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Case Number 310,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DERRICK POWELL,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	**No. 310, 2016**
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

STATE'S ANSWERING MEMORANDUM

Pursuant to this Court's September 6, 2016 Scheduling Order and in response to Derrick Powell's October 10, 2016 Opening Memorandum, the State of Delaware submits this Answering Memorandum in support of its position that neither *Hurst v. Florida*[1] nor *Rauf v. State*[2] apply retroactively to Powell's May 2011 death sentence.

In his Opening Memorandum, Powell does not address the retroactivity issue raised by the State in the August 24, 2016 Stipulation of Counsel in this pending appeal from the Superior Court's denial of postconviction relief on May 24, 2016. Likewise, Powell does not discuss, or even cite, the *Teague v. Lane*[3] retroactivity analysis applicable to federal habeas corpus petitions or this Court's 1990 adoption of the *Teague* retroactivity paradigm for State postconviction relief proceedings in

[1] 136 S. Ct. 616 (2016).
[2] 145 A.3d 430 (Del. 2016).
[3] 489 U.S. 288 (1989).

Flamer v. State.[4] Instead, Powell argues that his 2011 death sentence under 11 *Del. C.* § 4209 must now be vacated because "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."[5] Powell is incorrect.

Both of the 2016 decisions in *Hurst* and *Rauf* are based upon the right to a jury trial guaranteed by the Sixth Amendment to the United States Constitution. *See Hurst*, 136 S. Ct. at 619 ("[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."). The five certified questions this Court answered in *Rauf* are based only on the federal Constitution, not the Delaware Constitution.[6] What neither *Hurst* nor *Rauf* answered is whether those federal Sixth Amendment jury trial right decisions are retroactive to a case on collateral review. As set forth in the State's October 10, 2016 Opening Memorandum, neither *Hurst* nor *Rauf* applies retroactively to Powell's collateral review appeal from the trial court's denial of State postconviction relief. Consequently, any Sixth Amendment jury trial protection recognized in *Hurst* or *Rauf* has no application to Powell's 2011 death sentence.

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[4] 585 A.2d 736, 748-50 (Del. 1990).

[5] Powell's Op. Memo. at 26.

[6] The questions certified by the Superior Court included both the state and federal constitutional issues, but this Court specifically rejected consideration of the state constitutional issues. *See Rauf*, 145 A.3d at 433 & n.2 (noting that the certified questions solely address federal law and specifically the Eighth Amendment).

***Teague/Flamer* retroactivity rule applies to cases on collateral review.**

Powell protests that he should not be subjected to the death penalty because his 2011 death sentence was imposed in the time interval between the decision in *Ring v. Arizona*[7] and *Brice v. State*,[8] and the 2016 *Hurst* and *Rauf* Opinions,[9] but subsequent decisions announcing new constitutional rules of criminal procedure are not applied retroactively to cases on collateral review.

In adopting *Teague*'s bright line retroactivity rule in *Flamer*,[10] this Court 26 years ago refused to apply the Sixth Amendment right to counsel protection recognized in *Michigan v. Jackson*[11] to exclude Flamer's taped incriminatory statement made after police initiated conversation following a Magistrate's appointment of counsel for Flamer.[12] Flamer's case was final for collateral review retroactivity purposes in 1985, when the United States Supreme Court denied certiorari review a second time.[13] Thus, the 1986 new rule of *Michigan v. Jackson* provided no benefit to Flamer in postconviction when this Court adopted "a general rule of nonretroactivity for cases on collateral review."[14] In 1989, the Superior Court rejected Flamer's request to adopt a

[7] 536 U.S. 584 (2002).
[8] 815 A.2d 314 (Del. 2003).
[9] *See* Powell's Op. Mem. at 10.
[10] 585 A.2d at 748-50.
[11] 475 U.S. 625 (1986).
[12] *Flamer*, 585 A.2d at 743-45.
[13] *Flamer v. Delaware*, 474 U.S. 865 (1985).
[14] *Flamer*, 585 A.2d at 749.

different retroactivity rule under the State Constitution.[15] In 1990, this Court set forth is reasoning for treating defendants on direct appeal differently from those pursuing collateral review after a trial and affirmance on direct appeal. In *Flamer*, this Court stated:

> A postconviction relief court need apply only the constitutional standards that prevailed at the time the original proceedings took place. The application of a constitutional rule not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect.[16]

Balancing this State's interest in the finality of a conviction against Flamer's Sixth Amendment right to counsel, this Court adopted the *Teague* rule for determining questions of retroactivity for collateral review proceedings and denied Flamer relief. Flamer was executed on January 30, 1996, after exhausting his federal habeas corpus rights.

Twenty years after *Flamer*, this Court continued to utilize the *Teague* nonretroactivity rule in affirming the denial of postconviction relief in *Richardson v. State*.[17] Finality is an important jurisprudential consideration. As noted in *Flamer*, "It is a matter of fundamental importance that there be a definitive end to the litigable

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[15] *State v. Flamer*, 1989 WL 7083, at *10 (Del. Super. Ct. June 16, 1989).
[16] 585 A.2d at 749.
[17] 3 A.3d 233, 235-40 (Del. 2010) (finding the holding of *Allen v. State*, 970 A.2d 203 (Del. 2009), not to be retroactively applicable). *See also Ruiz v. State*, 2011 WL 2651093, at *2 n.9 (Del. July 6, 2011) (*dicta*).

aspect of the criminal process."[18] *Teague*'s "relatively restrictive ruling reflects the criminal justice system's commitment to finality."[19] "The 'costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus ... generally far outweigh the benefits of this application.'"[20] Like Flamer, Powell is not entitled to relief under the Sixth Amendment to the United States Constitution because the 2016 decisions in *Hurst* and *Rauf* are not retroactive to Powell's appeal from the denial of State postconviction relief.

The Eighth Amendment was not the basis for *Hurst* or *Rauf*.

Powell's assertion of an Eighth Amendment claim is also unavailing, because neither the United States Supreme Court nor this Court have declared the death penalty to be an unconstitutionally cruel and unusual punishment. In 1976, the United States Supreme Court rejected claims that the death penalty was *per se* cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution.[21]

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[18] 585 A.2d at 745. *See also Ploof v. State*, 75 A.3d 811, 820 (Del. 2013) (Rule 61 "is intended to correct errors in the trial process, not to allow defendants unlimited opportunities to relitigate their convictions.").

[19] Comment, *Between a Rock and a Hard 50: The Effect of the Alleyne Decision on Kansas's Sentencing Procedures*, 24 Kan. J.L. & Pub. Pol'y 273, 287 (2015). *See also* Note, *False Hope for Prisoners: The Dangers of Making* Apprendi v. New Jersey *Retroactively Applicable to Felony Drug Convictions*, 8 Tex. Wesleyan L. Rev. 49, 68 (2001).

[20] *Teague*, 489 U.S. at 310 (quoting J. Powell's concurrence in *Solem v. Stumes*, 465 U.S. 638, 654 (1984)).

[21] *See, e.g.*, *Gregg v. Georgia*, 428 U.S. 153, 187 (1976); *Proffitt v. Florida*, 428 U.S. 242, 246 (1976); *Jurek v. Texas*, 428 U.S. 262, 268-69 (1976).

Hurst and *Rauf* are both based upon the Sixth Amendment jury trial right, not the Eighth Amendment prohibition against cruel and unusual punishment. There is no controlling authority that Powell's 2011 death sentence must be vacated on Eighth Amendment grounds. There is also no violation of the Delaware constitutional prohibition against "cruel punishments" contained in Article I, § 11.[22] Neither *Hurst* nor *Rauf* categorically say that a death sentence may never be imposed under any circumstances. The two decisions merely announce that then existing statutory procedures in Florida (*Hurst*) and Delaware (*Rauf*) were constitutionally deficient. If those statutory deficiencies are corrected by subsequent legislation, both states may still have a death penalty.

Neither *Hurst* nor *Rauf* addressed the Delaware Constitution.

Powell is also not entitled to have his death sentence vacated under the 1897 Delaware Constitution. Delaware Constitution Article I, § 4 guarantees the right to trial by jury. Powell had a Superior Court jury trial. Whether any abridgement of that state constitutional right occurred by application of the procedures of 11 *Del. C.* § 4209 at the penalty hearing still involves application of the retroactivity analysis of *Teague* as adopted by this Court in *Flamer*. At the time of his February 2011 Superior Court jury trial, Powell's penalty phase hearing was conducted in accordance with the then

[22] *See generally State v. Dickerson*, 298 A.2d 761, 767-68 (Del. 1973) (In light of "the long history of capital punishment in this State from colonial times, we reaffirm the view that capital punishment per se is not violative of the constitutional guarantees against 'cruel' or 'cruel and unusual' punishment ....").

existing law. The fact that the law may have changed in 2016 does not mean the 2011 jury verdict is improper if the subsequent decisions in *Hurst* and *Rauf* are not retroactive to Powell's prosecution.

Powell's additional claims are unavailing.

In addition to his three grounds of attack based upon the Sixth Amendment, Eighth Amendment, and Delaware State Constitution, Powell argues that his death sentence should be vacated because: (1) statistical studies of Delaware's death penalty practice since 1972; (2) capital murder defendant Otis Phillips is receiving the benefit of *Rauf* in his direct appeal; and (3) state court decisions in Connecticut and New York have vacated prior death sentences. None of these three additional grounds provide a basis for relief here.

1. Statistical studies are not a proper basis for constitutional relief.

Statistical studies of Delaware death penalty cases since 1972 are of limited utility because of the extremely small sample of defendants.[23] Social science surveys are not the law, and far reaching conclusions cannot be drawn from relatively limited samples.[24] In 2013, the Kent County Superior Court rejected a racial discrimination allegation in another capital postconviction proceeding based upon the data assembled in a 2012 Iowa Law Review article.[25]

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[23] *See* Johnson, *The Delaware Death Penalty: An Empirical Study*, 97 Iowa L. Rev. 1925 (Oct. 2012) (Survey of 58 Delaware capital cases since 1972).
[24] *See McCleskey v. Kemp*, 481 U.S. 279 (1987).
[25] *State v. Sykes*, 2013 WL 3834048, at *2 (Del. Super. Ct. July 12, 2013), *aff'd*, 2015 WL 417514 (Del. Jan. 30, 2015).

The United States Supreme Court in *McCleskey v. Kemp* presented "the question whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations prove that McCleskey's capital sentence is unconstitutional under the Eighth or Fourteenth Amendment."[26] The U.S. Supreme Court discounted the weight that could be placed on the statistical study in the case, known as the "Baldus Study," which involved 2,000 Georgia cases, because it was based on a "small sample."[27] The Court rejected the proposition that a defendant could draw an inference from statistics to specific decisions in trials, made up of uniquely composed juries whose judgments took into account innumerable factors that vary according to the individual defendant and the facts of the particular capital offense.[28] If the multiple regression analysis of Professor Baldus in *McCleskey* was inadequate, the tiny Delaware sample suggested by Powell is even more deficient. "Most scholars [have] also concluded that McCleskey marked the end of statistical challenges to the death penalty."[29] Indeed, "'Since McCleskey, no court has allowed a claim of this kind.'"[30]

[26] 481 U.S. 279, 282-83 (1987).
[27] *Id.* at 205 n.15.
[28] *Id*. at 204.
[29] Steven F. Shatz and Terry Dalton, *Challenging the Death Penalty With Statistics: Furman, McCleskey, and a single County Case Study*, 34 Cardozo L. Rev. 1227, 1241 (2013).
[30] *Id*. at 1242 (quoting *Evans v. State*, 914 A.2d 25, 66 (Md. 2006)).

2. Powell's convictions and sentence are final and now subject only to collateral review.

Second, Powell complains that if Otis Phillips, a recently convicted capital murder defendant, is receiving the benefit of *Rauf* in his direct appeal, Powell should receive the same benefit in postconviction. But Powell and Phillips are not similarly situated. The *Teague*/*Flamer* general nonretroactivity rule applies to *collateral review*, not *direct appeal*. A defendant like Phillips, who is still on direct appeal, does receive the benefit of retroactive application of *Hurst* and *Rauf* to his pending direct appeal. In *Flamer*, this Court expressly stated, "we adopt a general rule of non-retroactivity for cases on collateral review."[31] Phillips is on direct appeal, not collateral review and his conviction is not final.

3. Delaware adopted the *Teague* analysis in *Flamer*.

Finally, Powell cites state court decisions from Connecticut and New York that are not controlling.[32] In *Danforth v. Minnesota*, the U.S. Supreme Court pointed out that *Teague* involved the federal habeas corpus statute and that states could adopt a different state law retroactivity rule.[33] Some states have allowed defendants on collateral review to benefit from retroactive application of new rules. Delaware saw the advantage of the federal bright line rule of *Teague* in 1990 and has continued to employ the *Teague/Flamer* non-retroactivity rule to cases on collateral review. *Flamer*

[31] 585 A.2d at 749.
[32] *See State v. Santiago*, 122 A.3d 1 (Conn. 2015); *People v. LaValle*, 817 N.E.2d 341 (N.Y. App. 2004).
[33] 552 U.S. 264, 275 (2005).

is the law on retroactivity in Delaware.

***ACLU amicus's* contentions are unavailing.**

The arguments by the ACLU Foundation Capital Punishment Project (ACLU) most closely parallel Powell's attack. That is, the ACLU filing also does not discuss or even cite the retroactivity decisions in *Teague* or *Flamer*.

The death penalty does not constitute cruel and unusual punishment.

The ACLU argues that executing Powell would violate the U.S. Constitution's Eighth Amendment prohibition against cruel and unusual punishment and the Delaware Constitution Article I, § 11 prohibition against "cruel punishments." Neither the U.S. Supreme Court nor this Court have ever reached such a conclusion. In death penalty cases from five states, the U.S. Supreme Court rejected the argument that imposition of a death sentence under any circumstances violates the Eighth Amendment of the U.S. Constitution.[34] These five decisions from forty years ago remain the law. A sentence of death is not *per se* cruel and unusual punishment prohibited by the U.S. Constitution's Eighth Amendment. Since 1973, Delaware constitutional law has remained settled that capital punishment is not "cruel" punishment prohibited by Article I, § 11 of the Delaware Constitution.[35] There is no

[34] *See Gregg v. Georgia*, 428 U.S. 153, 187 (1976); *Proffitt v. Florida*, 428 U.S. 242, 247 (1976); *Jurek v. Texas*, 428 U.S. 262, 268-69 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 285 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 331 (1976).

[35] *See State v. Dickerson*, 298 A.2d 761, 767-68 (Del. 1973) (capital punishment not

controlling authority for the ACLU's argument.

In 2004, the United States Supreme Court found *Ring*, a case holding Arizona's capital sentencing scheme unconstitutional, not to be retroactively applicable in collateral review.

The ACLU argues that Powell's death sentence for murdering a police officer in the line of duty is inconsistent with evolving standards of decency. The ACLU claims, "The societal consensus is proven by the fact that, in the modern death penalty era, no person has ever been executed under a death-penalty statute the U.S. Supreme Court or a state supreme court previously struck as unconstitutional. Indeed, both times this has occurred in Delaware, the entire death row was spared."[36] This "modern death penalty era" apparently commenced in 1972 with the decision in *Furman v. Georgia*, 408 U.S. 238 (1972).[37] The ACLU appears to initially claim that no death row inmate has been executed after a capital sentencing statute has been overturned, but later appears to qualify that broad assertion by adding, "Fifteen people have been executed since *Ring*, undoubtedly including some prisoners who would have prevailed under *Ring*'s

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per se "cruel" or "cruel and unusual" punishment). *See also Sykes v. State*, 953 A.2d 261, 266 n.8 (Del. 2008) (lethal injection not cruel and unusual punishment under U.S. or Delaware Constitutions); *Dawson v. State*, 673 A.2d 1186, 1196-97 (Del. 1996) (Delaware lethal injection punishment not cruel under State Constitution); *DeShields v. State*, 534 A.2d 630, 640 (Del. 1987) ("Nor can we rule, as a matter of law, that death by hanging is 'cruel' in violation of Article I, section 11 of the Delaware Constitution."); *State v. Deputy*, 644 A.2d 411, 420-22 (Del. Super. Ct. 1994), *aff'd*, 1994 WL 285767 (Del. June 21, 1994).

[36] ACLU Brief at 3.

[37] ACLU Brief at 5, 11.

holding."[38]

The evolution of retroactivity analysis.

Whatever the ACLU may be claiming about U.S. executions since 1972, there are at least three pertinent factors to consider in evaluating the retroactivity of capital statute invalidations for sentenced death row inmates. First, the retroactivity analysis applicable to federal habeas corpus petitioners changed radically in 1989 with the *Teague* decision.[39] The concept of retroactivity and its application is a modern jurisprudential issue.[40] The approach to when new constitutional rules of criminal procedure announced in court decisions is retroactive to previously convicted defendants has also been evolving.[41]

> Until the 1960s, U.S. courts followed a general rule of full retroactivity in all cases, whether civil or criminal, on direct or collateral review. The Warren Court, unwilling to allow its revolution in criminal procedure to throw open prison gates across the country, departed from this rule in Linkletter v. Walker by creating a balancing test to determine whether a new rule would apply retroactively in criminal cases.[42]

Starting with *Linkletter v. Walker*,[43] "[t]he Warren Court's revolutionary changes in

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[38] ACLU Brief at 15.
[39] 489 U.S. 288 (1989) (general rule of nonretroactivity for cases on collateral review).
[40] Kermit Roosevelt III, *A Little Theory Is A Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 Conn. L. Rev. 1075, 1082 (1999).
[41] *See* Jason M. Zarrow and William H. Milliken, *The Retroactivity of Substantive Rules to Cases on Collateral Review and the AEDPA with a Special Focus on* Miller v. Alabama, 48 Ind. L. Rev. 931, 931-32 (2015).
[42] *Retroactive Application of New Rules*, 122 Harv. L. Rev. 425, 429-30 (2008) (citations omitted).
[43] 381 U.S. 618 (1965).

criminal procedure produced an equally revolutionary change in retroactivity analysis."[44] The issue in *Linkletter* was whether the decision in *Mapp v. Ohio*,[45] which applied the Fourth Amendment federal evidence exclusionary rule to the States, was retroactive.[46]

For the first time in *Linkletter*, the U.S. Supreme Court imposed a limit on the retroactivity of new constitutional rules of criminal procedure,[47] and held that *Mapp* was not retroactive to convictions that became final before *Mapp* was decided in 1963.[48] *Linkletter* devised a three-part test to determine retroactivity of a new rule of criminal procedure for cases on collateral review: (1) purpose of the new rule; (2) reliance on the prior rule; and (3) effect on the administration of justice if the new constitutional rule is applied retroactively.[49] Cases on direct review did receive the benefit of a retroactive application of a new constitutional rule.[50] The second Justice Harlan criticized the 1965 *Linkletter* three-factor retroactivity test (purpose, reliance,

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[44] Roosevelt, *supra*, 31 Conn. L. Rev. at 1089.
[45] 367 U.S. 643, 655 (1963).
[46] *Linkletter*, 381 U.S. at 629. Initially, the U.S. Supreme Court noted that the retroactivity question was not addressed in the federal constitution.
[47] Note, *Criminal Law: No Looking Back: Narrowing the Scope of the Retroactivity Doctrine for Juveniles Sentenced to Life Without Release - -Roman Nose v. State*, 41 Wm. Mitchell L. Rev. 330, 332-33 (2015).
[48] *Retroactive Application of New Rules*, 122 Harv. L. Rev. 425, 425 n.1 (2008).
[49] 381 U.S. at 636. *See Note, supra, 41 Wm. Mitchell L. Rev. at 333 n. 20. See also* Note, *A New Approach to the Teague Doctrine*, 66 Stan. L. Rev. 1159, 1164 (2014); Steven Semeraro, *Enforcing Fourth Amendment Rights Through Federal Habeas Corpus*, 58 Rutgers L. Rev. 983, 1011 (2006).
[50] *See Griffith v. Kentucky*, 479 U.S. 314, 321-23 (1987).

and effect of the new constitutional rule of criminal procedure) in his dissents in *Desist v. United States*[51] and *Mackey v. United States*,[52] and proposed an alternative test.[53] Justice Harlan thought his alternative test for determining retroactivity of court decisions was better suited to federal habeas corpus review which "is not designed as a substitute for direct review," but as an extraordinary remedy.[54] In habeas "[t]he interest in leaving concluded litigation in a state of repose" may outweigh readjusting cases under new constitutional rules.[55]

By 1989, the U.S. Supreme Court recognized that "[t]he *Linkletter* retroactivity standard has not led to consistent results."[56] Consequently, "[t]he *Linkletter* standard also led to unfortunate disparity in the treatment of similarly situated defendants on collateral review."[57] In *Teague v. Lane*, Frank Teague, a black federal habeas corpus petitioner who had been convicted of three counts of attempted murder, sought retroactive application of the *Batson*[58] rule prohibiting the state's use of peremptory jury strikes in a racially discriminatory manner.[59] Teague's convictions had become final two and a half years prior to the *Batson* decision. Abandoning the *Linkletter*

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[51] 394 U.S. 244, 256-69 (1969).
[52] 401 U.S. 667, 682-94 (1971).
[53] 66 Stan. L. Rev. at 1164-65.
[54] *Mackey*, 401 U.S. at 683.
[55] 66 Stan. L. Rev. at 1165. *See Mackey*, 401 U.S. at 683 (Harlan, J., concurring in the judgments in part and dissenting in part).
[56] *Teague*, 489 U.S. at 302.
[57] *Id*. at 305.
[58] *Batson v. Kentucky*, 476 U.S. 79 (1986).
[59] *Teague*, 489 U.S. at 292-93.

retroactivity test, a plurality of the U.S. Supreme Court adopted a new retroactivity test in Teague's case,[60] but ultimately concluded that *Batson* was not retroactively applicable to Teague's state court convictions. Teague's state court conviction became final in 1983, so he could not benefit from the 1986 *Batson* decision. The plurality decision on a new retroactivity approach announced in *Teague* has since gained acceptance by a majority of the U.S. Supreme Court.[61]

The only two exceptions to the *Teague* general rule of nonretroactivity for new constitutional rules of criminal procedure are: (1) a new rule that places "certain kinds of primary private conduct beyond the power of the criminal law-making authority to proscribe"; and (2) if the new rule requires the observance of those "procedures that … are implicit in the concept of ordered liberty."[62] Unless a new constitutional rule falls within one of those two very limited *Teague* exceptions, it "will not be applicable to those cases which have become final before the new rules are announced."[63] Both of the *Teague* exceptions are "very narrow."[64]

"[T]he first Teague exception bars application of the nonretroactivity rule to new constitutional decisions regulating the legislature's power to make behavior criminal,

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[60] *Teague*, 489 U.S. at 301. *See* 66 Stan. L. Rev. at 1167 ("the *Teague* Court renounced *Linkletter* and forged a new doctrine, under which new constitutional rules of criminal procedure generally do not apply to cases on collateral review").
[61] *See Penry v. Lynaugh*, 492 U.S. 302, 313 (1984); *Greene v. Fisher*, 132 S. Ct. 38, 44 (2011); 48 Ind. L. Rev. at 941.
[62] *Teague*, 489 U.S. at 307. *See also Flamer*, 585 A.2d at 749.
[63] *Teague*, 489 U.S. at 310.
[64] Ezra D. Landis, *A New Approach to Overcoming the Insurmountable "Watershed*

as opposed to new constitutional rules specifying the procedures that have to be used in deciding whether the behavior thus defined occurred."[65] This distinction between substantive and procedural rules is important because "a determination that a given rule is procedural essentially means that the rule will not be retroactively applicable."[66]

Procedural rules "regulate only manner of determining the defendant's culpability."[67] The Warren Court's "rights revolution" "promulgated new rules of criminal procedure, not new substantive rules of criminal law."[68] For this reason, virtually all of the new constitutional rules of criminal procedure announced by the U.S. Supreme Court since *Teague* have been found to be procedural and not retroactive to cases on collateral review.

The second *Teague* nonretroactivity exception for new watershed rules that involve "procedures that … are implicit in the concept of ordered liberty"[69] is even more limited than the first exception for new substantive rules.[70] In fact, the only watershed rule recognized under the second *Teague* exception is *Gideon v. Wainwright*, 372 U.S. 335 (1963).[71]

Rule" Exception to Teague's Collateral Review Killer, 74 Mo. L. Rev. 1, 2 (2009).
[65] Note, *Is Ring Retroactive?*, 103 Colum. L. Rev. 1805, 1822 (2003).
[66] 48 Ind. L. Rev. at 932-33.
[67] *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) (quoted in *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016)).
[68] 48 Ind. L. Rev. at 934.
[69] *Teague*, 489 U.S. at 307.
[70] *See Sepulveda v. United States*, 330 F.3d 55, 61 (1st Cir. 2003) ("examples of watershed rules are hen's-teeth rare").
[71] *See Whorton v. Bockting*, 549 U.S. 406, 419 (2007).

Welch v. United States, which addressed sentence enhancement under the Armed Career Criminal Act (ACCA) based on prior violent felony convictions, is one of the few post-*Teague* decisions found to be a substantive rule retroactively applicable to collateral review.[72] *Welch* held that the decision in *Johnson v. United States*,[73] that invalidated a portion of ACCA as unconstitutionally vague, was substantive because it changed the substantive reach of ACCA and altered the range of conduct or class of persons punishable under ACCA.[74] *Welch* is the rare case of a *Teague* exception. In 2006 (some 17 years after *Teague*), Professor Semeraro noted that even though *Teague* contained two exceptions to its nonretroactivity rule for collateral review cases, "since *Teague* was decided, however, the Court has never recognized a new rule that falls within these exceptions."[75]

Given the change in the retroactivity analysis from *Linkletter* to *Teague*, and *Teague*'s extremely limited exceptions to a general rule of nonretroactivity, it is misleading and unhelpful to evaluate death row inmates spared before 1989, with capital defendants whose collateral review challenges originated after the 1989 seismic shift caused by the *Teague* decision.

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[72] 136 S. Ct. 1257 (2016).
[73] 135 S. Ct. 2551, 2563 (2015).
[74] *In re Patrick*, 2016 WL 4254929, at *2 (6th Cir. Aug. 12, 2016).
[75] Steven Semeraro, *Enforcing Fourth Amendment Rules Through Federal Habeas Corpus*, 58 Rutgers L. Rev. 983, 1012 n.192 (2006).

Capital defendants on direct appeal continue to receive any benefits of new constitutional rules of criminal procedure.

The second pertinent factor to remember in reviewing the cases of death row inmates affected by capital sentencing decisions of the U.S. Supreme Court or a state supreme court in the "modern era" since *Furman* in 1972 is the simple procedural fact that capital inmates whose cases were still pending on direct appeal have uniformly received the retroactive benefit of new constitutional law decisions on criminal procedure. This was the governing principle for retroactivity under either *Linkletter* or *Teague*. Thus, in answering this Court's October 21, 2016 question about "cases where the U.S. Supreme Court has declared a death penalty unconstitutional and whether the case was applied retroactively or prospectively only," the question is really only pertinent as to inmates on collateral review. Since *Linkletter*, capital cases on direct review have always received the retroactive benefit of a new constitutional rule of criminal procedure.[76]

At issue in Flamer's postconviction relief proceedings in 1988-89 were two U.S. Supreme Court decisions issued after his 1980 Kent County Superior Court capital murder trial. A Delaware Magistrate had appointed the Public Defender to represent Flamer before a police officer initiated a conversation with Flamer during the second day of confinement that resulted in the 1979 incriminating recorded statement admitted at Flamer's 1980 trial.[77] In the May 1988 Superior Court postconviction evidentiary

[76] *See Griffith v. Kentucky*, 479 U.S. 314, 321-23 (1987); 66 Stan. L. Rev. at 1167.
[77] *Id.* at 745.

hearing, the admission at trial of the defendant's tape recorded statement to the State Police was challenged. In his statement, "Flamer admitted that he had stabbed Byard Smith several times during the course of the theft from the Smith residence, but insisted that he had not killed Smith. He also described the location of a second murder weapon."[78]

Edwards v. Arizona[79] prohibited police-initiated interrogation after a defendant has asserted his right to counsel. While *Edwards* would have been retroactively applicable during Flamer's direct appeal, the claim was not asserted at that time. In 1990, during Flamer's postconviction appeal, this Court found that the claim of an *Edwards* violation in the February 1979 recorded statement was now procedurally defaulted under Criminal Rule 61(i)(3). This Court ruled: "Flamer did not present an *Edwards* argument on direct appeal. However, he had the opportunity to raise such a claim at the time of appeal since *Edwards* was decided almost two years before this Court issued an opinion in Flamer's direct appeal. *Edwards* was known, or should have been known, to Flamer's counsel before 1983."[80] Because Flamer's former counsel did not raise an *Edwards* claim on direct appeal, the capital defendant, who was executed on January 30, 1996, could not receive state postconviction relief on the basis of *Edwards*.

Flamer raised a second claim in the state postconviction proceedings about his

[78] *Flamer*, 585 A.2d at 743.
[79] 431 U.S. 477 (1981).
[80] *Flamer*, 585 A.2d at 747.

incriminatory statement under the Sixth Amendment right to counsel protection based upon the 1986 U.S. Supreme Court decision in *Michigan v. Jackson*. *Jackson* held that if the police initiate conversation with a defendant who has asserted his right to counsel at arraignment (as Flamer did in the J.P. Court), any waiver of the right to counsel is invalid. After adopting the then new *Teague* retroactivity paradigm, this Court found that *Jackson* was not retroactive to Flamer's state collateral review and that his case was final for collateral review retroactivity purposes in 1985, when the U.S. Supreme Court denied certiorari review a second time.[81] Focusing on the *Jackson* Sixth Amendment claim, this Court in December 1990 stated: "We now analyze Flamer's contention under a new approach recently articulated by the United States Supreme Court with regard to federal habeas corpus relief. For cases on collateral review, a plurality of the Supreme Court developed a retroactivity analysis in *Teague v. Lane*.… The analysis applies to both capital and non-capital cases."[82]

In 1990, this Court plainly realized that *Teague* was a federal habeas case, and that the State retroactivity rule being adopted was not limited to capital murder cases.[83] Sitting *en banc*, this Court ruled: "We adopt a general rule of nonretroactivity for cases on collateral review."[84] *Michigan v. Jackson* did not fit within either of the two limited exceptions of *Teague*, so the new rule was not retroactive to death row inmate Flamer's

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[81] *Flamer v. Delaware*, 474 U.S. 865 (1985).
[82] *Flamer*, 585 A.2d at 748-49 (citation omitted).
[83] *Id*.
[84] *Id*. at 749.

postconviction relief appeal.[85] Five months after the adoption of the federal *Teague* general nonretroactivity rule for cases on collateral review in *Flamer*, this Court, in *Bailey v. State*,[86] applied the 1990 *Flamer* holding to a murder defendant seeking retroactive application of *Perry v. Leake*,[87] and affirmed the trial court's denial of postconviction relief. Twenty years after *Flamer*, this Court continued to utilize the *Teague* nonretroactivity rule in affirming the denial of postconviction relief in *Richardson v. State*.[88]

Not all procedural errors require retroactive application in collateral review.

A third pertinent factor in reviewing cases of U.S. death row inmates affected by post-1972 new rule case decisions is that the subsequent disposition of the capital defendant's case may depend upon other factors apart from pure retroactivity. For example, the applicable state capital sentencing scheme is of paramount importance. The history of the disposition of the Delaware capital inmates after the decisions in *Furman* (1972) and *Woodson* (1976) is illustrative. While the ACLU is correct that these twelve Delaware capital defendants were not executed, the reason for that disposition is dependent upon the precise capital sentencing statutes then in effect in Delaware, not any societal consensus against the death penalty.

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[85] *Id.* at 750.
[86] 588 A.2d 1121, 1127-28 (Del. 1991).
[87] 488 U.S. 272 (1989).
[88] 3 A.3d 233, 238-39 (Del. 2010).

Three Delaware capital inmates affected by *Furman v. Georgia*,[89] could not be executed because this Court found that when the Delaware mercy statute was eliminated, the only sentence for a first degree murder conviction became mandatory death.[90] This Court found this alteration in the sentencing statute presented an *ex post facto* constitutional problem. The *ex post facto* problem was the reason the three capital defendants in *Dickerson* were spared.

After *Furman*, "the Delaware General Assembly, like the Legislatures of at least nine other States" re-enacted their death penalty statutes as a mandatory punishment for first degree murder.[91] As amended after *Furman* (1972), 11 *Del. C.* § 4209(a) stated: "In any case in which a person is convicted of first degree murder the court shall impose a sentence of death. If the penalty of death is determined to be unconstitutional the penalty for first degree murder shall be life imprisonment without benefit of parole."[92]

The nine Delaware death penalty defendants in *State v. Spence* were never executed because the mandatory Delaware death penalty statute enacted in 1974 was invalidated by *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Roberts v. Louisiana*, 428 U.S. 325 (1976), and the default provision of § 4209(a) became operative. As a result of the U.S. Supreme Court declaring mandatory death penalty

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[89] 408 U.S. 238 (1972).
[90] *See State v. Dickerson*, 298 A.2d 761, 768 (Del. 1973).
[91] *State v. Spence*, 367 A.2d 983, 986 (Del. 1976).
[92] *Spence*, 367 A.2d at 984 n.1.

statutes unconstitutional in 1976, the then nine Delaware death row inmates received a life sentence without parole by operation of the unique Delaware statutory default provision.

None of the twelve former Delaware death row inmates in *Dickerson* and *Spence* escaped execution because of a societal consensus against their execution. Rather, it was the *ex post facto* problem in *Dickerson* and the unique 1974 statutory default provision in *Spence* that spared them.

The twelve Delaware former capital inmates in *Dickerson* and *Spence* received life sentences based not upon a pure retroactivity analysis but on the basis of another Constitutional infirmity in *Dickerson* and the specific 1974 statutory default provision in *Spence*. While Flamer was not raising a subsequent U.S. Supreme Court decision declaring a death penalty provision unconstitutional, Flamer was executed in 1996 after this Court declined to apply *Michigan v. Jackson* retroactively in his 1990 post-conviction appeal.

The ACLU appears to suggest that at least some Arizona capital inmates were executed when they did not receive any retroactive benefit from *Ring*. When the U.S. Supreme Court two years later in *Summerlin* said *Ring* was procedural and not retroactive, it removed that barrier to executing Arizona capital inmates whose cases were final before *Ring* was decided. This is precisely the concern for current Florida death row inmates whose cases became final before the January 2016 decision in

Hurst.[93]

The other three *amicus* filings contain equally unavailing arguments.

Unlike Powell and the ACLU, the other three amicus filings attempt to address in varying degrees the governing authority of the general nonretroactivity rule applicable to inmates seeking collateral review. These three amici all seek to avoid the general nonretroactivity rule of *Teague/Flamer* in at least three ways: (1) claiming that *Hurst* and *Rauf* are not "new rules"; (2) arguing that *Hurst* and *Rauf* fall within one or both of the two exceptions to *Teague*'s general nonretroactivity rule; and (3) in the case of the Atlantic Center for Capital Representation ("the Atlantic Center"), seeking to abandon the *Teague*/*Flamer* retroactivity analysis and adopt "an equities-based approach" to retroactivity based on independent state grounds as permitted by *Danforth v. Minnesota*.[94] None of these amicus contentions is meritorious.

***Hurst* announced a new rule of criminal procedure.**

These three amici, including Luis Cabrera who is not even currently subject to a Delaware death sentence, all recognize that the *Teague* general nonretroactivity rule is a formidable barrier to any retroactive application of *Hurst* and *Rauf* to Powell and any other Delaware death row inmate whose direct appeal is final. Their first line of attack is a claim that *Hurst* is not a "new rule" for retroactivity purposes because it is based

[93] *See* Gray Proctor, *Old Rule, Partially Retroactive, and No Remedy: Why Hurst Won't Help Many On Florida's Death Row*, 28 Fed. Sent. R. 316 (June 1, 2016) (reported at 2016 WL 3747292).

[94] 552 U.S. 264, 275 (2005) (pointing out that *Teague* applies to federal habeas corpus filings and is not binding on the states).

on the prior precedents of *Apprendi v. New Jersey*,[95] and *Ring*. Of course, if this analysis of merely looking to see if a prior precedent in some context exists is correct, *Ring* would not qualify as a "new rule" because it was manifestly based upon *Apprendi* decided two years earlier. That type of *a priori* reasoning was not followed by the U.S. Supreme Court in *Summerlin*.[96]

In *Teague*, a new rule is defined as a rule that "breaks new ground," "imposes a new obligation on the States or the Federal Government," or was not "dictated by precedent existing at the time the defendant's conviction became final."[97] "The explicit overruling of an earlier holding no doubt creates a new rule ...."[98] *Hurst* overruled both *Spaziano v. Florida*[99] and *Hildwin v. Florida*,[100] and *Hurst*'s holding about the Florida death penalty provisions qualifies as a "new rule" for purposes of the *Teague* retroactivity analysis. Similarly, *Rauf* provides a "new rule" because it

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[95] 530 U.S. 466 (2000).

[96] 542 U.S. 348, 351-54 (2004) (holding *Ring* to be procedural and not retroactive). *See generally Richardson*, 3A.3d at 239-41 (applying *Teague* retroactivity analysis and finding *Allen v. State*, 970 A.2d 203, 213 (Del. 2009) not a "new rule" and not retroactive to Richardson's earlier conviction); *Torrence v. State*, 2010 WL 3036742, at *2 (Del. Aug. 4, 2010).

[97] 489 U.S. at 301. *See* Annot., *Construction and Application the Teague Rule Concerning Whether Constitutional Rule of Criminal Procedure Applies Retroactively to Case on Collateral Review – Supreme Court Cases*, 44 A.L.R. Fed. 2d 557, § 8 (2010).

[98] *Saffle v. Parks*, 494 U.S. 484, 488 (1990). *See also Butler v. McKellar*, 494 U.S. 407, 412 (1990).

[99] 468 U.S. 447 (1984).

[100] 490 U.S. 638 (1989).

overrules *Brice v. State*[101] and *State v. Cohen*.[102] *Rauf* also overrules in part *Swan v. State*,[103] *Ortiz v. State*,[104] *Reyes v. State*,[105] and *Norcross v. State*.[106] Thus, both *Hurst* and *Rauf* announce "new rules" for purposes of the retroactivity analysis under *Teague* and *Flamer*. In *Teague*, "the Court reviewed its retroactivity rules to prevent federal habeas courts from applying virtually any new case retroactively. The Court accomplished this by adopting a bright-line rule prohibiting the retroactive application of all 'new rules' and defining the concept of a new rule expansively to include virtually any new decision that was not strictly dictated by prior law."[107] In simplest terms, both *Hurst* and *Rauf* announce new constitutional rules because they determined the state *procedures* used to impose a sentence of death previously found to have satisfied federal constitutional requirements, were unconstitutional. But the analysis does not end there.

This distinction between substantive and procedural rules is quite important because "a determination that a given rule is procedural essentially means that the rule will not be retroactively applicable."[108] Procedural rules "regulate only the manner of

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[101] 815 A.2d 314 (Del. 2003).
[102] 604 A.2d 846 (Del. 1992).
[103] 28 A.3d 362 (Del. 2011).
[104] 869 A.2d 285 (Del. 2005).
[105] 819 A.2d 305 (Del. 2003).
[106] 816 A.2d 757 (Del. 2003).
[107] Semeraro, *supra*, 58 Rutgers L. Rev. at 1012.
[108] 48 Ind. L. Rev. at 932-33.

determining the defendant's culpability."[109] The Warren Court's "rights revolution" "promulgated new rules of criminal procedure, not new substantive rules of criminal law."[110] *Hurst* and *Rauf* did not declare the death penalty unconstitutional. Both decisions only found that existing State statutory procedure for imposing such a capital sentence deficient under the Sixth Amendment. Florida and Delaware may still have a death penalty once the legislature corrects the deficiencies identified in *Hurst* and *Rauf*. The only issue is the procedure that Florida and Delaware may utilize in imposing a death sentence. Once procedural deficiencies are corrected in new legislation, a new death penalty regime may commence.

Hurst and *Rauf* are both procedural and not within the first *Teague* exception. Earlier cases such as *Ivan V. v. City of New York*,[111] decided prior to the formulation of the *Teague* nonretroactivity rule in 1989, have no application because they were decided under *Linkletter*. Claims that subsequent cases have altered, extended, or eroded the *Teague* rule is inaccurate. *Teague*'s retroactivity test adopted by *Flamer* has not been overruled and remains the law. Until a decision is overruled, there is nothing uncertain about its legal validity.

The Atlantic Center's proposal to abandon *Teague* is misplaced.

Lastly, the Atlantic Center offers the novel proposal that based on independent state grounds as permitted by *Danforth v. Minnesota*, Delaware should adopt a new

[109] *Summerlin*, 542 U.S. at 353.
[110] 48 Ind. L. Rev. at 934.
[111] 407 U.S. 203 (1972).

retroactivity rule based on "an equities-based approach to determine the retroactivity of *Rauf*, as opposed to the analysis set forth in *Teague v. Lane*."[112] Specifically, the Atlantic Center argues that Delaware should utilize the *Linkletter* retroactivity analysis that the U.S. Supreme Court abandoned in *Teague* because "[t]he *Linkletter* retroactivity standard has not led to consistent results."[113] There is no benefit to returning to a discredited paradigm that led to inconsistent results. Amorphous and ill-defined alternative retroactivity tests are a poor substitute for the federal bright line of *Teague* that recognizes the jurisprudential goal of finality for criminal convictions.

Alternative retroactivity approaches offer no discernible benefit.[114] Having no limit on retroactivity "carries the risk of disturbing the state's criminal justice systems each time a new rule of constitutional criminal procedure is announced."[115] All of this is important because changing the State's retroactivity standards will affect not only the Delaware death row inmates, but potentially all Delaware inmates who may file an untimely subsequent motion for State postconviction relief.[116]

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[112] Atlantic Center Amicus Brief at 1.
[113] *Teague*, 489 U.S. at 302.
[114] *See, e.g.*, Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 Harv. L. Rev. 1055, 1100-01 (1999) (equilibrium analysis).
[115] Note, *Criminal Law: Minnesota Formally Adopts the Teague Retroactivity Standard for State Postconviction Proceedings* – Danforth v. State, 36 Wm. Mitchell L. Rev. 297, 319 (2009).
[116] *See* Del. Super. Ct. Crim. R. 61(d)(2)(ii) (effective June 4, 2014).

Conclusion

Because this Court, in *Flamer*, adopted the *Teague* rule of non-retroactivity, whether *Hurst* and *Rauf* should be applied retroactively in collateral review should be analyzed under *Teague*. Neither *Hurst* nor *Rauf* can meet an exception to *Teague*'s non-retroactivity rule. Consequently, Powell is not entitled to any retroactive application of *Hurst* or *Rauf*.

Wherefore, the State requests that this Court deny Powell's motion to vacate his death sentence and proceed to briefing on Powell's claims challenging the denial of his motion for postconviction relief.

Respectfully submitted,

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Date: November 10, 2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DERRICK POWELL,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	**No. 310, 2016**
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This answering memorandum complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2016.

2. This answering memorandum complies with the type-volume limitation of the Court Order dated September 6, 2016 and Rule 14(d)(i) because it contains 7108 words, which were counted by Microsoft Word 2016.

Dated: November 10, 2016 /s/John Williams