, refusing to permit the state to substitute an advisory recommendation for a Sixth Amendment finding. 136 S.Ct. at 622 ("The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires").

Because it is a factual finding necessary to authorize a death sentence under the Delaware statute, the jury, not the court, must determine the existence of "any aggravating circumstance," statutory or non-statutory. *Id.* at 619. This Court's first certified question must be answered in the negative.

II. **IN ORDER TO COMPORT WITH FEDERAL CONSTITUTIONAL STANDARDS, THE JURY, IN FINDING THE EXISTENCE OF "ANY AGGRAVATING CIRCUMSTANCE," STATUTORY OR NON-STATUTORY, THAT HAS BEEN ALLEGED BY THE STATE FOR WEIGHING IN THE SELECTION PHASE OF A CAPITAL SENTENCING PROCEEDING, MUST MAKE SUCH FINDING UNANIMOUSLY AND BEYOND A REASONABLE DOUBT**.

The State's response entirely fails to answer this Court's second question, in which this Court asks for guidance regarding unanimity and the burden of proof in the event it determines the Sixth Amendment requires that the jury find all aggravating circumstances impacting the sentencing determination. By declining to address the question posed at all, the State essentially concedes what Rauf contended in his initial brief: that, if the Court makes this determination, as Rauf argues it should, the jury's findings must be made unanimously and subject to proof beyond a reasonable doubt. *See* Appellant's Opening Brief at 25-33.

The State's purported answer offers two strains of authority, neither of which compels its desired conclusion. In the first, the State claims this Court already decided this question in *Capano v. State*, 781 A.2d 556, 669 (Del. 2001). *Capano*, however, rested on an entirely different legal premise. The *Capano* court determined that the Delaware constitution did not require a capital jury's sentencing recommendation to be unanimous because the

recommendation was not a finding of fact. *Id*. This Court's certified question presumes just the opposite. This Court has never approved a non-unanimous verdict, subject to a reduced burden of proof, where the Delaware Constitution or the Sixth Amendment required the jury to determine a fact or element of a crime. To the contrary, it is clearly established that, under the Delaware constitution, all jury verdicts must be unanimous. *Claudio v. State*, 585 A.2d 1278, 1298 (Del. 1991).

The second strain of authority the State claims are the companion cases of *Apodaca v. Oregon*, 406 U.S. 404 (1972), and *Johnson v. Louisiana*, 406 U.S. 356 (1972). As discussed fully in Rauf's opening brief, the narrow holding of these cases was the product of splintered rulings founded on since-rejected rationales. *See* Appellant's Opening Brief at 26-30. In addition, neither case approves, nor can it be read to approve, a non-unanimous verdict in a capital case. *Id.* The State's response does not address any of the arguments Rauf advanced about these cases, nor does it find any fault with Rauf's analysis of their holdings. Rather, it simply claims, in misleading and incomplete fashion, "The United States Supreme Court has not found a jury unanimity requirement applicable to the states." State's Answering Brief at 18. Because, in a capital case such as this one, unanimity and proof beyond a reasonable doubt are required under both the

United States and Delaware Constitutions, Question 2 must be answered in the affirmative.

Finally, the State clings with the strength of desperation to the argument that "this Court's holding in *Brice* survives" because *Hurst* merely applied *Ring* to Florida's statutory procedure. State's Answering Brief at 17. The Court cannot reject the grounds the State advances without confronting the bankruptcy of the State's position.[2] *Brice* held that non-statutory aggravators do not require a jury finding beyond a reasonable doubt. *Brice*, 815 A.2d at 322. This was the second certified question in *Brice*, and in view of the language from *Walton v. Arizona*, 497 U.S. 639 (1990) (findings of aggravators can be made by a judge), and the fact that the *Ring* Court had no occasion to discuss the finding of multiple aggravators, it was understandable that the Court would find that non-statutory aggravators do not require 6th Amendment protection.

The State stubbornly refuses to acknowledge that after *Kansas v. Carr*, 136 S.Ct. 633 (2016), and *Hurst*, however, the landscape has changed. In *Hurst*, the Supreme Court did have occasion to cite the judge's finding of aggravating circumstance(s) (plural) in condemning the Florida system. *see*

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2 The doctrine of *stare decisis* is of course "essential to the respect accorded to the judgments of the Court and to the stability of the law," but it does not compel this Court to follow a past decision when its rationale no longer withstands "careful analysis." *Lawrence v. Texas*, 539 U.S. 558, 577 (2003).

Hurst, 136 S.Ct. at 622 ("the trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely."). Furthermore, in view of *Carr's* language regarding the purely factual nature of any aggravating circumstance, there is no principled distinction for allowing a non-statutory aggravating circumstance to be proven by a lesser standard than a statutory aggravating circumstance. The *Brice* court was not faced with these kinds of analyses.

The *Brice* Court also held that the weighing of aggravating and mitigating circumstances did not require a jury finding beyond a reasonable doubt. Again, the State fails to recognize that before *Hurst*, the U.S. Supreme Court did not have occasion to characterize the weighing process as one governed by *Ring*. In *Hurst*, it is difficult to comprehend why it would have discussed the Florida judge's role in weighing – in condemning the Florida scheme - if the Court did not view the weighing process as implicating the Sixth Amendment (i.e., "[T]he trial court alone must find the facts that sufficient aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances."). *Hurst*, 136 S.Ct. at 622. Arguably, the *Brice* Court could not have anticipated that language, and since neither *Ring* nor *Walton* addressed weighing, the *Brice* Court could have viewed weighing

aggravators vs. mitigators as a function outside the protective scope of the Sixth Amendment.

Moreover, *Brice* simply did not address the question of whether, even assuming that *Ring* required only that one statutory aggravator be found by the jury (and not the judge), Delaware's scheme for finding the statutory aggravator met the *Ring* standard. Thus, the *Brice* Court had no occasion to address the statutory language directing the judge to weigh the aggravators that s/he had found. In not certifying a question relating to the findings of statutory aggravators, the *Brice* Court may have assumed that Delaware trial courts would work around the statutory language directing trial courts - after the jurors' work is done - to undertake the task of determining the statutory aggravator. However, the experience since 2003 has demonstrated that there is no workaround for statutory language that requires the court to make an independent determination of the statutory aggravator, nor for the concomitant instructions that tell the jury that this is what the court will do when the jury's job is complete. The landscape in the years since *Brice* was decided has altered considerably. "Time and subsequent cases have washed away the logic of [Brice]."[3] In light of *Hurst*, the Delaware death penalty scheme is unconstitutional and violates the Sixth Amendment.

3 *Hurst v. Florida*, 136 S.Ct at 624.

III. THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRES A JURY, NOT A SENTENCING JUDGE, TO FIND THAT THE AGGRAVATING CIRCUMSTANCES FOUND TO EXIST OUTWEIGH THE MITIGATING CIRCUMSTANCES FOUND TO EXIST BECAUSE, UNDER 11 *DEL. C.* §4209, THIS IS THE CRITICAL FINDING UPON WHICH THE SENTENCING JUDGE "SHALL IMPOSE A SENTENCE OF DEATH".

The State's response to Question 3, like its response to Question 1, simply repeats, without further analysis, its empty assertion that the Sixth Amendment only requires jury determination of a single aggravating circumstance. Again, it fails to acknowledge the entirety of the *Hurst* opinion, does not distinguish the statutory text of the Delaware statute from that disapproved in *Hurst*, and does not even acknowledge this Court's observation in its certified question that the weighing determination is "the critical finding upon which the sentencing judge shall impose a sentence of death." For all of the reasons set forth above and in Rauf's opening brief, the State's argument is unavailing. *See Hurst*, 136 S.Ct. at 622 (impermissible judge-made findings included "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances"); *Woodward v. Alabama*, 134 S.Ct. 405, 410-11 (2013)(Sotomayor, J., dissenting from denial of certiorari)(noting that, because Alabama law required a finding "that any aggravating factors outweigh the mitigating

factors he has presented" before a death sentence may be imposed, that finding "must be made by a jury);*Woldt v. People*, 64 P.3d 256, 266 (Colo. 2003) (*en banc*)(Sixth Amendment required jury to make all factual findings on which death sentence predicated, including that "(A) At least one aggravating factor has been proved; and (B) There are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved").

Instead of directly addressing the text of *Hurst*, which indicates that the Sixth Amendment, as interpreted in *Ring*, applies to findings regarding the relative weight of aggravating and mitigating circumstances, 136 S.Ct. at 622, the State quotes extensively from *Carr*, 136 S.Ct. 633 (2016), an Eighth Amendment case about an unrelated issue. In *Carr*, the defendants had argued that the trial court's failure to specifically instruct the jury that mitigating circumstances need not be proven beyond a reasonable doubt violated the Eighth Amendment. *Id*. at 642. The U.S. Supreme Court rejected that contention, finding that the Kansas jury instruction adequately explained the proper analysis. *Id*. at 643. In so doing, the Court noted, "the instruction makes clear that both the existence of aggravating circumstances and the conclusion that they outweigh mitigating circumstances must be proved beyond a reasonable doubt." *Id*. Rauf asks for no more than what the Kansas statute, approved in *Carr*, provides.

IV. THE FINDING THAT THE AGGRAVATING CIRCUMSTANCES FOUND TO EXIST OUTWEIGH THE MITIGATING CIRCUMSTANCES FOUND TO EXIST MUST BE MADE BY A JURY UNANIMOUSLY AND BEYOND A REASONABLE DOUBT TO COMPORT WITH FEDERAL CONSTITUTIONAL STANDARDS.

Again, the State's answer entirely fails to address the question posed by this Court. The Court asked, if it were to find that the Sixth Amendment requires the jury to make the findings regarding the relative weight of aggravating and mitigating circumstances, would the requirements of unanimity and proof beyond a reasonable doubt apply? The State ignores this question entirely, and instead attempts to restate or reframe its response to Question 3. Given the absence of a response, this Court must conclude there is no dispute here. Once the Court determines these findings fall under the Sixth Amendment's umbrella, they must be made unanimously and subject to proof beyond a reasonable doubt.

In its purported response to Question 4, the State falsely equates jury fact-finding regarding the relative weight of aggravating and mitigating circumstances with jury sentencing, which it then seeks to demonstrate is not constitutionally required. *See* State's Answering Brief at 23-26. Rauf does not contend that the Sixth Amendment requires jury sentencing. If the Delaware statute allowed the court to make the ultimate sentencing decision,

once the jury had made all of the factual findings necessary to authorize a sentence of death, it would be fully compliant with *Hurst*. However, the statute does no such thing. Instead, the statute impermissibly requires the judge, not the jury, to make these additional factual findings precedent to a death sentence.

The State again claims that *Kansas v. Carr*, 136 S.Ct. at 643, provides some guidance to the Court here. The invocation of *Carr* in this context is puzzling and grossly misread. The State argues that this Court should derive some meaning from the absence of any discussion whatsoever about (1) the necessity of jury participation in the weighing determination or, (2) the necessity of a unanimous verdict. State's Answering Brief at 24. But *Carr* did not raise or involve either of these questions. The Kansas statute at issue, in fact, already provided for both. *See* Kan. Stat. Ann. § 21-6617(e) (formerly § 21-4624(e))("If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances … exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced to life without the possibility of parole"). The Supreme Court's approval of this statute's constitutionality cannot be read as a rebuke of its

contents. Therefore, Question 4 must be answered in the affirmative.

V. IF ANY PROCEDURE IN 11 *DEL. C.* §4209'S CAPITAL SENTENCING SCHEME DOES NOT COMPORT WITH FEDERAL CONSTITUTIONAL STANDARDS, SUCH PROCEDURE CANNOT BE SEVERED FROM THE REMAINDER OF 11 *DEL. C.* §4209 AND THE COURT CAN NOT PROCEED WITH INSTRUCTIONS TO THE JURY. THE CONSTITUTION REQUIRES THAT THE LEGISLATURE CORRECT ANY CONSITUTIONAL INFIRMITIES OF THE DELAWARE CAPITAL SENTENCING SCHEME.

The unconstitutional provisions of Delaware's capital sentencing scheme are not severable. To determine the severability of an unconstitutional provision in a Delaware statue there is a two-part inquiry: first, whether the legislature intended the statute to be severable, and second, whether the remainder of the statute may be "given effect" without the invalid provisions. *State v. Spence*, 367 A.2d 983, 988-989 (Del. 1976); *State v. Dickerson*, 298 A.2d 761, 765-766 (Del. 1972), abrogation on other grounds recognized by *Cohen v. State*, 604 A.2d 846 (1992); *Rappa v. New Castle County*, 18 F.3d 1043, 1072 (3d Cir. 1994); see also 1 *Del. C.* §§ 308, 301. There is clearly a legislative preference for severability in Delaware; in addition to the general severance provision, 1 *Del. C.* § 308, the General Assembly included a severability clause in its 2002 amendment of the death penalty statute in response to *Ring v. Arizona*. 141 Del. L. Ch. 423 (2002) ("Section 7. If any provision of this Act or the application thereof to any

person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to that end the provisions of this Act are declared to be severable."). However, the issue here is whether the death penalty statute can be given effect without the invalid provisions. It cannot.

The Delaware statute contains a number of unconstitutional provisions that are not "capable of separation in fact." *Rappa*, 18 F.3d at 1072 (internal quotation marks omitted). The statute commits the necessary factfinding to the judge, not the jury; imposes an unconstitutional burden of proof on the finding of aggravating circumstances and the determination that aggravating circumstances outweigh mitigating circumstances (preponderance of the evidence rather than beyond a reasonable doubt); and fails to require unanimity where the jury recommends death. If these unconstitutional provisions were removed, 11 *Del C.* § 4209 could not be called "complete and whole in all respects." *Dickerson*, 298 A.2d at 766. Without subsection (d)(1), which requires the judge to find the facts necessary to impose death, the statute is not "capable of being given effect alone as an enforceable concept" because there would be no statutory procedures in place to impose the death penalty. *Stiftel v. Malarkey*, 384 A.2d 9, 17 (Del. 1977); *C.M.G. v. L.M.S.*, 2009 WL 5697870, at *10 (Del. Dec. 21, 2009). The

unconstitutional provisions are therefore not severable.

The statute's constitutional problems require a complete statutory restructuring, a task for the legislature, not the courts. As the U.S. Supreme Court noted in *Booker*, "[o]urs, of course, is not the last word: The ball now lies in [the legislature's] court. The … Legislature is equipped to devise and install, long term, the sentencing system, compatible with the Constitution, that [it] judges best for [its] system of justice." *United* States *v. Booker*, 543 U.S. 220, 265 (2005).

CONCLUSION

Based on the reasons and authorities set forth herein, 11 *Del. C.* § 4209 violates the Sixth Amendment to the United States constitution. The constitutional deficiencies are so fatal that they render Delaware's capital sentencing scheme entirely invalid.

Respectfully submitted,

SANTINO CECCOTTI (#4993)
ROSS A. FLOCKERZIE (#5483)
DAVID C. SKORANSKI (#5662)
Assistant Public Defenders
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801
(302) 577-5200

Attorneys for Appellant

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