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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DERRICK POWELL,	)	No. 310, 2016
	)	
Appellant	)	ON APPEAL FROM
	)	THE SUPERIOR COURT OF THE
v.	)	STATE OF DELAWARE
	)	ID No. 0909000858
STATE OF DELAWARE,	)	
	)	
Appellee	)	

ON APPEAL FROM THE SUPERIOR COURT OF

THE STATE OF DELAWARE IN AND FOR SUSSEX COUNTY

MEMORANDUM IN SUPPORT OF APPELLANT'S MOTION TO VACATE A DEATH SENTENCE

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Dated: October 10, 2016

BACKGROUND AND PROCEDURAL HISTORY

Derrick Powell is a death-sentenced inmate. His appeal of the denial of his Amended Motion for Postconviction Relief is pending in this Court, although it has been stayed since June 29, 2016. On August 24, 2016, Mr. Powell filed a Motion to Vacate a Death Sentence. This Court agreed to hear the motion and set forth a schedule for legal memoranda and argument. This is Mr. Powell's Opening Memorandum.

The Jury Acquitted Mr. Powell of One Reckless Murder and Found Him Guilty of the Second Reckless Murder

Trial evidence established that Luis Flores and Christopher Reeves set up a deal to buy marijuana, but lacked the funds for the purchase. Mr. Powell accompanied them to the McDonald's in Georgetown, and the three formulated a plot to rob the seller. Mr. Powell is alleged to have shot at the seller, then the three fled in a Chrysler Sebring. Police followed. Their cars collided. Officer Chad Spicer was fatally shot. Reeves fled, hid, and was eventually apprehended days later. Mr. Powell was quickly apprehended at a nearby house. Flores stayed at the scene.[1] Reeves was charged and pled guilty to Disregarding a Police Signal and Resisting Arrest.[2] Flores was not charged at all.

[1] *See, Powell v. State*, 49 A.3d 1090, 1093-94 (Del. 2012); *State v. Powell*, 2011 WL 2041183 at *2-*7 (Del. Super. Ct.)
[2] *State v. Reeves*, ID No. 0909000883.

Flores was the major contributor to the DNA on the gun's trigger. The chance of the DNA coming from a different Hispanic male was 1 in 67 million. Reeves and Mr. Powell were minor contributors as well.[3]

The jury found Mr. Powell not guilty of recklessly killing Spicer while Spicer was in the lawful performance of his duties, but guilty of recklessly killing Spicer while fleeing from an attempted robbery. The penalty phase took seven days.[4] The jury deliberated for three hours and 20 minutes before rendering its advisory verdict.[5]

Judicial Factfinding Results in a Death Sentence[6]

Five of twelve Sussex County citizens voted that the mitigating circumstances outweighed those in aggravation. Of course, how the jurors reached their decisions cannot be known. The Superior Court judge, in his independent findings, stated he gave the recommendation "great weight."[7]

Applying the statute then in effect, the judge conducted independent factfinding and concluded, "the sentence is death."[8] The court found that "whether Powell actually formed an intent to kill the police officer is an unknown."[9]

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[3] *Trial Transcript (Tr.)* February 3, 2011 at S-95-96.
[4] D.I. 258.
[5] *Tr.*, February 23, 2011 at 82, 88.
[6] *State v. Powell*, 2011 WL 2041183 (Del. Super. Ct.).
[7] *Id.* at *11.
[8] *Id.* at *29.
[9] *Id.* at *14.

Nevertheless, the judge decided, "this was no accident. Powell intended to shoot at the police in order to get away."[10] In other words, the court independently determined intent even though the jury was never asked to do so. The court weighed this aggravator heavily.[11] Likewise, the court also found that "[Powell's] conduct rises to a level of reckless disregard to human life."[12] This was another finding the jury did not make, nor was it asked to make. Neither intent nor reckless disregard were alleged in the guilt phase, nor were they enumerated in the State's list of nonstatutory aggravators.

As required by statute, the State presented a list of 11 nonstatutory aggravating factors to the Court. The defense listed 14 mitigating factors.[13] The judge determined the evidence was overlapping. He considered some evidence presented by the defense as establishing aggravating factors, and vice versa.[14] The defense presented Mr. Powell's young age of 22 as a mitigating factor. A capital defendant's young age is often mitigating given the body of scientific evidence of brain development and the impetuosity of the young.[15] But the judge disregarded that evidence and instead decided, "twenty-two may be young, but society expects

[10] *Id.* at *14.
[11] *Id.* at *15.
[12] *Id.* at *11.
[13] *Id* at *14.
[14] *Id.* at *12.
[15] *See, e.g., Roper v. Simmons,* 543 U.S. 551, 559 (2005).

a person at the age of twenty-two to behave like an adult."[16] The judge found that what was mitigating about Mr. Powell's young age was it meant that a life sentence would be longer and under harsh conditions.[17]

Among the other nonstatutory aggravators the court found were established were the concurrent conviction for Attempted Robbery First Degree,[18] the impact of Mr. Spicer's death on relatives, family, friends, and community,[19] and Mr. Powell's poor performance as a Maryland probationer.[20] The court also held that three other incidents of prior violent conduct had been established.[21]

The fact that Mr. Powell grew up in "an abusive, drug-using, dysfunctional environment" was established as mitigating evidence.[22] The opinion is silent as to how much weight it was given. Then the judge considered all the mental health evidence—five experts testified. He decided that the brain disorder evidence was mitigating, but did not weigh it heavily.[23] Ignoring this Court's oft-repeated guidance that mitigating evidence is not limited to circumstances that might excuse or explain a defendant's criminal conduct,[24] the judge concluded:

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[16] *Powell* at *19.
[17] *Id.*
[18] *Id.* at *15.
[19] *Id.* at *16.
[20] *Id.*
[21] *Id.*at *18.
[22] *Id.*
[23] *Id.* at *28.
[24] *See, e.g., Sykes v. State,* --- A.3d. ---, 2015 WL 417514 at *7 (Del.); *Ploof v. State,* 75 A.3d 840, 856 (Del. 2013).

> The bottom line as to all of the brain disorder evidence is that it is not very helpful. The brain disorder testimony did not help in understanding the "why" as to September 1, 2009. There was no direct "cause and effect" opinions offered as to the diagnoses and why a person was killed.[25]

Ultimately, the judge found that the aggravating evidence outweighed the mitigating circumstances and sentenced Mr. Powell to death.[26]

This Court Finds Our Death Penalty Statute Constitutionally Infirm in Light of *Hurst.*

On January 12, 2016, the United States Supreme Court issued *Hurst v. Florida*,[27] invalidating Florida's death penalty statute. Florida, like Delaware, was a "recommendation state," in which the jury's vote is advisory. A judge must weigh the aggravating and mitigating circumstances to make the sentencing determination.[28] The *Hurst* court held Florida's statute infirm because it "did not require the jury to make the critical findings necessary to *impose* the death penalty."[29] Instead, a judge determined whether sufficient aggravating circumstances existed, and that the mitigating circumstances did not outweigh the aggravating circumstances.[30]

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[25] *Powell,* 2011 WL 2041183 at *28.
[26] *Id.* at *29.
[27] 136 S.Ct. 616 (2016).
[28] *Hurst* at 620; *Fla. Stat.* § 921.141(3).
[29] *Hurst* at 622 (emphasis added).
[30] *Id.*

The *Hurst* court noted that in Florida, the advisory jury "does not make specific factual findings with regard to the existence of *mitigating or aggravating* circumstances and its recommendation is not binding on the trial judge."[31] Justice Breyer concurred, on the same Eighth Amendment grounds he expressed in *Ring*: "the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death."[32] Only Justice Alito dissented in *Hurst*.

Capital cases were stayed in Delaware while this Court considered *Hurst*, in the form of answers to certified questions in a case styled *Rauf v. State*.[33] In *Rauf*, a majority of this Court held that *Hurst* requires a jury to unanimously and beyond a reasonable doubt find any aggravating circumstance alleged by the State, and that a jury must unanimously and beyond a reasonable doubt determine that aggravators outweigh mitigators if death is to be the sentence.[34] This Court also concluded that our death penalty statute[35] cannot be severed and preserved in a manner that would pass muster under *Hurst*.[36]

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[31] *Hurst* at 622.
[32] *Hurst* at 624, *citing Ring v. Arizona*, 536 U.S. 584, 614 (2002).
[33] ---A.3d ---, 2016 WL 4224252 (Del. 2016).
[34] *Rauf* at *1.
[35] 11 *Del. C.* § 4209.
[36] *Rauf* at *1.

ARGUMENT

I. Because *Ring* and *Hurst* Signify a Return to, and Not a Departure from, the Founders' Concept of the Jury's Role, Mr. Powell Should Not Be Executed.

The years since *Apprendi* have seen an inexorable march of Sixth Amendment jurisprudence returning the jury to the role envisioned by the Founders.[37] As to the death penalty, the wayward detour of the post-*Furman* years has now been course-corrected by *Hurst*. To execute Mr. Powell because he happened to be sentenced before the path was righted would be an unthinkable and draconian repudiation of Sixth Amendment protections. *Hurst* restored a bedrock due process right that existed all along; it must not be denied to Mr. Powell.

The Apprendi-Hurst *continuum confirms that elements of an offense must be found by a jury.*

The *Apprendi* court noted that modern-day distinctions between "elements" and "sentencing factors" did not exist at the time of the Founding.[38] Embracing substance over form, the court returned us to the relevant inquiry: "does the required finding expose the defendant to a greater punishment then authorized by the jury's verdict?"[39] As *Hurst* notes, the Supreme Court has deployed this axiomatic inquiry to restore the original role of the jury in a number of contexts

[37] *See,e.g., Rauf* at *24 n 216.
[38] *Apprendi v. New Jersey,* 530 U.S. 466,478 (2000).
[39] *Id.* at 494.

since *Apprendi*.[40]

Along the way, the Court has had little difficulty limiting[41] or outright overruling its own precedents. *Alleyne* is significant because its holding that facts leading to minimum mandatories are jury elements overruled *Harris v. United States*,[42] which was decided only 12 years before. In doing so, *Alleyne* returns to the principle that has guided due process for centuries: submitting to the jury "every fact that was a basis for imposing or increasing punishment."[43]

Rauf *establishes that* Hurst *is a return to bedrock Sixth Amendment principles.*

The *Rauf* opinion chronicles the foundational understanding of the jury's crucial role in death cases in the pre-*Furman* years.[44] No doubt exists that for the vast majority of our nation's history, and Delaware's, that a death sentence could only be imposed when a unanimous jury said it should be. *Rauf's* description of the post-*Gregg* era of guided discretion[45] aptly describes how the Supreme Court's efforts to avoid capricious and arbitrary imposition had the unintended consequence of abrogating the constitutional mandate of the jury's role as

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[40] *Hurst* at 621(applying *Apprendi* to plea bargains); *Blakely v. Washington*, 542 U.S. 296 (2004)(federal sentencing guidelines); *United States v. Booker*, 543 U.S. 220 (2005)(criminal fines); *Alleyne v. United States*, 133 S.Ct. 2151 (2013)(mandatory minimum sentences)).
[41] *Alleyne* at 2156 (describing efforts to establish and delineate the term "sentencing factor," first used in *McMillan v. Pennsylvania,* 477 U.S. 79 (1986).
[42] 536 U.S. 545 (2002)
[43] *Alleyne* at 2159.
[44] *Rauf* at *5-*9.
[45] *Id.* at *10-*16.

factfinder.

Even during this post-*Gregg* constitutional detour, our State became an outlier: from 1991[46] to the time *Hurst* was decided, Delaware was among only three which relegated the jury's role to merely an advisory one.[47]

Derrick Powell must not be executed because of an anomalous misstep in our constitutional jurisprudence.

There can be no doubt that Derrick Powell's death sentence is anomalous to *Hurst's* central holding: "the Sixth Amendment requires a jury, not a judge to find each fact necessary to impose a sentence of death."[48] As *Hurst* and *Rauf* point out, the maximum punishment that both Timothy Ring *and* Timothy Hurst could have received without judicial factfinding was life.[49]

In fact, Mr. Powell's sentence is an emblematic example of judicial factfinding. The judge unilaterally decided Mr. Powell killed with intent and with reckless disregard for human life—a close parallel to the finding by the judge who sentenced Timothy Ring.[50] Moreover, Mr. Powell's judge decided to give little weight to crucial mitigating evidence because it did not explain the "why" as to

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[46] Our State required unanimous jury sentencing until the life sentences in the Brooks Armored Car murder cases, which caused the General Assembly to modify our statute. *See, State v. Cohen,* 604 A.2d 846 (Del. 1992); *Rauf* at *16 n 143.
[47] *Id.* at *22.
[48] *Hurst* at 619.
[49] *Hurst* at 622; *Rauf* at *37.
[50] *Ring v. Arizona,* 536 U.S. 584, 594 (2001)(in a felony murder proceeding, judge in a special verdict found that Ring "is the one who shot and killed Mr. Magoch" and further found that Ring was a major participant.).

what happened.[51] As to Mr. Powell's young age of 22, the judge alone decided "society expects a person at the age of 22 to behave like an adult."[52]

If Derrick Powell is executed, it will be because he had the misfortune to be sentenced during a period of constitutional jurisprudence that has now been recognized as misguided, and corrected by *Apprendi, Ring,* and *Hurst*. His death would be a ratification of a 40-year misstep that is anathema to our understanding of the Sixth Amendment since the Founding. His death should not result from the timing of our Supreme Court's gradual realization that juries were improperly cut out of the sentencing process.

The happenstance of Mr. Powell being sentenced between* Ring/Brice *and* Hurst/Rauf *should not result in his death.

Moreover, Mr. Powell's death would be the result of this Court's interpretation of *Ring* in *Brice*,[53] which maintained a distinction between eligibility facts and imposition facts. *Hurst* confirms that the distinction is nonexistent: all facts necessary for the imposition of death must be found by a jury. Like *Spaziano* and *Hildwin, Brice* is "no longer viable" after *Hurst* and has been overruled.[54]

In fact, *Hurst* should be seen not as an extension or reinterpretation of *Ring,* but rather as further confirmation of the core requirement of unanimous jury

[51] *State v. Powell*, 2011 WL 2041183 at *28 (Del. Super. Ct.).
[52] *Id.* at 19.
[53] *Brice v. State,* 815 A.2d 314, 320 (Del. 2003).
[54] *Rauf* at *28, *45, overruling *State v. Brice,* 815 A.2d 314 (Del. 2003).

findings to impose death sentences. Basic tenets of judicial restraint compel the Court to limit its holdings to the specific constitutional question before it.[55] By addressing itself only to the issue raised on appeal in *Ring*, the *Ring* court created the miasma surrounding death eligibility and death imposition. Although the artificial distinction was cleared away in *Hurst,* the constitutional principles existed all along.

The Arizona statute addressed in *Ring* was unique. It listed 10 statutory aggravators. Nonstatutory aggravators were not considered. In the special verdict, the judge was required to find the "existence or nonexistence" of all 10 factors.[56] Finding at least one, the judge "shall *impose* a sentence of death" if the mitigating circumstances were insufficient to call for leniency.[57] Under the Arizona statute, the judge, in one proceeding, considered all the facts necessary to impose or not impose a sentence of death. The scheme did not have separate eligibility and imposition phases.

As Justice Ginsburg noted, "Ring's claim is tightly delineated: "He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him…*nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death*

[55] *See, e.g., Spector Motor Service, Inc. v. McLaughlin,* 323 U.S. 101, 105 (1944).
[56] 1991 A.R.S. § 13-703(E).
[57] *Id.* (emphasis added).

penalty."[58] Ring limited his argument to a post-*Apprendi* syllogism: if *Apprendi* conditions an increase in the maximum punishment on a jury finding of fact, and the death penalty is an increase in the maximum punishment, then *Apprendi* applies to capital murder cases.[59] If the *Ring* opinion appears to be circumscribed, it is because the Court was answering the question posed.

But there is ample support in *Ring* for the principle that the Sixth Amendment requires a jury to find all facts necessary to impose a death sentence. Justice Ginsburg noted:

> The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both.[60]

Justice Scalia concurred with equal force:

> I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to the imposition of the level of punishment the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.[61]

The *Hurst* court confirms that the Sixth Amendment guarantee does not solely apply to one fact which determines death eligibility. It did so by referring

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[58] *Ring* at 597 n 4. (emphasis added).
[59] *Petitioner's Brief* at *17 (2002).
[60] *Ring* at 609.
[61] *Ring* at 610.

back directly to *Ring*:

> 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.[62]

In analyzing Florida's statute, the *Hurst* court found it constitutionally infirm because the judge had a "central role" in finding both the aggravating and mitigating facts.[63] By connecting Ring's case and Hurst's case, the Court made clear that the constitutional principles announced since *Apprendi* are not innovations but rather, are the embodiment of long-cherished rights.

Timothy Ring, Timothy Hurst, and Derrick Powell were all sentenced to death on facts found by a judge. To put Mr. Powell to death because he was sentenced in the post-*Ring*, pre-*Hurst* time window would be an utterly permanent and unjust result. This Court should recognize that truth, and give meaning to the venerated phrase, "death is different,"[64] and vacate his sentence.

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[62] *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016).
[63] *Id* at 622.
[64] *See, e.g., Rauf* at *27.

II. Derrick Powell's Death Sentence Violates the Delaware Constitution and Must Be Vacated.

Delaware embraces traditions of dual sovereignty.

The rights and liberties set forth in the federal constitution define the minimum. When state constitutions provide broader protections, whether substantive or procedural, those broader protections pertain.[65] In fact, to perceive our State constitution to be but a mirror of the federal constitution, this Court has held, would be to relinquish the importance of our State's sovereignty and become "less of a State than its sister State who recognize the independent significance of their Constitutions."[66]

Our State constitutional jurisprudence has long given meaning to the concept of dual sovereignty in Delaware. By carefully considering the textual and structural differences between constitutions, and by considering State law, traditions, and interests, this Court has our State constitution as an independent source for recognizing and protecting individual rights.[67] As a result, our citizens enjoy greater protections and freedoms than the minimum described in the federal constitution.[68]

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[65] *Sanders v. State,* 585 A.2d 117, 145, *citing Mills v. Rogers,* 457 U.S. 291, 300 (1982).
[66] *Id.* at 145-146.
[67] *State v. Jones,* 745 A.2d 856, 864-65 (Del. 1999).
[68] *See, e.g, Jones v. State,* 745 A.2d 856 (Del. 1999)(greater protection as to when an individual is seized by the State), *Doe v .Wilm. Housing Auth.* 88 A.3d 654 (Del. 2014)(broader right to bear arms), *Hammond v. State,* 569A.2d 81 (Del. 1987)(broader protections in preservation of evidence), *Dorsey v. State,* 761 A.2d 807 (Del. 2000)(declining to adopt the federal good faith

The right to trial by jury in Delaware precedes and exceeds the federal law.

Supreme among our Delaware constitutional protections is the right to trial by jury. As *Claudio*[69] and its progeny fully explain, Article I, § 4 "guarantees the right to trial by jury as it existed at common law."[70] The Delaware constitution, unlike its federal counterpart,[71] incorporates all the characteristics of the jury trial from the common law, including the unanimity requirement.[72]

The right to jury trial as existed at common law predates the federal constitution and was embedded in its 1776 Declaration of Rights and Fundamental Rules, its 1776 constitution and every one thereafter.[73] It remains vital to this day. Just last year, in *McCoy v. State,*[74] this Court granted a new trial, on State constitutional grounds, when the trial judge refused the capital murder defendant a peremptory strike. Although no federal right to peremptory challenge exists, at common law, the peremptory challenge was considered an essential component of the jury trial right.[75] As such, this Court reversed on Delaware constitutional grounds. In doing so, this Court upheld the validity of implementing rules which

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exception for search warrants), *Bryan v. State,* 571 A.2d 170 (Del. 1988)(broader protections in the right to counsel).
[69] *Claudio v. State,* 585 A.2d 1278, 1301 (Del. 1991).
[70] *Fountain v. State,* 275 A.2d 251, 251 (Del. 1971).
[71] *See, Apodaca v. Oregon,* 406 U.S. 404 (1972)(holding that the federal constitution does not require jury unanimity in state trials).
[72] *Claudio* at 1290-1301.
[73] *Claudio* at 1290-1291.
[74] 112 A.3d 239 (Del. 2015).
[75] *Id.* at 256.

give effect to the right to jury trial as it existed at common law.[76]

Derrick Powell was deprived of his right to a jury trial under the Delaware Constitution.

John Dickinson, Richard Bassett, and our other constitutional forebears[77] would doubtless be shocked that in Delaware, we ever deprived a defendant in a capital case his right to a jury trial. It is inconceivable that the delegates to our constitutional convention in 1791 would have approved a provision reading, "trial by jury shall be as heretofore, with the exception of capital murder cases." The framers of our 1776 constitution would certainly have found repugnant a suggestion that, "trial by jury of the facts where they arise is one of the greatest securities of the lives, liberties and estates of the people,[78] except when it comes to capital murder cases."

The lineage of this radical departure from our fundamental Delaware principles is easily traced. Federal post-*Furman* jurisprudence was mission-oriented: to bring guided discretion to capital punishment in a manner that avoided arbitrary and capricious imposition. Our General Assembly and judiciary followed along. But that pendulum, in the *Apprendi-Ring-Hurst* era has returned to an equipoise between constitutional rights. The jury trial right can and must coexist

[76] *Id.*
[77] *See, Claudio* at 1291-1293.
[78] *Claudio* at 1296, citing 1 *Del.Laws*, App. 81.

with the rights embodied in the Eighth Amendment.

The other crucial development in Delaware's repudiation of the jury trial right in capital cases occurred when this Court answered certified questions in *Cohen v. State*.[79] This Court was asked to pass upon the constitutionality of judge sentencing after the General Assembly changed our statute in response to life sentences in a high profile murder case.[80] *Cohen* held that sentencing determinations are not "facts" upon which the jury must decide guilt or innocence, so the statute did not do insult to our State constitution.[81] *Apprendi* and its progeny leave no doubt that *Cohen* misconstrued what facts must be found by a jury.[82]

A judge alone found the facts to sentence Derrick Powell to death during a time when our State constitutional mandates were left unprotected. His sentence defies our centuries-long Delaware constitutional heritage.

A right is meaningless without a corresponding remedy; Mr. Powell's death sentence must be vacated.

This Court has held, "without a constitutional remedy, a Delaware 'constitutional right' is an oxymoron that could unravel the entire fabric of protections in Delaware's two hundred and twenty-five years old Declaration of

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[79] 604 A.2d 846 (Del. 1992).
[80] *See, Rauf* at *16 n 143.
[81] *Cohen* at 852.
[82] *See, Apprendi* at 477: "the fundamental meaning of the jury trial guarantee of the Sixth Amendment is that all facts essential to the imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt." (Scalia, J., concurring).

Rights."[83] The 1776 framers of our State constitution, in adopting the common law, were informed by Blackstone's teachings that "every right, when withheld, must have a remedy, and every injury its proper redress."[84] The intervening centuries have seen no diminution of those principles.

This Court granted Isaiah McCoy a new capital murder trial because "any other conclusion would leave McCoy without a remedy for the erroneous denial of his right to exercise a peremptory challenge."[85] This Court granted the postconviction remedy of a new penalty phase to Thomas Capano, because a jury did not unanimously find the statutory aggravating circumstance, in violation of *Ring*.[86] The remedy in *Capano* was premised on the Delaware Constitution's guarantee that verdicts must be unanimous.[87]

The facts necessary to impose a death sentence on Derrick Powell were not found unanimously by a jury. His rights under the Delaware Constitution were violated, and that same constitution requires a remedy. The only available—and necessary—remedy is to vacate his death sentence.

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[83] *Dorsey v. State,* 761 A.2d 807, 820 (Del. 2000).
[84] *Dorsey* at 817, *citing* 3 *William Blackstone, Commentaries* at 109; *See also, Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163 (1803).
[85] *McCoy* at 258.
[86] *Capano v. State,* 889 A.2d 968, 980 (Del. 2006).
[87] *Id.* at 979.

III. To Execute Derrick Powell Would Be So Unusual and Arbitrary that it Would Violate the Eighth Amendment.

The Eighth Amendment is aspirational and dynamic. It seeks to fulfill the fundamental "duty of the government to respect the dignity of all persons."[88] Eighth Amendment jurisprudence "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[89] It is by now axiomatic that the Supreme Court looks to "evolving standards of decency that mark the progress of a maturing society" in considering whether a punishment violates the Cruel and Unusual clause.[90] [91]

In bringing meaning to our evolving standards paradigm, the Supreme Court has repeatedly held that it looks to objective markers, most particularly the "legislation enacted by our country's legislatures."[92] It did so in *Atkins v. Virginia*, finding significant that 16 states enacted legislature to ban the execution of the intellectually disabled in the preceding 13 years.[93] As the *Atkins* court noted, "it is not so much the number of these States that is significant, but the consistency of the direction of the change."[94]

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[88] *Roper v. Simmons,* 543 U.S. 551, 560 (2005).
[89] *Weems v. United States*, 217 U.S. 349, 378 (1910).
[90] *See, Trop* at 100 (1958); *Roper v. Simmons,* 543 U.S. 551, 560 (2005); *Hall v. Florida,* 134 S.Ct. 1986, 1992 (2014).
[91] Delaware's counterpart to the Eighth Amendment, Art. 1, § 11, adheres to the same general principles. *See, Sanders v. State,* 585 A.2d 117, 144 (Del. 1990).
[92] *Penry v. Lynaugh,* 492 U.S. 302, 331 (1989).
[93] *Atkins v. Virginia,* 536 U.S. 304, 314-315. (2002).
[94] *Id.* at 315.

Judge sentencing in capital cases was an outlier even when it was permitted.

The insinuation of judge factfinding into capital cases began, innocently enough, with the Supreme Court's recognition that "death is different from any other punishment imposed under our system of criminal justice."[95] That qualitative difference wrought jurisprudence aimed at "minimizing the risk of arbitrary and capricious action"[96] in our administration of the ultimate penalty. In enacting changes that were consonant with guided discretion principles, a few States, including ours, removed the jury from its proper factfinding role.

This development occurred largely because the Supreme Court said it could. Despite holding in *Witherspoon* that "capital juries express the conscience of the community on the ultimate question of life or death,"[97] the Supreme Court acquiesced to capital judge sentencing in the nascent days of the restored death penalty.[98] The later holdings of *Spaziano*[99] and *Hildwin*[100] buttressed that position, until it was exposed repugnant to the Sixth Amendment in *Apprendi, Ring,* and most recently, *Hurst.*

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[95] *Gregg v. Georgia,* 428 U.S. 153, 188 (1976).
[96] *Gregg* at 195.
[97] *Witherspoon v. Illinois,* 391 U.S. 510, 519 (1968).
[98] *Proffitt v. Florida,* 428 U.S. 242 (1976)
[99] *Spaziano v. Florida,* 468 U.S. 447 (1984).
[100] *Hildwin v. Florida,* 490 U.S. 638 (1989).

Even before* Ring, *judge-only and hybrid schemes were unusual.

Although constitutionally permitted, nonjury schemes were still a rarity in 2002. When *Ring* was decided, 29 of the 38 death penalty States committed life-or-death decisions to juries.[101] That left five judge-only States[102] and four states, including Delaware, with advisory jury "hybrid systems."[103] Delaware was among the jury States until 1991, but left the mainstream—76% of the death penalty States empowered the jury to make the life-or-death decision.

After* Ring, *hybrid sentencing schemes were exceedingly rare.

In response to *Ring*, Arizona,[104] Colorado,[105] Idaho,[106] Indiana,[107] and Nevada[108] became jury-only States. Delaware retained an advisory jury system for the finding and weighing of aggravation and mitigation.[109] By the time Justice Sotomayor dissented from the denial of *certiorari* in *Woodward v. Alabama*, Delaware, Florida, and Alabama were the only advisory jury States remaining.[110][111] In other words, just 9% of the capital punishment States were identified by Justice

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[101] *Ring* at 608 n 6.
[102] *Id.*; Arizona, Colorado, Idaho, Montana, and Nebraska.
[103] *Id.*; Delaware, Alabama, Florida, and Indiana.
[104] A.R.S. § 13-752 (2002).
[105] Colo. Crim. P. § 32 (2002).
[106] Id. Code § 18-4004 (2003).
[107] Ind. Code Ann. § 35-50-2-9 (2002).
[108] Nev. Rev. Stat. Ann. § 175.554 (2003).
[109] 11 *Del. C.* § 4209 (2002).
[110] *Woodward v. Alabama,* 134 S.Ct. 405, 407 (Mem.) (2013)(Sotomayor, J., dissenting).
[111] Montana is referred to as a judge-only State in *Woodward,* but the statutory aggravator must be found by the "trier of fact" beyond a reasonable doubt. MCA 46-18-302(b). Nebraska repealed its death penalty in 2015. Neb. Rev. St. § 28-105 (2015).

Sotomayor as "judge override" States.[112]

The idiosyncratic Delaware scheme imposed death in a manner that was qualitatively different than the jury states.

In *Caldwell v. Mississippi,* the Supreme Court affirmed that the Constitution does not permit a sentence of death when the jury has been led to believe the ultimate responsibility lies elsewhere.[113] Justice Marshall echoed Justice Harlan's pre-*Furman* holding that "jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision."[114]

Caldwell's precepts did not find a home in Delaware. Professor Kleinstuber's empirical study of 35 actual Delaware jurors from eight capital trials revealed something close to juror nonchalance about the process. Over half the jurors surveyed perceived the sentencing decision was "mostly the responsibility of the judge and appeals courts."[115] Out of five factors responsible for punishment (the law, the judge, the jury, the individual juror, and the defendant), "the jury" did not even crack the top three, and "the individual juror" ran dead last in order of importance.[116] An empirical study by the Capital Jury Project of the other advisory

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[112] *Woodward* at 407. Only Alabama makes vigorous use of the judicial override.
[113] 472 U.S. 320, 328-29 (1985).
[114] *Id.* at 329-330, *citing McGautha v. California,* 402 U.S. 183, 208 (1971).
[115] Kleinstuber, Ross, *"Only a Recommendation": How Delaware Capital Sentencing Law Subverts Meaningful Deliberations and Jurors' Feelings of Responsibility,* 19 Widener L. Rev. 323, 335 (2013).
[116] *Id.* at 335.

jury States reveal a similar perception of lack of responsibility.[117] For example, only 55% of hybrid jurors thought the jury was more responsible for the sentence than the judge, compared to 82% in the binding States.[118]

The Delaware study's interviews with jurors reveal a shocking lack of deliberation, or even interest, in the proceedings: "why do we even have to go through this if at the end of the day, the judge makes the decision?" said one juror.[119] Moreover, 60% of the jurors had already made up their mind about penalty during the guilt phase; many could not even recall the mitigating evidence.[120]

The instructions given our penalty phase actually subvert meaningful deliberation. Said one juror, "honestly, everybody just wanted to get out, so everybody just put in their vote and we told the bailiff we were ready, so there was really no discussion."[121] Another juror stated, "I don't think there was a whole lot of deliberation because we didn't need to all agree."[122] Finally, one juror found the penalty phase much easier, in large part because "it did not have to be unanimous, and we knew it was only a recommendation and the judge could overrule it if he

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[117] William J. Bowers, Wanda D. Foglia, Jean E. Giles, and Michael E. Antonio, *The Decision Maker*
Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty
Decision-Making, 63 Wash. & Lee L. Rev. 931 (2006)
[118] *Id.* at 956.
[119] *Id.*at 339.
[120] *Id.* at 334.
[121] *Id.*at 340.
[122] *Id.* at 341.

didn't feel it was right."[123]

The study reveals that the recommendation from which the judge takes his or her soundings is a hollow and capricious one. By instructing the jury that it need not be unanimous and that the judge will conduct the same independent analysis, we have untethered the jury from its fundamental role and invited the very caprice and arbitrariness against which *Caldwell* cautions.

Of course, in Mr. Powell's case, the nature of the deliberations is unknowable. What is known with certainty is the jury began deliberating at 10:40 AM and were back with a vote at 2:00 PM—after seven days of testimony.[124]

Delaware's advisory jury scheme is a distinction *with* a difference: more death sentences. The Cornell Law School's comprehensive study of our death penalty cases from 1977-2007 establishes that death-sentencing rates increased dramatically once judges entered the sentencing picture.[125] The legislative frustration with juries that did not impose the death penalty was assuaged.[126] In murder cases with penalty hearings, death was imposed 19% of the time in the jury era, then 53% of the time in the post-1991 judge era, then 39% of the time in the

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[123] *Id.* at 337.
[124] *Tr.*, February 23, 2011 at 82, 88.
[125] Hans, Valerie P.; Blume, John H.; Eisenberg, Theodore; Hritz, Amelia Courtney; Johnson, Sheri Lynn; Royer, Caisa E.; Wells, Martin T., *The Death Penalty: Should the Judge or the Jury Decide Who Dies,* 15-02 Cornell L. Rev. 2, 6 (2014).
[126] *Id.* at 9 n 50, quoting the House Speaker: "elected officials are tired of these juries that don't impose the death penalty."

post-2002 hybrid era. In other words, Mr. Powell was sentenced in an era when death was imposed twice as often as when the jury discharged its awesome responsibility.

The imposition of Mr. Powell's death sentence would be antithetical to evolving standards of decency.

Mr. Powell was sentenced under a statute that permitted the wanton and freakish imposition of death decried by *Furman*.[127] This much is clear from the required review of legislation in our sister States. Judge sentencing and hybrid schemes were legislative rarities after *Furman*, and all but disappeared after *Ring*. The primary guidepost of evolving standards leaves no doubt that our scheme was so unusual as to violate the Eighth Amendment.[128]

Our anomalous statute led directly to arbitrary and capricious results. Relegated to mere advisors, juries in Delaware were unable to appreciate or fulfill their roles as the conscience of the community. The empirical data establish that Delaware death sentences were imposed at a dramatically higher rate than when juries occupied their proper constitutional role. Mr. Powell's sentence occurred at a time when our State did not uphold its Eighth Amendment duty to protect the dignity of all persons. Only by vacating his sentence can that dignity be restored.

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[127] *Furman v. Georgia,* 408 U.S. 238, 310 (1972)(Harlan, J., concurring).
[128] *See, Rauf* at *4 (noting that our State is "one of the few outliers" without jury sentencing.).

IV. Mr. Powell's Death Sentence Must Be Vacated Because Our Statute Was Unconstitutional As Applied to Him.

After *Furman*, this Court has considered several as-applied challenges to our death penalty statute after it has been found constitutionally infirm. It now must do so again, based on this Court's finding that 11 *Del. C.* § 4209 is nonseverable and unconstitutional in its entirety.[129] Specifically, the statute as applied to Mr. Powell deprived him of a unanimous jury finding of "any aggravating circumstance" beyond a reasonable doubt and a unanimous jury finding beyond a reasonable doubt that the "aggravating circumstances outweigh the mitigating circumstances."[130] Mr. Powell has demonstrated that on Sixth Amendment, Eighth Amendment, and Delaware constitutional grounds, the existing statute, as applied to him was unconstitutional and must not result in his death.

Post*-Furman *interpretations vacated all Delaware death sentences—twice.

Before *Furman*, Delaware had a mandatory death statute with a mercy statute safety valve.[131] This Court, in an attempt to implement the fractured guidance of *Furman*, invalidated the mercy statute because it allowed for "uncontrolled discretionary imposition of the death penalty."[132] This Court found

[129] *Rauf* at *2.
[130] *Id.*
[131] Formerly 11 *Del. C.* § 3901.
[132] *State v. Dickerson,* 298 A.2d 761, 764 (Del. 1972).

that our mandatory death statute could stand alone.[133] In doing so, however, this Court found the existing death sentences violated the due process clause.[134] After supplemental briefing, and with the agreement of the Attorney General and the Public Defender, this Court vacated all previously imposed death sentences.[135]

The mandatory death penalty was short-lived. After *Woodson v. North Carolina*,[136] this Court was asked to reconsider its interpretation of *Furman*. Once again, all death sentences were vacated and the sentences were commuted to mandatory life imprisonment.[137]

***This Court vacated Thomas Capano's death sentence as violative of* Ring.**

Capano was sentenced to death under the 1991 statute. On postconviction review, he raised an as-applied challenge to his sentence as procedurally flawed under *Ring*. This Court found that because the jury did not find the statutory aggravator unanimously, the sentencing procedure was unconstitutional as applied to him.[138] In doing so, this Court noted a truth which resonates today: "for over 230 years, Delaware has required that twelve members of a jury unanimously find as

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[133] *Id.* at 767.
[134] *Id.* at 768.
[135] *Id.* at 771.
[136] 428 U.S. 280, 303 (1976)(mandatory death statutes violate the cruel and unusual punishment clause).
[137] *State v. Spence,* 367 A.2d 983, 988 (Del. 1976).
[138] *Capano v. State,* 889 A.2d 968, 978 (Del. 2006). This Court has also considered as-applied challenges in similar circumstances, but found the jury's guilt phase verdict establishing the statutory aggravator comported with *Ring. See, e.g., Reyes v. State,* 819 A.2d 305, 316 (Del. 2003).

fact every element of a crime beyond a reasonable doubt."[139]

The *Capano* court's holdings are instructive because they underscore the indispensability of unanimous juries to our constitutional DNA: "the historical preference for unanimous juries reflects society's strong desire for accurate verdicts based on thoughtful and thorough deliberations by a panel representative of the community."[140] These noble sentiments, when juxtaposed against the insouciance of our non-unanimous, advisory jury system, demonstrate the magnitude of the constitutional deprivation in Mr. Powell's case.

Longstanding constitutional principles embedded in our federal and State constitutions renders the 2002 statute unconstitutional as applied to Mr. Powell.

The principles set forth in *Hurst* and confirmed in *Rauf* are not new. They have existed since the Founding. An application of these principles to Mr. Powell's proceeding renders the outcome constitutionally deficient. It lacked the safeguard of a unanimous jury finding of "any aggravating circumstance." It lacked the mandated jury factfinding and weighing of those facts under a reasonable doubt standard.

The fact that our constitutional principles were temporarily abrogated during the pendency of Mr. Powell's case does not mean they ceased to exist. This Court

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[139] *Id.*

[140] *Capano* at 979, *citing Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups,* 7 Psychol. Pub. Pol'y & L. 622, 669 (2001).

should adhere to the same as-applied principles it employed in 1972, 1976, and 2006. When a death penalty statute has been exposed as unconstitutional, the proceedings must be reconsidered; as applied to Mr. Powell, the sentence should be vacated.

V. To Execute Derrick Powell in a Post-*Rauf* Landscape Would Be a Repudiation of Fairness, Justice, and Decency.

Otis Phillips, a member of a gang called Sure Shots, killed one person at a nightclub in Wilmington then eliminated a witness by killing him at a community soccer tournament in Eden Park.[141] After a trial, the jury voted 12-0 for death. The judge sentenced him to death.[142] Yet he will not get the death penalty because the State conceded that under *Rauf,* Phillips had the "right not to be executed unless a jury concludes unanimously that it has no reasonable doubt that it is the appropriate sentence."[143] Yet the State still seeks Derrick Powell's execution.

The State will likely contend that various legal principles establish that Otis Phillips and Derrick Powell are not similarly situated, even though their death sentences were imposed by operation of the same statute. But vicissitudes and intricacies of procedure aside, is it just and right that Derrick Powell should be executed when Otis Phillips will not? If our jurisprudence is to be measured by

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[141] *Phillips v. State,* No. 497, 2015, State's Answering Brief, 2016 WL 4490366 (Del. Supr.) at *5-6.
[142] *Id.* at *2.
[143] *Id.* at *18, *citing Rauf* at *36.

evolving standards of decency, as it must, that question must be answered resoundingly in the negative.

Post-death penalty states do not execute those previously sentenced to die.

It is instructive to consider the fate of death row inmates from other jurisdictions who, in one manner or another, have repealed or abolished the death penalty. In 2012, Connecticut repealed its death penalty. In a 2015 comprehensive postconviction opinion, the Connecticut Supreme Court held that "it would be unconstitutionally cruel and unusual to execute offenders who committed capital crimes before [the date of repeal]."[144] As one concurrence put it: "our laws should never succumb to the inherent indecency associated with a vengeful purpose directed toward a few isolated individuals. I do not believe that this is the legacy which Connecticut wishes to leave to its future generations."[145]

The Connecticut Supreme Court's opinion states several grounds for abolishing retroactive executions: federal and State Eighth Amendment principles, the problem of racial disparity in the administration of the death penalty, and the utter lack of any deterrent effect of executing a prisoner in a State with no death penalty. Added to all these reasons is the unassailable reality that States do not carry out executions after a repeal or invalidation of their death penalty has gone

[144] *State v. Santiago,* 122 A.3d 1, 9 (Conn.).
[145] *Id.* at *230 (Eveleigh, J., concurring).

into effect.[146]

The consensus against executing death-sentenced inmates after repeal or invalidation of the statute is demonstrable by way of recent examples. Maryland abolished the death penalty in 2013.[147] In January 2015, Governor O'Malley commuted the sentences of all death row inmates.[148] After an 11-year moratorium on the death penalty, Illinois repealed its statute in 2011.[149] Then the governor issued an executive order commuting death sentences. New Jersey's legislature abolished its death penalty and applied the abolition retroactively.[150]

In New York, the prohibition on the death penalty was court-imposed. The Court of Appeals determined the statute was unconstitutional due to the "deadlock provision" that instructed the jury that in the event of a non-unanimous verdict, the defendant might serve only 20-25 years rather than life.[151] Finding that the provision may result in a coercive, and therefore unreliable, choice, the Court remanded for resentencing of the defendant to either life or 20 years to life.[152]

Three years later, giving *LaValle* its "full precedential value," the Court applied it retroactively to inmates already sentenced to death.[153] In doing so, the

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[146] *Id.* at *180.
[147] S.B. 276, 2013 Gen. Assemb. Sess. (Md. 2013).
[148] Executive Order 01.01.2015.06 (Md. 2015).
[149] S.B. 3539, 96th Gen. Assemb. Sess. (Ill. 2011).
[150] Assemb. 795, 212th Leg. Sess. (N.J. 2006).
[151] *People v. LaValle,* 817 N.E. 2d 341, 358 (N.Y. Ct. App. 2004).
[152] *Id.* at 368.
[153] *People v. Taylor,* 878 N.E. 2d 969, 983-84 (N.Y. Ct. App. 2007).

Court grounded its holding in the "irrevocable nature of capital punishment" and the "concomitant need for greater certainty in the outcome of capital jury sentences."[154]

In Delaware, as elsewhere, whether the abolition has come from the executive, legislative or judicial branch, the result has been the same: the existing death sentences have been vacated. Those decisions comport with a recognition of the awesome finality of death as a sentence, and recognize that death is truly different. To do otherwise would be grossly irreconcilable with the norm, and moreover, would be repugnant to our status as an enlightened society.

[154] *Id.*

CONCLUSION

As the foregoing has established, the overwhelming weight of constitutional jurisprudence requires that Mr. Powell's death sentence be vacated by this Court. The sentence was the product of judicial factfinding and the corresponding deprivation of Mr. Powell's right to a unanimous jury verdict and a standard of beyond a reasonable doubt. The sentence was imposed in violation of his right to due process, his rights under our Delaware Constitution, and his right to be free of cruel and unusual punishments. Finally, executing Mr. Powell when virtually all other repeal and abolition States have retroactively vacated its death sentences would be inhumane and unjust. For all these reasons, Derrick Powell respectfully asks this Court to vacate his death sentence.

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