EFiled: Mar 09 2016 02:15PM EST
Filing ID 58694119
Case Number 39,2016

IN THE SUPREME COURT OF DELAWARE

BENJAMIN RAUF, Defendant-Appellant, v. STATE OF DELAWARE, Plaintiff-Appellee.	)	No. 39, 2016 Certified Questions of Law from the Superior Court Of the State of Delaware Cr. ID No. 1509009858

BRIEF OF THE ATLANTIC CENTER FOR CAPITAL REPRESENTATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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INTRODUCTION AND SUMMARY OF ARGUMENT

On January 12, 2016, the United States Supreme Court held in *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016), that Florida's capital sentencing scheme was unconstitutional because "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."

In the case of Appellant Benjamin Rauf, against whom the State will seek the death penalty if he is convicted of First Degree Murder, this Court has accepted questions certified by the Superior Court concerning whether Delaware's death penalty laws are unconstitutional in light of *Hurst*. The Atlantic Center for Capital Representation files this brief as amicus in support of Appellant's Opening Brief on the first certified question, namely:

> 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?

This Amicus Brief addresses three separate yet related reasons why Delaware's death sentencing system fails to vest in the jury responsibility to make the death eligibility determination, and therefore violates the Sixth Amendment under the *Hurst* standard.

First, the language of the death penalty statute, 11 *Del. C.* § 4209(d)(1), authorizes the trial judge to independently find all of the aggravating

circumstances, including the statutory aggravating circumstance(s), in violation of *Hurst*. A series of Supreme Court cases, culminating in *Hurst*, repudiates the argument that essential facts exposing one to a death sentence are exempted from the Sixth Amendment by merely classifying them as sentencing factors. This rule requires this Court to reexamine precedent that a factual finding made during the judge sentencing phase is immune from Sixth Amendment requirements.

Second, because jurors are instructed consistent with the statutory language of Section 4209, they are led to believe that the trial judge makes independent findings as to all of the aggravating circumstances, including the statutory aggravating circumstance(s). This necessarily diminishes the jurors' appreciation of the gravity of the task that they must perform. Under *Hurst*, *Kansas v. Carr*, 133 S. Ct. 633 (2016), and *Caldwell v. Mississippi*, 472 U.S. 320 (1985), a death sentencing process that impacts jurors in this fashion is unconstitutional, because it impairs their duty to perform their essential fact finding role under the Sixth Amendment.

Third, the advisory nature of the Delaware scheme, in which the jury issues a recommendation, and not a sentence, unconstitutionally minimizes the jury's sense of responsibility in determining the existence of a statutory aggravating circumstance(s). The animating principle of *Caldwell*, that "the uncorrected suggestion that the responsibility for any ultimate determination of death will rest

with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role," supports this conclusion. 472 U.S. at 333. So too does actual practice. A recent study on Delaware capital jury deliberations, which relied upon juror interviews, suggests that due to the advisory nature of the Delaware system, jurors may not be truly engaged in determining if a statutory aggravator exists beyond a reasonable doubt.

STATEMENT AND IDENTITY OF *AMICUS CURIAE*, ITS INTEREST IN THE CASE, AND THE SOURCE OF ITS AUTHORITY TO FILE

The Atlantic Center for Capital Representation is a nonprofit organization based in Philadelphia, Pennsylvania. The Center's mission is to serve as a clearinghouse for capital litigation, and to provide litigation support to attorneys with clients facing capital prosecution or execution. The Center focuses particularly, although not exclusively, on the Mid-Atlantic Region. Its mission is achieved through consultation with capital defense teams, training lawyers and mitigation specialists, and conducting direct pretrial and post-conviction litigation. Towards this end, the Center has conducted trainings and consultations in Delaware, including consultations and trainings with the Delaware Office of Defense Services. Based on its mission and service, the Center has a significant interest in the manner in which capital jurisprudence is administered in Delaware.

ARGUMENT

I. The Delaware Capital Sentencing Scheme Violates The Sixth Amendment Because The Judge Alone, Not The Jury, Actually Determines Eligibility For A Death Sentence.

Hurst v. Florida, 136 S. Ct. 616 (2016), renders Delaware's capital scheme violative of the Sixth Amendment. The most basic tenet of the decision—that fact-finding subjecting a defendant to the death penalty must be made by a jury—does not occur in Delaware. Delaware's capital sentencing scheme, which requires a judge to independently find the statutory aggravating circumstance that makes a defendant eligible for death, is thus unconstitutional under *Hurst*. Without replicating Appellant's work, amicus will briefly expand on the *narrowest* portion of Argument One, addressing Delaware's most glaring Sixth Amendment infirmity:

> The jury's finding of a statutory aggravator is absolutely *irrelevant* to eligibility: Only fact-finding by a judge exposes one to the death penalty.

Under *Hurst*, the central question for this Court is clear: In the absence of fact finding by the trial court, what is the maximum sentence the defendant can receive?

> 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 fact-finding.

Hurst, 136 S. Ct. at 622. Correctly applying the rule of *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000), as the Court did in *Hurst*, to Delaware's capital sentencing scheme results in the same constitutional infirmity: it permits "a sentencing judge to find an aggravating circumstance, independent of a jury's fact finding, that is necessary for imposition of the death penalty." *Id.* at 623.

The Delaware death penalty statute plainly requires the judge to independently find the statutory and nonstatutory aggravators to weigh. After the jury makes its advisory sentence recommendation and is discharged, a defendant is not yet eligible for the death penalty, because the Delaware statute explicitly provides that the judge, not the jury, weigh the aggravating circumstances "found by the Court to exist." 11 *Del. C.* § 4209(d)(1). Thus, the judge, not the jury, determines what aggravating circumstances have been proven and will be placed on the scales for weighing. Without the necessary judicial finding of an aggravator, the maximum penalty remains "a sentence of imprisonment for the remainder of the defendant's natural life." *Id.* § 4209(d)(2). Even a case with no mitigating circumstances results in a scale in equipoise: the defendant must receive a life sentence. The judge's finding of an aggravating circumstance in Delaware does exactly what *Hurst* prohibits under the Sixth Amendment: it conditions an increase in maximum penalty to death on facts found by a judge alone.

Assignment of this fact-finding role to the judge, rather than the jury, is precisely what *Hurst* found impermissible.

Therefore, even were this Court to decide that *Hurst* does not require juries to find *every single* aggravator, no Delaware defendant is death-eligible until the judge finds—at absolute minimum—one aggravator. Without a judicial finding of at least one aggravator, no death sentence is possible because nothing exists to place on the aggravation side of the scale.

The fact that the judge does not receive the case unless and until the jury votes unanimously upon a statutory aggravating circumstance is irrelevant to the *Ring/Hurst* calculus. Amicus acknowledges that in *Brice v. State*, 815 A.2d 314 (Del. 2003), and in subsequent decisions, this Court has declined to find that *Ring v. Arizona*, 536 U.S. 584 (2002), which is discussed in Appellant's Opening Brief, has any application after the jury is discharged, declaring that the judge's findings are purely a matter of sentence selection not subject to the Sixth Amendment. *See, e.g., Ortiz v. State*, 869 A.2d 285, 304-05 (Del. 2005) ("In *Brice* we held that the United States Supreme Court decision in *Ring* only applies to the narrowing phase of Delaware's 'hybrid' capital punishment system."). The United States Supreme Court, however, has repudiated the argument that essential facts exposing one to a death sentence are exempted from the Sixth Amendment by merely classifying them as "sentencing factors" (i.e., selection factors) rather than an "element." *See*

S. Union Co. v. United States, 132 S. Ct. 2344, 2348 (2012) (rejecting the argument that "there is a constitutionally significant difference between a fact that is an element of the offense and one that is a sentencing factor") (internal quotations omitted). This is why, for example, when the Superior Court in *Ortiz*, found an aggravator formerly rejected by the jury, that finding implicated Sixth Amendment eligibility concerns, notwithstanding the fact that it was a "sentencing" finding. *State v. Ortiz*, 2003 WL 22383294, at *13-14 (Del. Super. Sept. 26, 2003), *aff'd, Ortiz v. State*, 869 A. 2d 285 (Del. 2005).[1]

Thus, while under *Brice*, 815 A.2d at 321, the jury's finding of a statutory aggravating circumstance binds the court, it only binds the court to proceed to a death penalty sentencing determination. The first question the judge must answer is whether the statutory aggravator exists. The judge's determination as to whether the statutory aggravator exists, "whether the statute calls [the statutory aggravator an] element[] of the offense, [a] sentencing factor[], or Mary Jane," is essential to the question of eligibility. *Ring*, 536 U.S. at 610 (Scalia, Thomas, J. concurring). As set forth in the statute, and as interpreted by the Delaware Courts,[2] *Brice* cannot

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[1] On direct appeal in *Ortiz*, the defendant did argue that *Apprendi* and *Ring* rendered the Delaware scheme unconstitutional. *Ortiz*, 869 A.2d at 303. This Court, however, did not consider whether Oritz's Sixth Amendment right had been violated when the judge found an aggravator that the jury had rejected. *See Capano v. State*, 889 A.2d 968, 973 (2006) (less than unanimous finding of statutory aggravator is an acquittal of that aggravator).

[2] *See* Appellant's Opening Brief at 22-23.

and does not compel the judge to find the aggravator, unless and until the judge determines that it is made out.

Hurst now makes crystal clear that Delaware's continued entrustment to a judge of fact finding necessary to the imposition of death, rather than a jury, is unconstitutional under the Sixth Amendment. Even under the most parsimonious reading of *Hurst*, a Delaware defendant does not become "death-eligible" without the independent judicial finding of at least one aggravator. The Delaware capital punishment scheme thus violates the Sixth Amendment and should be struck down by this Court.

II. The Advisory Nature of Delaware's Death Penalty Scheme Prevents The Jury From Conducting The Sixth Amendment Fact-Finding Required By *Hurst.*

Hurst, establishes that when the jury plays an "advisory" role in sentencing, that role does not satisfy the "necessary factual finding that *Ring* requires." 136 S. Ct. at 622. Both the advisory nature of the Delaware jury's role in issuing a mere recommendation of sentence, and Section 4209(d)(1)'s requirement that the weighing be conducted based upon "the aggravating circumstances *found by the Court* to exist," minimizes for the jury the significance of its role in determining the existence of a statutory aggravating circumstance, in violation of *Hurst* and *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (emphasis added). As it stands, the Delaware scheme cannot be administered in a manner that gives the jury the necessary appreciation of their constitutionally crucial role in sentencing.

A. Delaware capital jury instructions, based on the Delaware death penalty statute, unconstitutionally inform the jury that the judge finds the statutory aggravating circumstance.

Delaware juries that are instructed in accordance with the actual language in Section 4209(d)(1), are expressly informed that the trial judge will sentence the defendant to death if the "aggravating circumstances found by the Court to exist outweigh the mitigating circumstances . . . ." Trial courts, following the natural implication of this statutory language, explicitly instruct juries that the trial court

will conduct the identical two part inquiry that the jury has conducted.[3] *See*, *e.g.*, *State v. Norman*, No. 0504005647A, Superior Court, Sussex County, 6/25/07 Tr. 17 (after describing the penalty jury's two tasks, court instructs that it will determine penalty "using the same process just described for you, the jury") (Appx. at 7); *State v. Shannon Johnson*, No. 0609017045, Superior Court, New Castle County, 4/4/08 Tr. at 56-57 (jury instructed that death sentence will result "if the court finds . . . at least one statutory aggravating circumstance) (Appx. at 13); *State v. Kevin Phillips*, No. 1210013272, Superior Court, New Castle County, 10/12/15 Tr. at 103 (court instructs that after jury performs its two tasks, "the court is required to conduct the identical inquiry") (Appx. at 19).[4]

These instructions unconstitutionally misinform the jury as to the nature and consequence of its role. To satisfy the Sixth Amendment, the jury's role must be that of ultimate decision maker regarding the statutory aggravating circumstance, not advisor. *Hurst*, 136 S. Ct. at 622. The jurors' perception of their role is critical in determining whether they are suitably engaged in fact-finding that satisfies the Sixth Amendment. *See id.* (Supreme Court does not take issue with Florida's contention that the Florida jury found the statutory aggravating circumstance;

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[3] The two part inquiry consists of first determining whether a statutory aggravator has been found beyond a reasonable doubt; and second, weighing the found aggravators against the found mitigators.

[4] All references to "Appx. __" herein refer to the Appendix filed contemporaneously herewith.

however, because the jury was acting in an advisory capacity, any such finding was constitutionally defective); *see also Caldwell*, 472 U.S. at 341 (the Court has "always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility'"). Typical Delaware instructions - consistent with the plain language of the statute - must inevitably lead the jury to understand that *all* of its findings are merely advisory, and that the sentencing court will independently decide whether any aggravator exists.

"Undefined words [in a statute] are given their ordinary, common meaning . . . ." *Wyatt v. Rescare Home Care*, 81 A.3d 1253, 1260 (Del. 2013). "Find" is a transitive verb (i.e., an action verb) that implies will. Its pertinent definitions include descriptive terms reflecting independent judgment (e.g., to "discover" or "come upon" by "study," "searching," or "effort"). *Merriam-Webster.com*. 2016. http://www.merriam-webster.com (defining "find") (last visited March 6, 2016). Thus, when capital juries are instructed that the judge finds the aggravators after the jury's work is concluded, those juries can only conclude that the judge will exercise his/her independent judgment in making those findings.

A Delaware judge who instructs the jury that s/he will weigh what s/he has "found," is only faithfully following the language of the statute. The information

that is conveyed to the jury, while unconstitutional, is consistent with Delaware statutory language. It is thus not surprising that juries are routinely instructed in this manner, and *not* routinely instructed that their finding on the statutory aggravator compels the judge to make the identical finding. Indeed, while Section 4209(c)(4) directs the trial court to instruct the jury on its responsibility to find and weigh aggravating (and mitigating) circumstances, the statute does not direct the court to inform the jury that its finding on the statutory aggravator compels the trial judge to make an identical finding. The language of the statute does not even require the trial judge to find the aggravator(s) found by the jury.

This inevitably leads to confusion among judges presiding over capital cases, thus presenting the mirror image of the *Caldwell* problem: Delaware judges, following the language of the statute, unconstitutionally arrogate to themselves the authority to independently find the statutory aggravating circumstance. The inverse of diminishing the jury's constitutional role is expanding, beyond constitutional limits, the judge's role. *See, e.g.*, *State v. McCoy*, 2012 WL 5552033, at *5 (Del. Super. Oct. 11, 2012) ("Court must determine [whether] at least one statutory aggravating circumstance exists;"); *State v. Small*, 2011 WL 2992038, at *3 (Del. Super. July 22, 2011) ("As a result [of the jury's finding on the statutory aggravating circumstance], the "Court must . . . like the jury, make

two findings. The Court must first find, beyond a reasonable doubt, the existence of at least one statutory aggravating factor. . . . ").

The problem can only be addressed by invalidating the statute. Any "fix" would require this Court to instruct the lower courts to discontinue their decades-long practice of reading the pertinent statutory language to the jury, or worse, to instruct the jury that – in the case of the death penalty statute – words should not be given their ordinary meaning.

In *Hurst*, the United States Supreme Court held that the Sixth Amendment does not permit a capital jury to play an advisory role in the "necessary fact[] finding required by *Ring*." 136 S. Ct. at 622. Allowing a jury to believe that the judge will determine the statutory aggravating circumstance renders its role advisory. Such a role is no less a violation of the Sixth Amendment than the jury's role in *Hurst*, because it precludes the jury's serious engagement in the fact-finding on a critical element in the life or death determination. *See Kansas v. Carr*, 133 S. Ct. 633, 642 (2016) (distinguishing between "judgement call" of mitigation which does not implicate constitution (as to burden of proof) and "purely factual determination" of statutory aggravation, which does). The Delaware death penalty statute violates both the Sixth and Eighth Amendment because it creates too great a constitutional risk that the jury perceives its role in voting on the statutory aggravating circumstance to be advisory, and thus creates "substantial unreliability"

in that determination. *Caldwell*, 472 U.S. at 330. Accordingly, its fact-finding as to the statutory aggravating circumstance does not meet the standard required by *Hurst*, 136 S. Ct. at 618.

In *Garden v. State*, 815 A.2d 327, 345 (Del. 2001) (superseded by statute), this Court found that the penalty jury had been "misled or misinformed" because the trial judge instructed the jury that its recommendation would be given great weight, and then gave that recommendation less than great weight. *Id.* at 344-45. If this Court assumes that the Delaware statute requires the jury to make the eligibility determination, then juries that are instructed that the judge will make the identical inquiry, are no less misinformed than the jury in *Garden*. Under such circumstances the jury's vote cannot satisfy *Hurst*. This Court cannot be confident that Delaware jurors are truly engaged in determining the existence of a statutory aggravating circumstance(s) in the manner required by *Hurst.*

B. The Delaware advisory scheme unconstitutionally minimizes the jury's appreciation of its responsibility in determining the statutory aggravating circumstance.

Even if Delaware juries believed that the judge does not determine the statutory aggravator, in Delaware (unlike Mississippi in *Caldwell*), the jury is actually instructed that the life or death decision rests elsewhere. This knowledge, as in *Caldwell*, necessarily informs the jury's lack of appreciation of the gravity of its task in determining the statutory aggravating circumstance.

In *Caldwell*, 472 U.S.at 328-29, the Court held that the Eighth Amendment prohibits death sentences that rest "on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *See also Ring*, 536 U.S. at 619 ("[T]he Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death.") (Breyer, J., concurring). Although in *Caldwell*, the death penalty statute gave the ultimate sentencing authority to the jury, its animating principle is that "the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." 472 U.S. at 333. While in Delaware the "suggestion" made to the jury is correct, it nonetheless visits the identical harm on the Delaware jury's appreciation of its constitutional role (i.e., determining the statutory aggravator) as was visited on the jury in *Caldwell*. Regardless of the nature of the jury's role in the life or death determination, the suggestion that the ultimate responsibility rests with others presents an equal danger that the role will be diminished.

The Delaware advisory scheme minimizes the jury's sense of responsibility in carrying out its purported constitutional role; it creates too great a constitutional

risk that the jury does not appreciate the gravity of its task because it knows that the ultimate decision rests elsewhere.

The constitutional infirmity found in *Caldwell* arose from instructing the jury that there would be appellate review of a death sentence; as a result, the jury would fail to "recognize the gravity of its task and proceed with the appropriate awareness of its truly awesome responsibility." 472 U.S. at 341; *see also id.* at 330 ("In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court."). The Delaware scenario is more constitutionally suspect than the scenario in *Caldwell*, because the minimizing instruction is legitimized by the Delaware statute. The Delaware penalty phase jury's diminished sense of responsibility in its finding of the statutory aggravating circumstance violates *Hurst*, because it impairs the legitimacy of the jury's Sixth Amendment fact-finding regarding the statutory aggravator. The fact that jurors know the ultimate decision does not rest with them, informs their appreciation of the gravity of their task in assessing the statutory aggravator. "[M]any of the jurors in Delaware focus solely on the portion of the judge's sentencing instructions that tells them they are only making a recommendation in order to absolve themselves of responsibility." Ross Kleinstuber, *"Only a Recommendation": How Delaware Capital Sentencing*

Law Subverts Meaningful Deliberations and Jurors' Feelings of Responsibility, 19 Widener L. Rev. 323, 331 (2013) (Appx. at 23, 31).

In Kleinstuber's study, a majority of the Delaware jurors interviewed maintained the belief that the defendant's fate was mostly the responsibility of the trial judge and the appellate court. Appx. at 32. A juror - who deliberated on the statutory aggravating circumstance - stated "we all knew when we went in there for that sentencing phase that it didn't matter really if we said yes to the judge or no to the judge. It's the judge's final decision." Appex at 34. Kleinstuber aptly observed: "If jurors are not taking their sentencing responsibility seriously, they may not be truly engaged in determining if a statutory aggravator exists beyond a reasonable doubt, as the *Ring* decision mandates." Appex. at 29.

Kleinstuber's study demonstrates that even if Delaware jurors believed that their finding of a statutory aggravator determined death eligibility, which they do not, their understanding that they do not make the ultimate life or death decision, impacts their finding of the statutory aggravator in a manner that violates the Sixth Amendment.

Because of the Delaware statute's explicit instruction to the jurors that they are only advisors, and the impact of that instruction on them, there can be no confidence that jurors are conducting the fact-finding required by *Hurst* in assessing the statutory aggravators. Accordingly, the statute is unconstitutional.

CONCLUSION

For all of the foregoing reasons, the Atlantic Center for Capital Representation respectfully urges the Court to conclude that Delaware's death penalty statute, 11 *Del. C.* § 4209(d)(1), violates the Sixth Amendment and is therefore invalid.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nicholas J. Rohrer, hereby certify that on March 9, 2016, I caused to be served a true and correct copy of the foregoing document upon the following counsel of record in the manner indicated below:

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