EFiled: Mar 30 2016 06:25PM EDT
Filing ID 58791143
Case Number 39,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

ON CERTIFICATION FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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Dated: March 30, 2016

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NATURE AND STAGE OF THE PROEEDINGS

A New Castle County grand jury returned an indictment on December 21, 2015 charging Benjamin Rauf ("Rauf") with two counts of Murder in the First Degree (11 *Del. C.* §§ 636(a)(1) & 636(a)(2)) and related offenses. DI 1.[1] The indictment alleges that Rauf "(i) intentionally caused the death of Shazim Uppal by shooting him; and (ii) also recklessly caused Mr. Uppal's death, while Rauf was engaged in the commission of, attempted commission of, or flight after committing or attempting first-degree robbery."[2] On January 4, 2016, Rauf's case was specially assigned to a Superior Court Judge. DI 4. "Rauf now awaits trial, and the State has announced its intent to seek the death penalty for the murder counts."[3]

On January 12, 2016, the United States Supreme Court held that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."[4] As a result, "Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional."[5] Eight days later, the United States Supreme Court, in *Kansas v. Carr*,[6] held that its "case law does not require capital sentencing courts 'to

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[1] "DI_" refers to docket items in *State v. Benjamin Rauf*, ID No. 1509009858. B1-4.

[2] *State v. Rauf*, 2016 WL 320094, at ¶ (2)(a) (Del. Super. Jan 25, 2016).

[3] *Id.* at ¶ (1).

[4] *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016).

[5] *Id.* at 624.

[6] 136 S. Ct. 633 (2016).

affirmatively inform the jury that mitigating circumstances need not be proved beyond a reasonable doubt.'"[7] The Court doubted "whether it is even possible to apply a standard of proof to the mitigating-factor determination (the so-called 'selection phase' of a capital sentencing proceeding)."[8] The Kansas sentencing scheme, therefore, withstood constitutional scrutiny.

As a result of these decisions, on January 25, 2016, Superior Court certified five questions to this Court in accordance with Delaware Supreme Court Rule 41.[9] Superior Court commented that "[o]ur highest federal and state courts have long and consistently recognized state capital sentencing schemes, including those of Florida and Delaware, consist of an 'eligibility' or 'narrowing' phase and a 'selection' or 'weighing' phase."[10] Superior Court found that the Delaware sentencing scheme satisfies the constitutional requirement of jury fact-finding in the eligibility phase.[11] Because Superior Court found, in light of *Hurst*, that there is a lack of clarity as to the role and requirements of a capital jury during the selection phase, the court submitted a series of five questions to insure that "Delaware's capital cases . . . proceed only under sentencing procedures that

[7] *Id.* at 642.

[8] *Id.*

[9] *Rauf*, 2016 WL 320094.

[10] *Rauf*, 2016 WL 320094, at ¶ (3)(b) (citing *Carr*, 136 S. Ct. at 642; *Zant v. Stephens*, 462 U.S. 862, 878-79 (1983); *Brice v. State*, 815 A.2d 314, 322 (Del. 2003)).

[11] *Rauf*, 2016 WL 320094, at ¶ (3)(d) (citing *Swan v. State*, 820 A.2d 342, 359 (Del. 2003); *Brice*, 815 A.2d at 322.

comport with federal and state constitutional requirements for the determination of a potential death sentence."[12]

On January 28, 2015, this Court accepted Superior Court's certification, but narrowed the questions to "focus solely on federal law, and the implications of the United States Supreme Court's decision in *Hurst.*"[13] This Court, in accordance with Article IV, Section 11(8) of the Delaware Constitution and Delaware Supreme Court Rule 41, revised and accepted the following questions:

(1) Under the Sixth Amendment to the United States Constitution, may a sentencing judge in a capital jury proceeding, independent of the jury, 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 a capital sentencing proceeding?

(2) If the finding of 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 be made by a jury, must the jury make the finding unanimously and beyond a reasonable doubt to comport with federal constitutional standards?

(3) Does the Sixth Amendment to the United States Constitution require 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"?

(4) If the finding that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist must be made by

[12] *Rauf*, 2016 WL 320094, at ¶ (4)(b).

[13] *Rauf v. State*, Del. Supr., No. 39, 2016, Strine, C.J. (Jan 28, 2016) (Order) (Ex. A).

a jury, must the jury make that finding unanimously and beyond a reasonable doubt to comport with federal constitutional standards?

(5) If any procedure in 11 *Del. C.* § 4209's capital sentencing scheme does not comport with federal constitutional standards, can the provision for such be severed from the remainder of 11 *Del. C.* § 4209, and the Court proceed with instructions to the jury that comport with federal constitutional standards?[14]

"Rauf is designated the appellant and the State is designated the appellee for the purposes of the caption on any filings in this Court with respect to the certified questions."[15] Rauf filed a timely opening brief. This is the State's answering brief.

[14] *Id.* at ¶ 6.

[15] *Id.* at ¶ 7.

SUMMARY OF THE ARGUMENT

I. This question should be answered in the affirmative. A sentencing judge may independently find an aggravating circumstance for weighing in the selection phase of a capital sentencing proceeding. The United States Supreme Court's holding in *Hurst* does not require jury fact-finding in the selection phase. Rather, the Court reaffirmed the principle that a fact that elevates the maximum available penalty in the eligibility phase must be made by a jury (if a jury has not been waived).

II. This question should be answered in the negative. After a Delaware capital jury finds the existence of a statutory aggravating circumstance unanimously and beyond a reasonable doubt, a death sentence is the maximum sentence available to the sentencing judge. Thereafter, in the selection phase, the jury need not find the existence of any aggravating circumstance.

III. This question should be answered in the negative. A Delaware sentencing judge may independently weigh aggravating and mitigating circumstances when assessing whether the death penalty shall be imposed in a particular case. The United States Supreme Court, in *Carr*, highlighted the impracticalities of assigning a burden of proof in an assessment premised largely on a moral calculus.

IV. This question should be answered in the negative. A Delaware sentencing judge is constitutionally permitted to consider a jury's sentencing recommendation and independently balance the aggravating circumstances against the mitigating circumstances. While *Carr* acknowledges that no burden of proof is required for the assessment of mitigating factors, the Supreme Court, based on the nature of the assessment in the selection phase, does not mandate jury involvement.

V. This question should be answered in the affirmative. Pursuant to Delaware statutory law and the clear intent of the General Assembly, any constitutionally offending provisions of 11 *Del C.* § 4209 may be judicially excised.

STATEMENT OF FACTS

Rauf has been charged by indictment with two counts of first degree murder involving a single victim. "The indictment charges that Rauf, on or about August 23, 2015, in New Castle County: (i) intentionally caused the death of Shazim Uppal by shooting him; and (ii) also recklessly caused Mr. Uppal's death, while Rauf was engaged in the commission of, attempted commission of, or flight after committing or attempting first-degree robbery."[16] "The State will seek the imposition of the death penalty if Rauf is convicted at trial."[17]

Title 11, Section 4209 of the Delaware Code ("Section 4209") sets forth Delaware's capital sentencing scheme. In 1991, the death penalty sentencing procedure was amended to provide the bifurcated sentencing process that exists today. The 1991 statute required the jury to determine (1) whether the evidence shows beyond a reasonable doubt the existence of at least one statutory aggravating circumstance and (2) whether, by a preponderance of the evidence, the aggravating circumstances outweigh any mitigating circumstances found to exist.[18] The trial court, after considering the recommendation of the jury, decided the same questions. If the trial court concluded that the answer to both questions was in the affirmative, it was required to impose a sentence of death; otherwise, it had to

[16] *Rauf*, 2016 WL 320094, at ¶ (2)(a).

[17] *Id.* at ¶ (1).

[18] 11 *Del. C.* § 4209(c) (1991).

impose a sentence of life imprisonment.[19] The sentencing judge was provided with the ultimate responsibility for the imposition of a death sentence while the jury acted in a purely advisory capacity "as the conscience of the community."[20] The 1991 amendments created a three stage capital penalty procedure: the guilt stage, the narrowing stage, and the weighing stage.[21]

In 2002, the United States Supreme Court, in *Ring v. Arizona*,[22] applied the analysis set forth in *Apprendi v. New Jersey,*[23] to find Arizona's capital sentencing procedure violated the Sixth Amendment.[24] "[B]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" *Ring* concluded that those aggravating factors that expose a defendant to a greater punishment must be found to exist by a jury.[25] Shortly thereafter, to "conform Delaware's death penalty sentencing procedures to the new rule announced by the United States Supreme Court in *Ring v. Arizona*," the Delaware General Assembly amended Section 4209 to "bar [Superior Court] from imposing a death sentence unless a jury (unless waived by the parties) first determines unanimously and beyond a reasonable doubt that at least one statutory aggravating

[19] 11 *Del. C.* § 4209(d) (1991).

[20] *Wright v. State*, 633 A.2d 329, 335 (Del. 1993).

[21] *Flamer v. State*, 490 A.2d 104, 131-36 (Del. 1983).

[22] 536 U.S. 584 (2002).

[23] 530 U.S. 466 (2000).

[24] *Ring*, 536 U.S. at 609.

[25] *Id.*

circumstance exists."[26] To accomplish this, Section 4209 was amended by replacing section 4209(c)(3) with the following language:

> (c)(3)b.1. The jury shall report to the Court its finding on the question of the existence of statutory aggravating circumstances as enumerated in subsection (e) of this section. In order to find the existence of a statutory aggravating circumstance as enumerated in subsection (e) of this section beyond a reasonable doubt, the jury must be unanimous as to the existence of that statutory aggravating circumstance. As to any statutory aggravating circumstances enumerated in subsection (e) of this section which were alleged but for which the jury is not unanimous, the jury shall report the number of the affirmative and negative votes on each such circumstance.
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> 2. The jury shall report to the Court by the number of the affirmative and negative votes its recommendation on the question as to whether, by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bear upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist.[27]

The 2002 amendment affected only the eligibility, or narrowing, phase of Delaware's procedure. "The [Superior Court] will continue to be responsible for ultimately determining the sentence to be imposed, after weighing all relevant evidence presented in aggravation or mitigation which bears upon the particular

[26] S.B. 449, 141st Delaware General Assembly, Synopsis (2002). B7.

[27] 73 Del. Laws ch. 423.

circumstances or details of the commission of the offenses and the character and propensities of the offender."[28] This Court found that the 2002 amendment satisfies the requirement of jury fact-finding set forth by *Ring*.[29]

Florida's statute retained the role of the jury as advisor, akin to the 1991 version of Section 4209. The United States Supreme Court, in light of *Ring*, concluded in *Hurst* that the Florida procedure violated the Sixth Amendment because "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."[30] It is against this landscape that the certified questions, as amended and accepted by this Court, are evaluated.

[28] S.B. 449, 141st Delaware General Assembly, Synopsis (2002). B7.

[29] *See generally Brice v. State*, 815 A.2d 314 (Del. 2003).

[30] *Hurst*, 136 S. Ct. at 622.

I. A SENTENCING JUDGE MAY INDEPENDENTLY FIND AN AGGRAVATING CIRCUMSTANCE FOR WEIGHING IN THE SELECTION PHASE OF A CAPITAL SENTENCING PROCEEDING.

QUESTION PRESENTED

"Under the Sixth Amendment to the United States Constitution, may a sentencing judge in a capital jury proceeding, independent of the jury, 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 a capital sentencing proceeding?"

STANDARD AND SCOPE OF REVIEW

"Because [this Court is] addressing a certified question of law, as distinct from a review of a lower court decision, the normal standards of review do not apply."[31] This Court reviews the certified questions in the context in which they arise.[32] "The scope of the issues that may be considered in addressing a certified question is limited by the procedural posture of the case."[33]

MERITS OF ARGUMENT

The answer to certified question (1) is yes. The question before the Court is limited to the federal constitutional question regarding the requirements of a state

[31] *Rales v. Blasband,* 634 A.2d 927, 931 (Del. 1993).

[32] *Id.*

[33] *Id.*

sentencing procedure in capital cases. Most recently, the United States Supreme Court in *Hurst v. Florida*[34] applied the procedural principles of *Ring v. Arizona*[35] to the Florida statutory capital sentencing procedure and concluded:

> The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.[36]

Delaware's capital sentencing procedure provides the constitutional safeguards the United States Supreme Court concluded were lacking in Florida.

Hurst expressly applied the analysis in *Ring* to reach its decision that the Florida capital sentencing statute was unconstitutional.[37] This Court has previously considered the application of *Ring* to Delaware's capital sentencing statute and found the statute to comport with Sixth Amendment jurisprudence.[38] *Hurst* does not change that analysis.

In Florida, the role of the capital penalty phase jury ("capital jury") was limited to providing an advisory opinion as to the existence of, and weighing of,

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[34] 136 S. Ct. 616 (2016).

[35] 536 U.S. 584 (2002).

[36] *Hurst*, 136 S. Ct. at 624 (assessing the constitutionality of Fla. Stat. Ann. §§ 775.082(1) & 921.141(3) (2010)).

[37] *Id.* at 621-22.

[38] *Brice v. State*, 815 A.2d 314 (Del. 2003).

aggravating and mitigating circumstances.[39] Significantly, the Florida capital jury was not required to find *any* statutory aggravating circumstance unanimously or beyond a reasonable doubt. The capital jury did not report on any specific aggravating circumstance at all. Thus, in Florida, a judge was required to make the factual finding that exposed the defendant to a capital sentence. This violated *Ring*. Applying the clear reasoning of *Ring* to Florida's sentencing procedure, *Hurst* found that the judge, in a jury trial, could not make the factual finding that resulted in a potential sentence greater than that to which the defendant was exposed by the jury verdict at trial.[40] Florida conceded that a jury was required "to find every fact necessary to render Hurst eligible for the death penalty."[41] Florida's statutes did not provide for that jury finding. Delaware's statute does.

The role of a Delaware capital jury is not so limited. First, a Delaware capital jury must find the existence of at least one statutory aggravating factor unanimously and beyond a reasonable doubt before the sentencing court may consider imposing a sentence of death upon a convicted murderer.[42] Second, a Delaware capital jury, in addition to assessing and voting upon submitted statutory

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[39] Fla. Stat. Ann. § 921.141(5-6) (2010).

[40] *Hurst*, 136 S. Ct. at 622 ("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.").

[41] *Id.*

[42] 11 *Del. C.* § 4209(c)(3)a.1.

aggravators, may consider both non-statutory aggravators and mitigators in making its recommendation to the sentencing judge.[43] As this Court explained in *Brice*,

> The narrowing phase under the 2002 Statute simply requires a jury to find, unanimously and beyond a reasonable doubt, the existence of at least one statutory aggravating circumstance before the sentencing judge may consider imposing the death sentence. Non-statutory aggravators, if considered at all, do not enter the mix until after the jury performs its essential function during the narrowing phase. Accordingly, a finding of non-statutory factors does not "increase" the maximum penalty that a defendant can receive. Rather, non-statutory aggravators are part of the total mix, including mitigating factors, when the sentencing judge performs his function during the weighing phase.[44]

The difficulty with the Florida statutes was that a trial judge alone could find a fact leading to the eligibility of a murderer for a death sentence, even if a jury had not made such a fact-finding.[45] In contrast, Delaware's death penalty procedure mandates that the jury find a statutory aggravating factor to "unlock" the death penalty. Thereafter, the sentencing judge may independently assess the evidence to find an aggravating circumstance not previously found by the penalty phase jury.

Just as in any sentencing decision, the judge is free to consider all information presented in aggravation and mitigation to determine the appropriate

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[43] 11 *Del. C.* § 4209(c)(3)a.2.

[44] *Brice*, 815 A.2d at 322.

[45] *See Hurst*, 136 S. Ct. at 622 ("*Ring* required a jury to find every fact necessary to render Hurst *eligible* for the death penalty." (emphasis added)).

sentence for that particular defendant in light of his or her personal traits and the circumstances surrounding the offense. In Delaware, the jury provides another piece to that information, providing the vote regarding the individual conclusions of each juror as to whether the aggravating circumstances outweigh the mitigating circumstances. Using that information in conjunction with the presentations made during the penalty hearing, the judge then determines the appropriate sentence. Nothing in *Hurst* prevents a state from having the judge determine the sentence.[46]

[46] *See Hurst*, 136 S. Ct. at 624 (Breyer, J., concurring) ("I cannot join the Court's opinion[] ... based on my view that 'the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death.'") (citations omitted).

II. A DELAWARE CAPITAL JURY NEED NOT FIND THE EXISTENCE OF ANY AGGRAVATING CIRCUMSTANCE ALLEGED BY THE STATE FOR WEIGHING IN THE SELECTION PHASE TO COMPORT WITH FEDERAL CONSTITUTIONAL STANDARDS.

QUESTION PRESENTED

"If the finding of 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 proceeding must be made by a jury, must the jury make the finding unanimously and beyond a reasonable doubt to comport with federal constitutional standards?"

STANDARD AND SCOPE OF REVIEW

"Because [this Court is] addressing a certified question of law, as distinct from a review of a lower court decision, the normal standards of review do not apply."[47] This Court reviews the certified questions in the context in which they arise.[48] "The scope of the issues that may be considered in addressing a certified question is limited by the procedural posture of the case."[49]

MERITS OF ARGUMENT

The answer to certified question (2) is no. Section 4209(c)(3)a.1. requires the Delaware capital penalty phase jury to find at least one statutory aggravating

[47] *Rales v. Blasband,* 634 A.2d 927, 931 (Del. 1993).

[48] *Id.*

[49] *Id.*

circumstance unanimously and beyond a reasonable doubt. After a statutory aggravating circumstance, determined from the list in Section 4209(e), is found unanimously and beyond a reasonable doubt, the defendant becomes death eligible[50] and any further jury finding of statutory or non-statutory aggravating circumstances need not be unanimous or made beyond a reasonable doubt.

The capital jury unanimity and beyond a reasonable doubt burden of proof requirements have both been addressed previously in Delaware. Distinguishing between the guilt and penalty phases of a capital murder prosecution, this Court has held "that the jury is not required to return a unanimous finding of an aggravating factor in its advisory role during the penalty phase."[51] As to the applicable burden of proof, the Delaware capital punishment procedure statute answers the question. Section 4209(c)(3)a.1. provides that during the "narrowing phase" of the capital penalty proceeding, the jury must find at least one statutory aggravating circumstance unanimously and beyond a reasonable doubt. "*Ring* does not extend to the weighing phase."[52] Thus, as *Hurst* merely applied *Ring* to Florida's statutory procedure, this Court's holding in *Brice* survives.

The controlling federal law on jury unanimity and the "beyond a reasonable doubt" standard were both set forth by the United States Supreme Court in 1972 in

[50] *Brice*, 815 A.2d at 322 ("the narrowing phase").

[51] *Capano v. State*, 781 A.2d 556, 669 (Del. 2001).

[52] *Brice*, 815 A.2d at 322.

the companion cases of *Apodaca v. Oregon*[53] and *Johnson v. Louisiana*.[54] The United States Supreme Court has not found a jury unanimity requirement applicable to the states. Accordingly, the current Delaware capital punishment procedure statute does "comport with federal constitutional standards." Moreover, because *Ring* does not apply beyond the eligibility or narrowing stage,[55] there is no constitutional requirement as to burden of proof in the selection phase. *Hurst* has not altered the calculus.[56] The Delaware death penalty procedure, particularly as amended in 2002 after *Ring*, avoids the constitutional problem found in the Florida statutory framework.

[53] 406 U.S. 404 (1972) (Oregon statute allowing guilty verdicts on 10-2 jury vote did not violate Sixth Amendment's jury trial guarantee).

[54] 406 U.S. 356 (1972) (Louisiana procedure allowing criminal verdicts on 9-3 jury vote did not violate the beyond a reasonable doubt evidentiary requirement of the Fourteenth Amendment due process clause). *See* Joshua Dressler and Alan C. Michaels, *Understanding Criminal Procedure*, vol. 2, § 13.02 [8] at p. 288 (2006); Wayne R. LaFave and Jerold H. Israel, *Criminal Procedure* § 22.1(e) at pp. 958-59 (2d ed. 1992).

[55] Any fact elevating exposure to greater punishment is like an element. *See Ring*, 536 U.S. at 589 (applying holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) to capital defendants); *see also Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013) (holding any fact that increases minimum mandatory is an "element" that must be submitted to the jury).

[56] Well before *Hurst*, it was apparent that "If Florida law, like Delaware's new [2002] capital sentencing statute, required that juries make the aggravating factor determination, then Florida law would be in compliance with Ring." Brendan Ryan, "*The Evans Case: A Sixth Amendment Challenge to Florida's Capital Sentencing Statute*," 67 U. Miami L. Rev. 933, 970-71 (2013).

III. A DELAWARE SENTENCING JUDGE MAY FIND THAT THE AGGRAVATING CIRCUMSTANCES FOUND TO EXIST OUTWEIGH THE MITIGATING CIRCUMSTANCES FOUND TO EXIST.

QUESTION PRESENTED

"Does the Sixth Amendment to the United States Constitution require 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'?"

STANDARD AND SCOPE OF REVIEW

"Because [this Court is] addressing a certified question of law, as distinct from a review of a lower court decision, the normal standards of review do not apply."[57] This Court reviews the certified questions in the context in which they arise.[58] "The scope of the issues that may be considered in addressing a certified question is limited by the procedural posture of the case."[59]

MERITS OF ARGUMENT

The answer to certified question (3) is no. "The Sixth Amendment requires

[57] *Rales v. Blasband,* 634 A.2d 927, 931 (Del. 1993).

[58] *Id.*

[59] *Id.*

a jury, not a judge, to find each fact necessary to impose a sentence of death."[60] A Delaware jury must find, unanimously and beyond a reasonable doubt, the existence of at least one statutory aggravating circumstance before an offender is eligible to receive a sentence of death.[61] This is the critical finding that allows a sentencing judge to consider the imposition of a death sentence. "A sentence of death shall not be imposed unless the jury . . . first finds unanimously and beyond a reasonable doubt the existence of at least 1 statutory aggravating circumstance as enumerated in subsection (e) of [section 4209 of Title 11]."[62]

Rauf correctly posits that "[t]he State is likely to argue . . . that determining the relative weight of aggravating and mitigating circumstances is not a factual finding, but rather a judgment call that *Hurst* permits a court to make."[63] This is precisely the position advanced by the State. The United States Supreme Court, in *Carr*,[64] discussed the distinction between the eligibility, or narrowing, phase of a capital trial and the selection phase, noting that it is possible to apply a standard of proof to the eligibility phase – "the aggravating factor determination" – "because that is a purely factual determination."[65] The facts allowing the imposition of

[60] *Hurst* 136 S. Ct. at 619.

[61] 11 *Del. C.* § 4209(d).

[62] *Id.*

[63] Op. Brf. at 41.

[64] *Kansas v. Carr*, 136 S. Ct. 633 (2016).

[65] *Id.* at 642.

death – the statutory aggravators found in Section 4209(e) – either do, or do not, exist, "and one can require the finding that they did exist to be made beyond a reasonable doubt."[66] The assessment of mitigation in the selection phase "is largely a judgment call (or perhaps a value call)" not readily assessed by the beyond a reasonable doubt metric applied to purely factual determinations.[67] The United States Supreme Court recognized that "[i]f we were to hold that the Constitution requires the mitigating-factor determination to be divided into its factual component and its judgmental component, and the former to be accorded a burden-of-proof instruction, we doubt that would produce anything but jury confusion."[68]

Hurst found "Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance" to be unconstitutional in light of *Ring*.[69] Delaware's sentencing scheme provides the constitutional safeguard mandated by *Ring*. A Delaware sentencing judge may not increase a defendant's sentence based upon her own fact-finding. Rather, unless and until a jury, unanimously and beyond a reasonable doubt, finds the existence of a statutory aggravating factor, life is the maximum sentence that may be imposed. Once that

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Hurst*, 136 S. Ct. at 624.

critical finding is made, the Delaware statute contemplates a judicial assessment akin to a traditional sentencing hearing, a well-settled process unaffected by *Hurst*.[70]

[70] *See Ring*, 536 U.S. at 597 n.4 (explaining the limited scope of that ruling and clarifying that *Ring* does not "argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty."). *See also Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (plurality opinion) ("[I]t has never [been] suggested that jury sentencing is constitutionally required.").

IV. THE FINDING THAT THE AGGRAVATING CIRCUMSTANCES FOUND TO EXIST OUTWEIGH THE MITIGATING FACTORS FOUND TO EXIST NEED NOT BE MADE BY A JURY AND NEED NOT BE UNANIMOUS AND BEYOND A REASONABLE DOUBT.

QUESTION PRESENTED

"If the finding that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist must be made by a jury, must the jury make that finding unanimously and beyond a reasonable doubt to comport with federal constitutional standards?"

STANDARD AND SCOPE OF REVIEW

"Because [this Court is] addressing a certified question of law, as distinct from a review of a lower court decision, the normal standards of review do not apply."[71] This Court reviews the certified questions in the context in which they arise.[72] "The scope of the issues that may be considered in addressing a certified question is limited by the procedural posture of the case."[73]

MERITS OF ARGUMENT

The answer to certified question (4) is no. As discussed above, jury involvement in the capital sentencing phase is not constitutionally mandated. Rather, before a sentence of death may be imposed, a jury must, unanimously and

[71] *Rales v. Blasband,* 634 A.2d 927, 931 (Del. 1993).

[72] *Id.*

[73] *Id.*

beyond a reasonable doubt, find the existence of a statutory aggravating factor. Once that determination has been made, the sentencing judge is empowered to impose a sentence of life or death. Delaware law, though, provides greater statutory protection to individuals convicted of a crime eligible for capital punishment.

Carr provided some constitutional guidance in the weighing of aggravators and mitigators in the selection phase. Importantly, while the Supreme Court assessed the Kansas process, it did not require (1) jury participation in the weighing phase or (2) jury unanimity if a state elects to involve a jury in the weighing process.[74] Rather, *Carr* pointed out the practical difficulties – near impossibility – of injecting a standard of proof in the selection phase.[75] Ultimately, the Supreme Court concluded that jury confusion is best avoided by not imparting a burden of proof in the sentencing phase: "In the last analysis, juror will accord mercy if they deem it appropriate, and withhold mercy if they do not, which is what our caselaw is designed to achieve."[76]

An affirmative response to this certified question would require a finding that jury sentencing is constitutionally mandated. It is not. As Justice Breyer's concurrences in both *Hurst* and *Ring* illustrate, those decisions address jury

[74] *Carr,* 136 S. Ct. at 643.

[75] *Id.* at 642.

[76] *Id.*

involvement only in the eligibility phase. Justice Breyer declined to join the majority opinion in *Ring* based on his belief "that the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death."[77] Then, again, in *Hurst*, Justice Breyer declined to join the majority opinion because "[n]o one argues that Florida's juries actually sentence capital defendants to death – that job is left to Florida's judges."[78] The United States Supreme Court has consistently upheld the constitutionality of judge sentencing in capital cases.[79]

> Th[e] Supreme Court has pointed out that jury sentencing in a capital case can perform an important societal function, [citation omitted], but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.[80]

Delaware's procedure passes constitutional muster.[81] In the weighing phase, a jury

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[77] *Ring*, 536 U.S. at 614 (Breyer, J., concurring).

[78] *Hurst*, 136 S. Ct. at 624 (Breyer, J., concurring) (citing Fla. Stat. Ann. § 921.143(3)(2010)).

[79] *See Alleyne*, 133 S. Ct. at 2163 ("In holding that facts that increase mandatory minimum sentences must be submitted to the jury, we take care to note what our holding does not entail. Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment.").

[80] *Profitt v. Florida*, 428 U.S. 242, 252 (1976).

[81] *See Capano v. State*, 781 A.2d 556, 582 (Del. 2001) ("The United States Supreme Court has never held that a judge's imposition of a death sentence following a unanimous finding of guilt by the jury and a less than unanimous recommendation of the jury in a penalty phase is a denial of the right to a jury trial or otherwise a denial of due process.").

need not engage in findings beyond a reasonable doubt; nor must the jury make a unanimous sentencing recommendation to the court.[82]

[82] *Ring*, 536 U.S. at 602 ("[O]nce a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.") (quoting *Apprendi*, 530 U.S. at 497).

V. IF THIS COURT FINDS ANY PROVISIONS OF SECTION 4209 TO BE UNCONSTITUTIONAL, THOSE PROVISIONS MAY BE SEVERED.

QUESTION PRESENTED

"If any procedure in 11 *Del. C.* § 4209's capital sentencing scheme does not comport with federal constitutional standards, can the provision for such be severed from the remainder of 11 *Del. C.* § 4209, and the Court proceed with instructions to the jury that comport with federal constitutional standards?"

STANDARD AND SCOPE OF REVIEW

"Because [this Court is] addressing a certified question of law, as distinct from a review of a lower court decision, the normal standards of review do not apply."[83] This Court reviews the certified questions in the context in which they arise.[84] "The scope of the issues that may be considered in addressing a certified question is limited by the procedural posture of the case."[85]

MERITS OF ARGUMENT

The answer to certified question (5) is yes. Title 1, section 308 of the Delaware Code provides,

> If any provision of this Code or amendments hereto, or the application thereof to any person, thing or circumstances is held invalid, such invalidity shall not affect the provisions or application of this Code or

[83] *Rales v. Blasband,* 634 A.2d 927, 931 (Del. 1993).

[84] *Id.*

[85] *Id.*

> such amendments that can be given effect without the invalid provisions or application, and to this end the provisions of this Code and such amendments are declared to be severable.

Pursuant to this provision, any portion of the Delaware's capital punishment procedure determined to be unconstitutional may be severed.

This Court has previously severed portions of the Delaware capital sentencing law found to be unconstitutional after a United States Supreme Court decision, leaving the balance of the statute intact.[86] In determining the constitutionality of a statute, "a court should refrain from invalidating more of a statute than is necessary."[87] "'Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem,' severing any 'problematic portions while leaving the remainder intact.'"[88] Should this Court find that any provision of Delaware's capital sentencing procedure runs afoul of the United States Constitution, that provision may be severed and the balance of the statute may be retained.

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[86] *See State v. White*, 395 A.2d 1082, 1090-91 (Del. 1978) (statutory aggravating circumstances that homicide victim was "elderly" or "defenseless" found to be "unconstitutionally vague, but severable."); *State v. Spence*, 367 A.2d 983, 988-89 (Del. 1976); *State v. Dickerson*, 298 A.2d 761, 764-67 (Del. 1972) ("we hold, under 1 *Del. C.* § 308, that the Murder Statute, including the mandatory death penalty contained therein, is severable from the Mercy Statute, that it does not fall with the Mercy Statute under Furman; and that it now stands alone, severed from the Mercy Statute.").

[87] *Regan v. Time, Inc*., 468 U.S. 641, 652 (1984) (quoted in *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987).

[88] *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 508 (2010) (quoting *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328-29 (2006)).

"Generally, the severability of a statute is a question of legislative intent as to the specific provision."[89] "[W]here the legislative intent is not clear from the statute itself, the Delaware courts derive the necessary intent from Delaware's general severance provision."[90] Unless there is a showing that the General Assembly did not intend the provisions of a statute to be severable, the question becomes "whether the remaining provisions have a separate purpose and are capable of functioning independently."[91] Here, the General Assembly specifically addressed the severability issue in the 2002 amendment to the section 4209: "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."[92] Thus, the General Assembly has resolved this question for this Court.

In his Opening Brief, Rauf answers certified question (5) in the negative and argues that this Court cannot "salvage the statute" by excising any unconstitutional provisions.[93] Rauf claims severability cannot save any portion of Section 4209 because the statute does not have one constitutional defect, but three. Rauf alleges

[89] *Rappa v. New Castle County*, 18 F.3d 1043, 1072 (3d Cir. 1994).

[90] *Id.* at 1072 (citing 1 *Del. C.* § 308).

[91] *Id.* (citing *In the Matter of Oberly*, 524 A.2d 1176, 1182 (Del. 1987)).

[92] 73 Del. Laws ch. 423.

[93] Op. Brf. at 48-49.

three constitutional deficiencies: (1) the statute designates the judge, not the jury, as the primary determinator of aggravating and mitigating circumstances and their relative weight; (2) the provision imposes an unconstitutional burden of proof (preponderance of the evidence) as to the determination of whether aggravators outweigh mitigators; and (3) the statute does not require an unanimous jury recommendation for death. Rauf misapprehends the extent of the ruling in *Hurst*, and his position as to severability of Section 4209 is incorrect.

Hurst is an application of *Ring* to the Florida statutory capital sentencing procedure. The limited procedural holding of *Hurst* is that a capital jury has to find an aggravating circumstance necessary for imposition of a death sentence.[94] The Florida capital sentencing scheme "which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional."[95] *Hurst* does not prohibit a judge from determining and weighing aggravating and mitigating circumstances in the selection phase. Consequently, jury unanimity is not required.

Rauf's assessment of Delaware's death penalty statute overstates the conclusions reached by the United States Supreme Court in *Hurst* and *Carr*. *Hurst* does not mandate jury sentencing; a sentencing judge properly retains a degree of

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[94] *Compare Schiro v. Summerlin*, 542 U.S. 348, 353 (2004) ("*Ring*'s holding is properly classified as procedural.").

[95] *Hurst*, 136 S. Ct. at 624.

authority to impose, or not impose, a death sentence where a jury has found a statutory aggravating circumstance unanimously and beyond a reasonable doubt. Additionally, in *Carr*, the Supreme Court highlighted the confusion that would ensue in attempting to assign a burden of proof to the weighing calculus.[96]

Should this Court find that the jury is required to make additional factual findings in the selection phase, it would be necessary to sever only the portions of Section 4209(d)(1) that permit the sentencing judge to independently find an aggravating circumstance to be considered in the weighing phase. Such a statutorily permitted severance would then require a capital jury to find all aggravating circumstances in the first instance and prohibit the sentencing judge from independently considering any aggravating circumstances not previously found by the penalty phase jury.

A Delaware statute containing a subsequently identified constitutional deficiency need not be voided in its entirety when a portion of the legislative enactment may simply be severed to remove the offending language. That is the purpose of Delaware's general severability statute, 1 *Del. C.* § 308. Rauf urges this Court to declare 11 *Del. C.* § 4209 unconstitutional in its entirety and to judicially abolish the death penalty in Delaware. However, this position is flatly inconsistent with Delaware law. Rather, Rauf's request is more properly the

[96] *Carr*, 136 S. Ct. at 642.

concern of the legislative branch of the government. Under the separation of powers doctrine, the General Assembly is charged with the enactment or removal of laws, while this Court interprets and applies its enactments.[97] *Hurst* did not eliminate the death penalty; it applied constitutional requirements to Florida law. Should the Court require the penalty phase jury to find all aggravating circumstances, all that would be required is for Delaware to sever any offending language from Section 4209.

[97] *See generally Evans v. State*, 872 A.2d 539, 548 (Del. 2005) ("The judicial function is to interpret the law and apply its remedies and penalties in particular cases.").

CONCLUSION

For the foregoing reasons, this Court should answer the certified questions as follows:

Question (1): This question should be answered in the affirmative.

Question (2): This question should be answered in the negative.

Question (3): This question should be answered in the negative.

Question (4): This question should be answered in the negative.

Question (5): This question should be answered in the affirmative.

/s/Elizabeth R. McFarlan (ID No. 3759)
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Dated: March 30, 2016

EFiled: Jan 28 2016 01:00PM EST
Filing ID 58489479
Case Number 39,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BENJAMIN RAUF,	§	
	§	No. 39, 2016
Defendant-Appellant,	§	
	§	Certification of Question of Law
v.	§	from the Superior Court
	§	of the State of Delaware
STATE OF DELAWARE,	§	
	§	Cr. ID No. 1509009858
Plaintiff-Appellee.	§	

Submitted: January 25, 2016
Decided: January 28, 2016

Before **STRINE**, Chief Justice; **HOLLAND**, **VALIHURA**, **VAUGHN**, and **SEITZ**, Justices, constituting the Court *en Banc*.

ORDER

This 28th day of January 2016, it appears to the Court that:

(1) The Superior Court has certified five questions of law to this Court in accordance with Article IV, Section 11(8) of the Delaware Constitution and Delaware Supreme Court Rule 41.

(2) The certified questions arise from the potential impact of the United States Supreme Court's recent decisions in *Hurst v. Florida*[1] and *Kansas v. Carr*[2] on the Delaware death penalty statute, 11 *Del. C.* § 4209. In *Hurst*, the United States Supreme Court held that the Florida capital sentencing scheme was unconstitutional because "[t]he Sixth Amendment requires a jury, not a judge, to

[1] __ U.S. __, 2016 WL 112683 (Jan. 12, 2016).
[2] __ U.S. __, 2016 WL 228342 (Jan. 12, 2016).

find each fact necessary to impose a sentence of death."[3] In *Carr*, the United States Supreme Court held that the Kansas Supreme Court erred in concluding that the Eighth Amendment requires a sentencing court to instruct the jury that mitigating circumstances need not be proven beyond a reasonable doubt and prohibits joint capital sentencing proceedings.[4]

(3) In this case, Benjamin Rauf has been indicted on charges that include Murder in the First Degree (Intentional Murder) and Murder in the First Degree (Felony Murder). The State has announced its intent to seek the death penalty for the murder counts. Rauf is currently awaiting trial. Over two dozen capital murder cases are currently pending in the Superior Court, with four of those cases scheduled to commence trial in less than 120 days.

(4) In light of the United States Supreme Court's recent decisions in *Hurst* and *Carr* and the pending capital murder cases, including this case, in the Superior Court, the Superior Court has certified the following questions to this Court in accordance with Rule 41:

> (1) Under the Sixth Amendment to the United States Constitution and/or Article I, Sections 4 and 7 of the Delaware Constitution, may a sentencing judge in a capital jury proceeding, independent of the jury, 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 a capital sentencing proceeding?

[3] 2016 WL 112683, at *3.
[4] 2016 WL 228342, at *8-12.

(2) If the finding of 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 be made by a jury, must the jury make the finding unanimously and beyond a reasonable doubt to comport with federal and state constitutional standards?

(3) Do the Sixth Amendment to the United States Constitution and/or Article I, Sections 4 and 7 of the Delaware Constitution require 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"?

(4) If the finding that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist must be made by a jury, must the jury make that finding unanimously and beyond a reasonable doubt to comport with federal and state constitutional standards?

(5) If any procedure in 11 *Del. C.* § 4209's capital sentencing scheme does not comport with federal and state constitutional standards, can the provision for such be severed from the remainder of 11 *Del. C.* § 4209, and the Court proceed with instructions to the jury that comport with federal and state constitutional standards?

(5) After careful consideration, we conclude that there are important and urgent reasons for an immediate determination of the questions certified as they relate to the United States Constitution. Although the Superior Court recommended that we consider somewhat broader questions that would implicate the meaning of our State Constitution, we believe it is preferable to focus solely on federal law, and the implications of the United State Supreme Court's decision in *Hurst*, because the decision in *Hurst* is the major development that impelled the

Superior Court to recommend certification and is the reason for our acceptance of this appeal. Because we are aware of no state law developments that justify opining on the Delaware Constitution, we have therefore narrowed the questions.

(6) Therefore, in accordance with Article IV, Section 11(8) of the Delaware Constitution and Delaware Supreme Court Rule 41, the questions certified by the Superior Court, as revised below, should be accepted.

(1) Under the Sixth Amendment to the United States Constitution, may a sentencing judge in a capital jury proceeding, independent of the jury, 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 a capital sentencing proceeding?

(2) If the finding of 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 be made by a jury, must the jury make the finding unanimously and beyond a reasonable doubt to comport with federal constitutional standards?

(3) Does the Sixth Amendment to the United States Constitution require 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"?

(4) If the finding that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist must be made by a jury, must the jury make that finding unanimously and beyond a reasonable doubt to comport with federal constitutional standards?

(5) If any procedure in 11 *Del. C.* § 4209's capital sentencing scheme does not comport with federal constitutional standards, can the

provision for such be severed from the remainder of 11 *Del. C.* § 4209, and the Court proceed with instructions to the jury that comport with federal constitutional standards?

(7) As recommended by the Superior Court, Rauf is designated the appellant and the State is designated the appellee for the purposes of the caption on any filings in this Court with respect to the certified questions.

NOW, THEREFORE, IT IS ORDERED that the questions certified by the Superior Court, as revised above, are ACCEPTED. The Clerk of the Court is directed to issue a briefing schedule to the parties.

BY THE COURT:

/s/ Leo E. Strine, Jr.

Chief Justice