EFiled: Oct 19 2016 09:16AM EDT
Filing ID 59717249
Case Number 310,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

| | |
|---|---|
| DERRICK POWELL,<br><br>Defendant-Appellant,<br><br>v.<br><br>STATE OF DELAWARE,<br><br>Plaintiff-Appellee. | No. 310, 2016<br><br>On Appeal from the Superior Court of the State of Delaware<br><br>Cr. ID No. 0909000858 |

# Amended Amicus Brief of Office of the Federal Public Defender for the District of Delaware as Amicus in Support of Appellant

OF COUNSEL:

Edson A. Bostic
Federal Public Defender
Tiffani D. Hurst
First Assistant Federal Public Defender
Jenny Osborne
Assistant Federal Public Defender
800 King Street, Suite 200
Wilmington, Delaware 19801
Telephone: 302-573-6010

MARGOLIS EDELSTEIN
Herbert W. Mondros, Esq. (#3308)
300 Delaware Avenue, Suite 800
Wilmington, DE 19801
Telephone: 302-888-1112

Dated: October 19, 2016

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

STATEMENT OF INTEREST ..... 2

INTRODUCTION ..... 3

ARGUMENT ..... 5

I. Regardless of whether this Court classifies the rule in *Rauf*—that all facts necessary for imposition of death must be found beyond a reasonable doubt—as a new substantive rule or a new watershed procedural rule, the law is well settled that the rule must be applied retroactively ..... 5

II. The Supreme Court's decision in *Schriro v. Summerlin*, refusing to retroactively apply *Ring v. Arizona*, is inapposite to determining that *Rauf* is retroactive ..... 16

CONCLUSION ..... 18

## TABLE OF AUTHORITIES

### Cases

*Apprendi v. New Jersey,* 530 U.S. 466 (2000).....17

*Bailey v. United States,* 516 U.S. 137 (1995) .....11

*Bousley v. United States*, 523 U.S. 614 (1998).....11

*Caldwell v. Mississippi*, 472 U.S. 320 (1985) .....16

*Danforth v. Minnesota*, 552 U.S. 264 (2008) .....9

*Flamer v. State*, 585 A.2d 736 (Del. 1990).....10

*Guardado v. Jones*, No. 4:15cv256-RH (N. D. Florida May 27, 2016).....5

*Hankerson v. North Carolina*, 432 U.S. 233 (1977) .....9

*Hildwin v. Florida,* 490 U.S. 638 (1989).....11

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

*In Re Winship,* 397 U.S. 358 (1970)..... passim

*Ivan V v. New York,* 407 U.S. 203 (1972)..... passim

*Johnson v. Alabama*, 2016 WL 1723290 (May 2, 2016); .....11

*Johnson v. United States,* 135 S. Ct. 2551 (2015)..... passim

*Kirksey v. Alabama*, 2016 WL 378578 (June 6, 2016).....12

*Miller v. Alabama,* 132 S. Ct. 2455 (2012).....12

*Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) ..... passim

*Neder v. United States*, 527 U.S. 1 (1999).....15

*Penry v. Lynaugh*, 492 U.S. 302 (1989) .....12

*Perry v. Florida*, No. SC 16-547 (Fla. Sup. Oct 15, 2016) .....6

*Rauf v. State*, 2016 WL 4224252 (Del. Aug. 2, 2016) ..... passim

*Ring v. Arizona,* 536 U.S. 584 (2002)..... passim

*Saffle v. Parks*, 494 U.S. 484 (1990).....9

*Schriro v. Summerlin,* 542 U.S. 348 (2004)..... passim

*Spaziano v. Florida*, 468 U.S. 447 (1984).....11

*State v. Cahill*, 443 A.2d 497 (1980) .....6

*State v. Grace*, 286 A.2d 754 (1971) .....6

*Sullivan v. Louisiana*, 508 U.S. 275 (1993).....15

*Teague v. Lane,* 489 U.S. 288 (1989) ..... passim

*Welch v. United States*, 136 S. Ct. 1257 (2016)..... passim

*Wimbley v. Alabama*, 2016 WL 410937 (May 31, 2016).....12

**Statutes & Constitutional Provisions**

11 Del. C. § 4209(d)(1).....18

U.S. Const. amend. VIII .....16

U.S. Const. amend. VI .....17

U.S. Const. amend. XIV ..... passim

## STATEMENT AND IDENTIFY OF AMICUS CURIAE, ITS INTEREST IN THE CASE, AND THE SOURCE OF ITS AUTHORITY TO FILE

The Office of the Federal Public Defender of the District of Delaware (Federal Defender) represents in various capacities eight of the twelve individuals currently on Delaware's death row whose cases were final when this court issued *Rauf v. State*, 2016 WL 4224252 (Del. Aug. 2, 2016). These clients will not benefit from *Rauf* unless this Court determines that it applies retroactively. Therefore the Federal Defender is interested in this case because of its life and death impact upon our clients. The Federal Defender offers this Court a substantive analysis of certain questions it faces in deciding Mr. Powell's motion, which will significantly impact our eight clients on death row.

## INTRODUCTION

The question of whether the new burden of proof rule announced in *Hurst v. Florida*[1] and *Rauf v. State*[2] is retroactive is settled: A change in the criminal burden of proof "substantially impairs the truth-finding function" in a way that implicates the presumption of innocence—that "bedrock" principle that lies at the "foundation of the administration of our criminal law."[3] The Supreme Court in *Ivan V v. New York*[4] found retroactive the new rule announced in *In Re Winship*[5] that increased the burden of proof rule in a juvenile proceeding. Later *Teague v. Lane*[6] incorporated language similar to that in *Ivan V* into its watershed procedural rule exception. The subsequent development of the *Teague* doctrine recognized by Justice Thomas in *Welch v. United States*,[7] and Justice Scalia in *Montgomery v.*

---

[1] 136 S. Ct. 616 (2016).

[2] 2016 WL 4224252 (Del. Aug. 2, 2016).

[3] *In re Winship*, 397 U.S. 358, 363-64 (1970); *Ivan V. v. New York*, 407 U.S. 203, 205 (1972).

[4] 407 U.S. at 204.

[5] 397 U.S. 358.

[6] 489 U.S. 288 (1989).

[7] *Welch v. United States*, 136 S. Ct. 1257, 1275 (2016) (Thomas, J., dissenting) ("Today's opinion [in *Welch*], underscores a larger problem with our retroactivity doctrine: The Court's retroactivity rules have become unmoored from the limiting principles that the Court invoked to justify the doctrine's existence. Under *Teague* itself, the question of whether *Johnson* applies retroactively would

*Louisiana*,[8] however, places *Hurst* and *Rauf* squarely in *Teague's* substantive new rule exception. In *Welch*, the Supreme Court extended the *Teague* substantive rule exception to include rules "that narrow the scope of a criminal statute by interpreting its terms:" *Hurst* and *Rauf* narrowed the scope of death penalty statutes by interpreting their terms.[9] Below, Amicus explains how the due process factfinding violation in *Hurst* and *Rauf* involves the same type of due process factfinding violation in *Johnson v. United States,*[10] which prompted the *Welch* Court to declare *Johnson* retroactive as a new substantive rule.

The State's reliance on *Schriro v. Summerlin's*[11] refusal to find *Ring v. Arizona*[12] retroactive is misplaced. *Ring* did not involve a Due Process Clause violation caused by the unconstitutional use of a lower burden of proof: *Ring* solely implicated the Sixth Amendment right to a jury. This significant distinction is fatal

---

be a straightforward "No." If this question is close now, that is only because the Court keeps moving the goalposts.").

[8] 136 S. Ct. 718, 744 (2016) (Scalia, J., dissenting, joined by Thomas & Alito, JJ.) (dicta describing the "requirement that the aggravators must outweigh the mitigators" as "substantie).

[9] 136 S. Ct. at 1265; *id.* at 1264-65 (2016).

[10] 135 S. Ct. 2551 (2015).

[11] 542 U.S. 348 (2004).

[12] 536 U.S. 584 (2002).

to the State's *Summerlin* argument, and central to why *Hurst* and *Rauf* fit both of *Teague*'s nonretroactivity exceptions.

## ARGUMENT

### I. Regardless of whether this Court classifies the rule in *Rauf*—that all facts necessary for imposition of death must be found beyond a reasonable doubt—as a new substantive rule or a new watershed procedural rule, the law is well settled that the rule must be applied retroactively.

Well settled Supreme Court precedent in *Ivan V v. State*[13] dictates that *Rauf v. State*[14] and *Hurst v. Florida*[15] apply to individuals whose cases were final when *Rauf* was issued regardless of whether this Court classifies *Rauf's* holding—that all facts necessary for imposition of death must be found *beyond a reasonable doubt*—as a new substantive rule or a new watershed procedural rule. This Court should find *Rauf* retroactive for the same reasons that the Supreme Court in *Ivan V* deemed *In re Winship*[16] retroactive: the difference in the burden of proof caused

---

[13] 407 U.S. 203; *see also Guardo v. Jones*, No. 4:15cv256-RH (N. D. Florida May 27, 2016) ("The Supreme Court has held a proof-beyond-a-reasonable-doubt decision retroactive.").

[14] 2016 WL 4224252.

[15] 136 S. Ct. 616.

[16] 397 U.S. 358.

the factfinding process to violate the Fourteenth Amendment Due Process Clause in a way that can result in the execution of a person innocent of the death penalty.[17]

The now-invalid Delaware death penalty statute authorized a death sentence to be imposed by a *preponderance of the evidence* finding that: (1) an aggravating circumstance exists; and (2) the aggravating circumstance(s) outweigh the mitigating circumstances.[18] *Hurst* and *Rauf* ruled, however, that a person can only be sentenced to death when a jury finds these two facts *beyond a reasonable doubt*.[19] Thus, *Hurst* and *Rauf* changed the burden of proof for imposing a death sentence.

---

[17] This Court has historically followed the rule. *See State v. Grace*, 286 A.2d 754 (1971), *superseded by statute as stated in State v. Cahill*, 443 A.2d 497, 498 (1980).

[18] 11 Del. C. § 4209(d)(1).

[19] *Hurst*, 136 S. Ct. at 621; *Rauf*, 2016 WL 4224252 at *2; *see also Perry v. Florida*, No. SC 16-547 at 4 (Fla. Sup. Oct 15, 2016) (In light of *Hurst*, the Florida Constitution requires "the findings necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury . . . . Those findings specifically include unanimity as to all aggravating factors to be considered, unanimity that sufficient aggravating factors exist for the imposition of the death penalty, unanimity that the aggravating factors outweigh the mitigating circumstances, and unanimity in the final jury recommendation for death.").

In 1972, the Supreme Court ruled in *Ivan V*[20] that the new rule announced in *Winship,*[21] changing the burden of proof for factfinding from the "preponderance of evidence" standard to a "beyond a reasonable doubt" standard, must be applied retroactively because this change implicated fact-finding reliability under the Due Process Clause. The *Ivan V* Court reasoned:

> the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in *Winship* was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect.[22]

The change in the burden of proof that was ruled retroactive in *Winship* is no different from the change in the burden of proof that occurred in *Hurst* and *Rauf*. In *Winship*, the Supreme Court struck down a state statute that permitted a determination of juvenile delinquency to be made by a preponderance of the evidence, rather than by beyond a reasonable doubt.[23] The delinquency judge in *Winship* acknowledged that the evidence might not have established guilt beyond a reasonable doubt, but rejected the contention that the Fourteenth Amendment Due

---

[20] 407 U.S. 203.

[21] 397 U.S. 358.

[22] 407 U.S. at 205.

[23] 397 U.S. at 369 (Harlan, J., concurring).

Process Clause required more than proof by a preponderance of the evidence.[24] The Supreme Court disagreed, explaining that the reasonable doubt standard plays a vital role in criminal procedure:

> The standard provides concrete substance for the presumption of innocence—that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law."[25]

The Supreme Court explained that a conviction based upon the civil preponderance standard would amount to "a lack of fundamental fairness."[26] In the worst case, the Supreme Court reasoned, the lower standard of proof could cause an innocent person to be convicted.[27] Just as in *Winship*, this Court in *Rauf* struck the state statute that permitted the death penalty to be imposed using a preponderance of the evidence standard for factfinding rather than the reasonable doubt standard. It follows that *Ivan V* controls here.

The Supreme Court in *Ivan V* determined that *Winship* was retroactive because the "reasonable-doubt standard 'is a prime instrument for reducing the risk

---

[24] *Id.* at 360.

[25] *Id.* at 363 (citation omitted).

[26] *Id.*

[27] *Id.* at 371 (Harlan, J., concurring).

of convictions resting on factual error.'"[28] This pre-*Teague* analysis, however, did not categorize the new *Winship* rule as substantive or procedural.[29]

Later, the *Teague* Court ruled that there were two exceptions to the general nonretroactivity requirement: These two exceptions apply when the new rule is substantive,[30] or when it is a fundamental, bedrock or watershed procedural rule contributing to fact-finding reliability.[31] *Teague* and its progeny, however, did not purport to overrule *Ivan V*, nor did it expressly indicate which *Teague* exception applied in *Ivan V*.

Nonetheless, the language in *Ivan V* that the "reasonable doubt standard" "reduc[es] the risk of convictions" based on "factual error" and is indispensable to

---

[28] 407 U.S. at 204; *see also Hankerson v. North Carolina*, 432 U.S. 233, 242-43 (1977) (full retroactivity afforded to requirement that State may not escape its burden of proof beyond a reasonable doubt by using presumptions to shift burdens of proof to the defense); .

[29] *Compare Ivan V with Teague v. Lane*, 489 U.S. 288 (1989).

[30] *Danforth v. Minnesota*, 552 U.S. 264, 266 (2008). "Although *Teague* describes new substantive rules as an exception to the bar on retroactive application of procedural rules, [the Supreme Court] has recognized that substantive rules 'are more accurately characterized as . . . not subject to the bar.'" *Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016) (citing *Schriro v. Summerlin*, 542 U.S. 348, 352 n.4 (2004) ("We have sometimes referred to rules of this latter type as falling under an exception to *Teague*'s bar on retroactive application of procedural rules; they are more accurately characterized as substantive rules not subject to the bar.") (citations omitted)).

[31] *Saffle v. Parks*, 494 U.S. 484, 495 (1990).

the "bedrock" principle of the "presumption of innocence" by "overcome[ing] an aspect of a criminal trial that substantially impairs the truth-finding function"[32] is similar to the language in *Teague* that only "watershed," procedural rules which "alter our understanding of [ ] bedrock procedural elements" are retroactive.[33]

But the "bright line" rules in *Teague* emphasized by the State[34] has blurred.[35] The *Teague* Court originally announced that a rule is only substantive if it renders certain conduct no longer criminal or a class of defendants no longer

---

[32] *See Ivan V, 407 U.S.* at 205-5 ("*Winship* expressly held that the reasonable-doubt standard "is a *prime instrument* for *reducing the risk of convictions resting on factual error*. The standard provides concrete substance for the *presumption of innocence*—that *bedrock* 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law' . . . . 'Due process commands that no man shall *lose his liberty* unless the Government has borne the burden of . . . convincing the factfinder of his guilt.' To this end, *the reasonable-doubt standard is indispensable*, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.'" Plainly, then, the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in *Winship* was to overcome an aspect of a criminal trial that *substantially impairs the truth-finding function*, and *Winship* is thus to be given complete retroactive effect.") (internal citations deleted) *(quoting Winship*, 397 U.S. at 363).

[33] 489 U.S. at 311.

[34] State's Opening Memo. at 12 (quoting *Flamer v. State*, 585 A.2d 736, 749 (Del. 1990)).

[35] *Welch*, 136 S. Ct. at 1276 (Thomas, J., dissenting); *Montgomery*, 136 S. Ct. at 743-44 (Scalia, J., dissenting, joined by Thomas, J., and Alito, J.).

punishable.[36] In contrast, the Supreme Court recently stated that "[a]lthough this Court has put great emphasis on substantive decisions that place certain conduct, classes of persons, or punishments beyond the legislative power of Congress, the Court has also recognized that some substantive decisions do not impose such restrictions."[37] For example, in *Bousley v. United States*,[38] the Supreme Court held *Bailey v. United States*[39] retroactive "even though Congress could (and later did) reverse *Bailey* by amending the statute." Thus *Bousley* "contradicts the contention that the *Teague* inquiry turns only on whether the decision at issue holds that Congress lacks some substantive power" to criminalize conduct or punish a class of people.[40] Also, in *Hurst*[41] itself the Supreme Court overruled *Hildwin v. Florida*[42] and *Spaziano v. Florida*,[43] which formed the basis for the Florida Supreme Court's ruling that *Ring* was non-retroactive, which might foreshadow what is to come. Recently, the Supreme Court in *Johnson v. Alabama* granted a

---

[36] 489 U.S. at 307.

[37] 136 S. Ct. at 1267.

[38] 523 U.S. 614 (1998).

[39] 516 U.S. 137 (1995).

[40] 136 S. Ct. at 1267.

[41] 136 S. Ct. at 618.

[42] 490 U.S. 638 (1989).

[43] 468 U.S. 447 (1984).

*Hurst*-based petition for rehearing, in a case where the certiorari petition had not made a *Hurst* or *Ring* argument, vacated the state court's judgment, and remanded to the state court for further consideration in light of *Hurst*. *See Johnson v. Alabama*, No. 15-7091, 2016 WL 1723290, at *1 (May 2, 2016); *see also Wimbley v. Alabama*, No. 15-7939, 2016 WL 410937, at *1 (May 31, 2016); *Kirksey v. Alabama*, No. 15-7912, 2016 WL 378578, at *1 (June 6, 2016).

Even more significant, *Montgomery*[44] and *Welch*[45] develop *Teague* in a way that categorizes *Winship* as a substantive rule. In *Montgomery*, the Supreme Court determined a new rule is substantive where "the Constitution itself deprives the State of the power to impose a certain penalty,"[46] and thereby found *Miller v. Alabama*[47] retroactive. "When an element of a criminal offense is deemed unconstitutional, a prisoner convicted under that offense receives a new trial where the government must prove the prisoner's conduct still fits within the modified definition of the crime."[48] Further, *Montgomery* reiterated that retroactive

---

[44] 136 S. Ct. 718.

[45] 136 S. Ct. at 1264-65.

[46] 136 S. Ct. at 729 (2016) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989).

[47] 132 S. Ct. 2455 (2012).

[48] 136 S. Ct. at 735.

treatment must be given to "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense."[49] *Montgomery* applies here.

Similarly in *Welch*, the Supreme Court defined substantive rules as rules "that narrow the scope of a criminal statute by interpreting its terms,"[50] and thereby found *Johnson v. United States*[51] retroactive. Both *Johnson* and *Rauf* involved defective factfinding which violate the Due Process Clause. The *Johnson* Court ruled that the "categorical approach" [52] to judicial factfinding regarding the

---

[49] *Id.* at 728 (citing Penry, 492 U.S. at 330.

[50] 136 S. Ct. at 1265, *id*. at 1264-1265.

[51] 135 S. Ct. 2551 (2015).

[52] *Johnson* involved the armed career criminal statute, where a defendant convicted of being a felon in possession of a firearm faces an enhanced penalty if he has three or more prior convictions for a "violent felony," which was defined in part as involving "conduct that presents a serious potential risk of physical injury to another." *Johnson*, 135 S. Ct. 2551. This definition, known as the "residual clause," increased the penalty that a court could impose from a maximum of ten years to a minimum of fifteen years and a maximum of life. *Id.* The Supreme Court found that the problem with the residual clause was the factfinding process of determining what constituted a violent felony, which required the court to consider an "abstract generic version of the offense," (a fact finding process known as the "categorical approach") instead of requiring the court to determine how an "individual offender might have committed" the offense on a particular occasion. *Id.* Thus, the residual clause failed not because the "serious potential risk" requirement enhanced the possible penalty, but because the "categorical approach" required courts to invoke a *defective factfinding process* by identifying a hypothetical risk posed by an abstract generic version of the offense.

residual clause of the armed career criminal statute was unconstitutional under the Due Process Clause, and thereby placed the implicated conduct beyond the ability of the Government to punish with a sentencing enhancement. Comparably, the courts in *Hurst* and *Rauf* ruled that the judicial *preponderance of the evidence* approach to factfinding rendered the death penalty statute unconstitutional: The lower burden of proof violates the Due Process Clause, which places the aggravating circumstances and weighing determination found under the preponderance of the evidence standard beyond the ability of the State to punish with a death sentence.[53] Aptly, the *Winship* Court rejected the suggestion that there is only a "'tenuous difference' between the reasonable doubt and preponderance standards":

> the preponderance test is susceptible to the misinterpretation that it calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted.[54]

Thus, the rules in *Johnson*, *Hurst* and *Rauf* deprive the State of the power to impose a certain penalty using a factfinding process that violates the Due Process Clause.

---

[53] *See Winship*, 397 U.S. 358.

[54] *Id.* at 367-58.

The characterization of the rulings in *Hurst* and *Rauf* as substantive is not frustrated by the fact that certain individuals who were found death eligible under the preponderance of the evidence standard might also be death eligible under the reasonable doubt standard. Indeed, *Johnson* was deemed retroactive despite that certain individuals might receive a violent felony enhancement where the factfinding does not involve the unconstitutional "categorical approach."[55] This is because, after *Johnson*, the Government can no longer apply the sentencing enhancement to an individual whose conduct is characterized as a violent felony *solely* based upon the "categorical approach." Similarly, in *Hurst* and *Rauf*, the State can no longer apply the sentencing enhancement of death to the category of individuals whose conduct is deemed death eligible *solely* based upon the preponderance of the evidence standard. Punishing offenders whose death sentences were determined by a preponderance of the evidence has become unlawful.[56]

---

[55] *See Welch*, 136 S. Ct. at 1265 ("*Johnson* establishes . . . that 'even the use of impeccable factfinding procedures could not legitimate' a sentence based on that clause.").

[56] Amicus contends that harmless error does not apply to *Hurst* and *Rauf* errors because *Hurst* and *Rauf* errors are structural. *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (denial of the right to a jury verdict beyond a reasonable doubt constitutes structural error); *Neder v. United States*, 527 U.S. 1, 8-9 (1999) (errors that "deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence" of

Put differently, *Hurst* and *Rauf* "changed the substantive reach" of Delaware's death penalty statute in a way similar to the change in the substantive reach of the armed career criminal statute in *Johnson*.[57] After *Hurst*, the Delaware death penalty statute "can no longer mandate or authorize any sentence" of death by relying on a preponderance of the evidence standard.[58] *Hurst* and *Rauf*, therefore announced a substantive rule entitled to retroactive effect.

II. The Supreme Court's decision in *Schriro v. Summerlin*, refusing to retroactively apply *Ring v. Arizona*, is inapposite to determining that *Rauf* is retroactive.

The State's reliance on *Schriro v. Summerlin*[59] is misplaced. The Supreme Court's decision in *Summerlin*, refusing to retroactively apply its decision in *Ring v. Arizona*,[60] is inapposite to this Court's determination of *Rauf's* retroactivity because the Arizona law at issue in *Ring* and the Delaware law at issue in *Rauf* are fundamentally different.

---

the death penalty are structural). But to the extent that harmless error applies (which it should not), it is worth noting that under the Eighth Amendment and *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985) (recognizing the significant impact of a jury's belief that the ultimate responsibility for determining whether a defendant will be sentenced to death lies elsewhere), the error in *Hurst* and *Rauf* cannot be found harmless.

[57] *Id*. at 1265.

[58] *Welch*, 136 S.Ct. at 1265.

[59] 542 U.S. 348, 355 (2004).

[60] 536 U.S. 584 (2002).

In *Ring*, the Supreme Court extended *Apprendi v. New Jersey*[61] to find that "[c]apital defendants . . . are entitled to a jury [rather than a judicial] determination of any fact on which the legislature conditions an increase in their maximum punishment."[62] Mr. Ring's claim was "tightly delineated[.] He contend[ed] only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him."[63] Mr. Ring's claim did not implicate the due process guarantee because "Arizona law already required aggravating factors to be proved *beyond a reasonable doubt*."[64] Indeed, the *Summerlin* Court took special note that *Ring* did not address the burden of proof.[65] Thus, the *Summerlin* Court ruled that *Ring* does not fall within *Teague*'s second exception because the evidence was too equivocal to support the conclusion that "judicial factfinding so 'seriously diminishe[s]' accuracy that there is an '"impermissibly large risk"' of punishing conduct the law does not reach."[66]

---

[61] 530 U.S. 466 (2000).

[62] *Ring*, 536 U.S. at 588.

[63] *Id.* at 597, n.4.

[64] *Summerlin*, 542 U.S. at 351, n.1; *Ring*, 536 U.S. at 597.

[65] *Id.* ("Because Arizona laws already required aggravating factors to be proved beyond a reasonable doubt, that aspect of *Apprendi* was not at issue.") (internal citations omitted).

[66] *Summerlin*, 542 U.S. at 356-57, 361.

Not true here. As explained in detail above, the judicial factfinding process in Delaware involved the lower preponderance of the evidence standard of proof, which violated the Due Process Clause.[67] Thus, under Supreme Court precedent, *Rauf's* increased burden of proof must be applied retroactively.

## CONCLUSION

Under the *Teague* retroactivity analysis and the recent decisions in *Welch* and *Montgomery*, this Court should hold that its decision in *Rauf v. State* applies to those defendants sentenced to death whose decisions were final when *Rauf* was issued.

Respectfully submitted,

OF COUNSEL:

Edson A. Bostic
Federal Public Defender
Tiffani D. Hurst
First Assistant Federal Public Defender
Jenny Osborne
Assistant Federal Public Defender
800 King Street, Suite 200
Wilmington, Delaware 19801
Telephone: 302-573-6010

MARGOLIS EDELSTEIN

*/s/ Herbert W. Mondros*
Herbert W. Mondros, Esq. (#3308)
300 Delaware Avenue, Suite 800
Wilmington, DE 19801
Telephone: 302-888-1112

[67] 11 Del. C. § 4209(d)(1).

CERTIFICATE OF SERVICE

I, Herbert W. Mondros, hereby certify that on this 19th day of October, 2016, a copy of the foregoing *Amended Amicus Brief of Office of the Federal Public Defender for the District of Delaware as Amicus in Support of Appellant* was served electronically via File & ServeXpress upon the following counsel of record:

Elizabeth R. McFarlan
Chief of Appeals
Delaware Department of Justice
820 N. French Street, 7th Floor
Wilmington, DE 19803

Patrick J. Collins, Esq.
Collins & Associates
716 North Tatnall Street, Suite 300
Wilmington, DE 19801

John R. Williams, DAG
Delaware Department of Justice
820 N. French Street, 7th Floor
Wilmington, DE 19803

Natalie Woloshin, Esq.
Woloshin Lynch & Natalie
3200 Concord Pike, PO Box 7329
Wilmington, DE 19803

*/s/ Herbert W. Mondros*
Herbert W. Mondros