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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

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

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Will our State execute Derrick Powell when this Court has declared the statute by which he was sentenced devoid of the constitutional protections of jury factfinding, a unanimous jury vote, and proof beyond a reasonable doubt? The State seeks that constitutionally unsupportable result for Derrick Powell. The State says that *Teague v. Lane's*[1] standard should apply, in that it is "well-defined," "practical," and "utilitarian."[2] The State urges the application of *Teague* to achieve "finality" and the end to "abusive repetitive postconviction matters."[3]

Utility and practicality as legal precepts are dwarfed by the monolithic protections embodied in our coexistent constitutions. Mr. Powell must not be executed because it is more practical to deploy a "bright line nonretroactivity rule."[4] As this Reply will discuss, this Court should not even apply *Teague*, and even if it does, the motion to vacate should still be granted. Moreover, the Delaware Constitution and Eighth Amendment prohibit the execution of Mr. Powell.

[1] 489 U.S. 288 (1989).
[2] *Opening Memorandum (Op. Mem.)* at 13.
[3] *Id.* at 13-14.
[4] *Id.* at 13.

1. The Supreme Court Drastically Curtailed Federal Habeas Review, but Those Limits Do Not Apply to the States.

Nonretroactivity is a recent innovation by a Court burdened with a proliferation of federal habeas litigation.

At common law, the concept of nonretroactivity did not exist. Courts adhered to Blackstone's maxim that the duty of the court was "not to pronounce a new law, but to maintain and expound the old one."[5] Justice Scalia opined that even the question of whether a Supreme Court decision shall apply retroactively "presupposes a view of our decisions as *creating* the law, as opposed to *declaring* what the law already is."[6] He considered that supposition contrary to the judicial power embodied in Article III of the Constitution.[7]

The "Great Writ"[8] of *habeas corpus* likewise originates in the common law and is the only common law writ to merit specific mention in the Constitution.[9] Prior to 1965, the federal habeas statute was interpreted quite broadly.[10] In the

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[5] *Linkletter v. Walker,* 381 U.S. 618, 622 (1965), *citing* 1 Blackstone, Commentaries 69 (15th ed. 1809).
[6] *Danforth v. Minnesota,* 552 U.S. 264, 286 (2008), *citing American Trucking Assns., Inc. v. Smith,* 496 U.S. 167, 201 (1989)(Scalia, J., concurring)(emphasis in original).
[7] *Id.*
[8] *Teague v. Lane,* 489 U.S. 288, 309 (1989).
[9] *See, e.g., Hamdi v. Rumsfeld,* 124 S.Ct. 2633, 2662-2663 (Scalia, J., dissenting).
[10] *See, e.g., Fay v. Noia,* 372 U.S. 391 (1963)(permitting State habeas petitioners to raise claims not raised in State court so long as they did not deliberately bypass State proceedings); *Brown v. Allen,* 344 U.S. 443 (1953)(permitting all constitutional claims to be raised in a habeas petition).

1950s and 1960s, as federal constitutional protections were made applicable to the States, the use of federal habeas as a means of collateral attack increased.[11] Until 1965, all constitutional criminal procedural decisions, even "new" ones, applied to State prisoners seeking habeas relief.[12]

Given the Warren Court's recognition of civil rights and liberties, made applicable to the States, it was perhaps inevitable that the Supreme Court would curtail plenary habeas review. *Linkletter v. Walker*[13] was the perfect vehicle for a newfound pronouncement of nonretroactivity, because otherwise, *Mapp v. Ohio's*[14] application of the exclusionary rule to the States would have affected "thousands" of cases.[15] The *Linkletter* Court determined that holding hearings about evidence now lost or destroyed, and having retrials with witnesses difficult to locate and with dimmed memories would "seriously disrupt the administration of justice."[16] So *Linkletter* adopted a case by case approach: "looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."[17] Justice Harlan saw *Linkletter* as the "product of

[11] *Danforth v. Minnesota,* 552 U.S. 264, 272 (2008).
[12] *Id.*
[13] 381 U.S. 618 (1965)
[14] 367 U.S. 643 (1961).
[15] *Linkletter,* 381 U.S. at 636.
[16] *Id.* at 637-38.
[17] *Id.* at 629.

the Court's disquietude with the impacts of its fast-moving pace of constitutional innovation in the criminal field."[18]

Ultimately, *Linkletter* led to inconsistent results and led to scholarly criticism that did not sit well with the Court.[19] In 1987, the Court held that retroactivity analysis would no longer apply to cases on direct review.[20] Two years later, the Court would fully abandon the "purpose and effect" principle of assessing new rules in favor of one that created a retroactivity threshold based on the procedural posture of the case.

The* Teague *agenda*: *deterrence, finality, and the conservation of judicial resources.

The rationale for *Teague* sprung from Justice Harlan's writings in two post-*Linkletter* cases. He espoused the notion that the "threat" of habeas has a deterrence function, incentivizing all courts to "conduct their proceedings in a manner consistent with established constitutional standards"—those in place at the time of the original proceeding.[21] In other words, "the threat of collateral attack"

[18] *Mackey v. United States,* 401 U.S. 667, 676 (1971).
[19] *Teague v. Lane,* 489 U.S. 288, 302-03 (1989).
[20] *Griffith v. Kentucky,* 479 U.S. 314 (1987).
[21] *Desist v. United States,* 394 U.S. 244, 263 (1969)(Harlan, J. dissenting).

would cause courts to "toe the constitutional line" by applying the constitutional law in place at the time of conviction.[22]

Although Justice Harlan believed that all "new" constitutional rules which "significantly improve the pre-existing factfinding procedures are to be retroactively applied on habeas,"[23] he circumscribed that principle with the competing consideration of finality. He asserted that society and the defendant have an interest in ensuring an end to litigation, rather than have the defendant's continued incarceration be "subject to fresh litigation on issues already resolved."[24]

Moreover, Justice Harlan believed that failing to consider finality interests would be a "strain on the very limited resources society has allocated to the criminal process."[25] Relitigation of "facts buried in the remote past" could "produce a second trial no more reliable at getting to the truth than the first."[26] Of course, that statement elides the fact that a retrial subject to the exclusionary rule or *Miranda* protections would produce a *fairer* trial, but the Justice's *Desist* and *Mackey* writings were clearly mission-oriented.

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[22] *Id.*
[23] *Id.* at 262.
[24] *Mackey v. United States,* 401 U.S. 667, 691 (1971).
[25] *Id.*
[26] *Id.*

Teague ***and the malleability of the "new rule" threshold inquiry.***

Adopting yet modifying Justice Harlan's writings, the *Teague* plurality, *sua sponte,* set forth a default of nonretroactivity for new rules. But if a constitutional rule is "merely an application of the principle that governed, then it has retroactive application.[27] Acknowledging it is "often difficult to determine when a case announces a new rule," the Court provided two contrasting standards. The Court described a rule as new when it "breaks new ground" or "imposes a new obligation on the State or Federal Government."[28] That standard limits the definition of "new rule." But the Court expanded the field in its second example, by stating that a rule is new if it was not *dictated* by precedent existing" when the conviction became final.[29] This second standard increased the likelihood that a rule could be "new," and thereby nonretroactive. It also abandoned Justice Harlan's original vision of a new rule as being *other than* settled law at the time of trial and rules that fell within the "logical compass"[30] of established rules.

The *Teague* plurality established two exceptions to the general principle of nonretroactivity for new rules: substantive and procedural. A new substantive rule

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[27] *Teague,* 489 U.S. at 307.
[28] *Id.*
[29] *Id.* (emphasis in original).
[30] *Desist v. United States,* 394 U.S. 244, 264 (1969)(Harlan, J., dissenting).

places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."[31] As to procedural rules, a plurality adopted Justice Harlan's original view that "a new rule should be applied retroactively if it requires observance of those procedures that are implicit in the concept of ordered liberty."[32] As this Court noted in *Flamer v. State,*[33] only three justices joined the portion of *Teague* that proposed the additional language comprising the second half of the "watershed rule:" "those new procedures without which the likelihood of an accurate conviction is seriously diminished."[34]

Justices Stevens and Blackmun concurred only in the judgment and the adoption of Justice Harlan's view that defendants on collateral review should not get the benefit of new rules "unless the original trial entailed elements of fundamental unfairness."[35] Moreover, they noted that factual innocence as a threshold would provide little guidance in important cases, "such as those challenging the constitutionality of capital sentencing hearings."[36]

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[31] *Id.* at 311.
[32] *Id.*
[33] *Flamer v. State,* 585 A.2d 736, 750, n. 7 (Del. 1990).
[34] *Teague,* 489 U.S. at 313.
[35] *Teague,* 489 U.S. at 319 (Stevens, J. dissenting), citing *Mackey* at 693.
[36] *Id.* at 321.

The "new rule" gatekeeping paradigm quickly turned out to be a moving target with majority and dissenting justices changing sides frequently. John Paul Penry sought relief from the Texas statute which limited jury consideration of mitigating factors, such as evidence of intellectual disability.[37] The Court agreed with Penry, even though the Court has previously upheld the same statute in *Jurek v. Texas*.[38] One would think that *Penry* announced a new rule, denying him relief unless he established one of the draconian *Teague* exceptions. Instead, the majority determined Penry deserved relief because the "old rule" of *Lockett v. Ohio*[39] and *Eddings v. Oklahoma*[40] applied and Penry deserved retroactivity to those cases.

But the Court soon expanded the "new rule" definition, eschewing the "dictated by prior precedent" maxim of *Teague*. Only a year after *Penry*, the Court decided a rule was new (and by default nonretroactive) if its precedents were "susceptible to debate among reasonable minds."[41] That fuzzy standard, which contradicts the principles of Justice Harlan, prompted Justice Brennan to remark,

[37] *Penry v. Lynaugh,* 492 U.S. 302 (1989).
[38] 428 U.S. 262 (1976).
[39] 438 U.S. 586 (1978)(juries are entitled to hear all possible mitigating evidence).
[40] 455 U.S. 104 (1982).
[41] *Butler v. McKellar,* 494 U.S. 407, 415 (1990).

"the court has finally succeeded in its thinly veiled crusade to eviscerate Congress' habeas corpus regime."[42]

"Death is different"[43] succumbs to the* Teague *nonretroactivity campaign.

Lockett and *Eddings* established that sentencers "must consider all relevant mitigating evidence."[44] Because death is "so profoundly different from all other penalties,"[45] individualized sentencing is "constitutionally indispensable."[46] But the Court nevertheless adhered to its *Teague* agenda. By manipulating what is a new rule and by exiling new rules to the procedural black hole, the Court decided that death is not different enough to overcome its nonretroactivity initiative.

Gary Graham sought habeas relief, because the Texas statute limited jury consideration of his youth and positive character traits—the same "limitations on mitigation" argument that Penry had made.[47] But this time the Court decided Graham sought a new rule and denied relief.[48] In doing so, the Court unseated *Penry* from its *Lockett-Eddings* "consider all mitigation" foundation and rebranded

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[42] *Id.* at 418 (Brennan, J., dissenting).
[43] *See, e.g., Woodson v. North Carolina,* 428 U.S. 280, 305 (1976).
[44] *Eddings* 455 U.S. at 116.
[45] *Lockett,* 483 U.S. at 605.
[46] *Woodson,* 428 U.S. at 304.
[47] *Graham v. Collins*, 506 U.S. 461 (1993)
[48] *Id.* at 478.

it narrowly, applying only to Penry's *specific* mitigators of mental retardation and childhood abuse.[49] Unlike Penry, Graham was executed.[50]

Time and again, administrative pragmatism[51] would trump constitutional principle. In *Ring,* Justice Scalia wrote, "the repeated spectacle of a man's going to his death because a *judge* found an aggravating factor existed…would undermine "our people's traditional…veneration for the protection of the jury in criminal cases."[52] Yet Justice Scalia wrote the majority opinion in *Summerlin v. Schiro*, which made *Ring* nonretroactive—ensuring the spectacle he disdained in *Ring*.[53]

Had the Court hewed to Justice Harlan's original view that "bedrock procedural elements that must be found to vitiate the fairness of a particular conviction,"[54] *Ring* would have likely been applied retroactively. But the Court applied the *Teague* minority rubric of fairness *and* accuracy. Because it found that the judge finding of fact did not *seriously* diminish accuracy,[55] Summerlin did not

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[49] *Id.* at 473-477.
[50] www.capitalpunishmentincontext.com/cases/graham (last viewed October 29, 2016). Graham was 17 at the time of offense, but was executed in 2000, demonstrating that with capital punishment, timing is everything.
[51] *Ring v. Arizona,* 536 U.S. 584, 620 (2002)(O'Connor, J., dissenting)(noting that *Apprendi* had caused a 77% increase in federal habeas petitions and an "enormous increase in the workload of an already overburdened judiciary.").
[52] *Id.* at 612.
[53] 542 U.S. 348.
[54] *Mackey,* 401 U.S. at 693-94.
[55] *Summerlin,* 542 U.S. at 352.

fit through the eye of the needle that retroactivity on habeas review has become. The Court set up *Gideon*[56] as the sole example of watershed retroactivity,[57] then has repeatedly used that benchmark as a blunt instrument to deny relief to the death-sentenced. It defies logic, but not expediency, to find that cases explicating the *Lockett-Eddings* principle that juries must consider all mitigating evidence is somehow a new rule that is not "watershed" enough. But that has been the uniform result in the *Teague* regime after *Penry.*[58]

The four dissenting justices in *Summerlin* aptly described the unsuitability of *Teague* in death penalty jurisprudence. They noted the Court's long-held principle that capital punishment cases require greater scrutiny and more protections against error.[59] Next, the dissent held that *Teague* in capital cases abandons the law's commitment to uniformity. *Summerlin* creates the grim spectacle of two

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[56] *Gideon v. Wainwright,* 372 U.S. 335, 343-345 (1963)
[57] *Teague,* 489 U.S. at 313.
[58] *See,e.g, Graham v. Collins,* 506 U.S. 461 (1993)(nonretroactive: jury instructions cannot inform jury to ignore mitigating evidence); *Saffle v Parks,* 494 U.S. 484 (1990)(nonretroactive: barring the anti-sympathy instruction); *Sawyer v. Smith,* 497 U.S. 227 (1990)(nonretroactive: prosecutor forbidden to argue to jury that the ultimate sentencing responsibility lies elsewhere); *Beard v Banks,* 542 U.S. 406 (2004)(nontretroactive: juries may not disregard mitigating evidence just because it is not unanimously found); for a comprehensive list of new procedural rules found not retroactive by the Supreme Court, *see,* Dov Fox & Alex Stein, *Constitutional Retroactivity in Criminal Procedure*, 91 Wash. L.Rev. 463, 466 at fn. 15 (2016).
[59] *Id.* at 362 (Breyer, J., dissenting).

individuals being sentenced by unconstitutional procedures, but one lives while the other is executed, "all through an accident of timing."[60] The dissent further argued that *Teague's* goal of finality is "unusually weak" in death cases—*Ring* affected 110 prisoners at most and would not have "thrown the prison doors open wide."[61]

These compelling reasons for a different paradigm in capital cases must necessarily inform State constitutional jurisprudence. As the Court confirmed in 2008, the States were never compelled to adhere to *Teague's* strictures.

Danforth *compels the States to chart their own courses on retroactivity.*

A seven-justice majority in *Danforth v. Minnesota*[62] confirmed that the *Teague* rubric is not binding on State courts. It cannot be: it is an exercise of the Supreme Court's authority to interpret the federal habeas statute, which extends only to the federal courts.[63] As *Danforth* explains, *Teague* promoted comity and federalism by "minimizing federal intrusion into state criminal proceedings."[64] But that concern does not limit a State's authority to review its own convictions and provide remedies "deemed 'nonretroactive' under *Teague.*"[65]

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[60] *Id.* at 363.
[61] *Id.* at 365.
[62] 554 U.S. 264 (2008).
[63] *Id.* at 278-79.
[64] *Id.* at 280.
[65] *Id.* at 281-282.

As catalogued by the Atlantic Center for Capital Representation in its *Amicus* Brief,[66] 19 States have rejected *Teague* as binding and fashioned their own rubrics for determining how to apply federal constitutional rules. Some States have generally considered the principles of *Teague,* but with an overlay of independent review based on State principles, or have returned to the "purpose and effect" rubric of *Linkletter*. Even those States, such as Delaware, which have applied *Teague*, are reminded in *Danforth* that such application is expressly not compelled by the Supreme Court.

2. This Court Should Not Apply *Teague* to the *Hurst/Rauf* Retroactivity Question.

Delaware applies* Teague *differently than the U.S. Supreme Court.

The State touts *Teague* as "well-defined," "utilitarian," and "helpful to the judiciary and attorneys."[67] But a closer look at Delaware jurisprudence reveals that Delaware applies *Teague* differently than the U.S. Supreme Court.

This Court first mentioned *Teague* in *Younger v. State*.[68] Because the State kidnapping statute was not reinterpreted in the new case upon which Younger

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[66] *Brief of the Atlantic Center for Capital Representation (ACCR) as* Amicus Curiae *in Support of Appellant* at 6-9 (October 17, 2016).
[67] *State's Op. Mem.* at 13.
[68] 580 A.2d 552 (Del. 1990).

relied,[69] Younger was unable to overcome Rule 61's procedural bars. Since the new case was merely a clarification of the older case, and Younger did not raise the issue in his first postconviction motion, he was barred by Rule 61(i)(1), the time bar, and61(i)(2), the successive motion bar.[70]

Younger is a procedural bar case, but did interpret *Teague.* This Court held that a when a decision clarifies prior ones, it is not a "new rule."[71] More importantly, *Younger* defined "new rule" differently than did *Teague*: the default nonretroactivity rule does *not* apply to "cases announcing a new rule which are merely an application of the principle that governs a prior case."[72]

This Court adopted *Teague* principles in *Flamer v. State*.[73] Flamer was on his second postconviction motion when he claimed that he should receive the retroactive benefit of *Michigan v. Jackson*,[74] regarding the Sixth Amendment right to counsel. Espousing the precepts of finality and deterrence, this Court applied *Teague*.[75] Based solely on the Eleventh Circuit's finding that *Jackson* is a

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[69] *Weber v. State,* 580 A.2d 552 (Del. 1988).
[70] *Younger* at 555.
[71] *Id.* at 554.
[72] *Id.* at 749.
[73] 585 A.2d 736 (Del. 1990).
[74] 475 U.S. 625 (1986)(establishing a rule that after a suspect has requested counsel, police may not initiate questioning).
[75] *Flamer* at 749.

nonretroactive new rule, this Court denied relief.[76] This Court then applied Rule 61(i)(4) and determined that reconsideration of his claim was not warranted in the interest of justice.[77]

Flamer gives us three important takeaways. First, *Flamer* is a pre-*Danforth* application of federal habeas review which should be re-examined after *Danforth*. This Court merely held: "based on [the *Teague*] standard, we adopt a general rule of nonretroactivity for cases on collateral review."[78] Second, the *Flamer* Court only applied the procedural exception as to procedures "implicit in the concept of ordered liberty."[79] It specifically declined to adopt the "accurate conviction" prong, noting that only four justices voted for it.[80] Finally, the *Flamer* Court confirmed *Younger's* definition of what a new rule is—and is not—in Delaware. Delaware's "application of the principle" standard for pre-existing rules hews much closer to Justice Harlan's "logical compass" construct—and differs from *Teague's* "dictated by prior precedent" paradigm.

In *Bailey v. State*, this Court held, "we decline to adopt a formal static test for determining the meaning of 'new rule' for purposes of our own state collateral

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[76] *Id.* at 750.
[77] *Flamer* at 750.
[78] *Id.* at 749.
[79] *Id.*
[80] *Flamer* at 749, n. 7.

relief provisions."[81] The *Bailey* Court specifically held that *Teague* applied to Rule 61(i)(1) cases, a result "foreshadowed" in *Younger.*[82] Rule 61(i)(1) permits untimely claims within a year after the U.S. Supreme Court or this Court recognizes a newly retroactive right, which dovetails with the *Teague* rubric.

The State's proposition that *Younger*, *Flamer*, and *Bailey* are precise adoptions of *Teague* does not stand up to scrutiny.[83] Moreover, this Court has never cited *Teague* in any case challenging a death sentence after the statute was declared unconstitutional. Finally, this Court has never considered whether to apply *Teague* to a death sentence in the post-*Danforth* landscape.

Teague's *policy considerations are meaningless in Mr. Powell's case.*

If the goals of *Teague* and its progeny are deterrence, finality, and the efficient administration of justice, none are served by applying *Teague* to Mr. Powell's motion to vacate his death sentence. Deterrence as a means for the Supreme Court to get lower courts to "toe the constitutional line"[84] has no bearing

[81] *Bailey v. State,* 588 A.2d 1121, 1128-29 (Del. 1991).
[82] *Bailey* at 1127, fn7.
[83] The other case cited by the State, *Richardson v. State,* 3 A.3d 233 (Del. 2011) is inapposite. It held that *Allen v. State* did *not* announce a new rule, but nevertheless applied *Teague* exceptions reserved only for new rules. *Richardson* was a State case interpreting a State statute, so the issue of *Teague* implications of Supreme Court rules was not implicated.
[84] *Desist,* 394 U.S. at 264.

on this Court's jurisprudence. (It also must be noted that deterrence in the other sense of the word - deterring capital murder by prospective offenders[85] - is not served by executing Mr. Powell either. We have no death penalty statute.)

Finality is an important consideration, and one upon this Court has relied.[86] But when balancing competing interests, finality pales in comparison to the prospect of executing someone who was sentenced to death under a statute now known to be unconstitutional. Moreover, as Justice Breyer pointed out in *Summerlin*, finality should be discounted in a death case, because those cases "may stretch on for many years regardless."[87] In fact, when it comes to the case of Mr. Powell and those similarly situated, vacating the death sentence will ensure a definitive end to *Hurst/Rauf*-related litigation.

Nor does executing Mr. Powell further the efficient administration of justice. This is not a constitutional rule that will throw the prison doors open wide if applied retroactively. It will not affect hundreds, or even dozens of Delaware prisoners. The universe of inmates potentially affected by retroactive application of *Hurst/Rauf* is exactly thirteen.

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[85] *Gregg v. Georgia,* 428 U.S. 153, 183 (1976).
[86] *See, McGriff v. State,* 929 A.2d 784 (Del. 2007)(applying Supreme Court holding that *Crawford v. Washington* does not apply retroactively).
[87] *Summerlin,* 542 U.S. at 364.

If Derrick Powell is executed, his death will be by application of an unconstitutional statute—an outcome would not serve any of the policy considerations that underlie *Teague.* This Court should reject *Teague* when considering the implications of *Hurst/Rauf* and apply a standard that gives meaning to the constitutional protections embodied in the Sixth and Eighth Amendments.

The mechanistic* Teague *approach ignores the "death is different" mandate.

This Court observed in *Rauf* that "*Hurst* and its predecessors surface a reality that had been somewhat obscured in the decades since *Furman*"—the fundamental right to a jury trial.[88] Likewise, the post-*Teague* years have obscured the constitutional mandate to treat death differently. The *Teague* nonretroactivity initiative cannot be square with this Court's constitutional mandate that the "irredeemable and unfathomable"[89] penalty of death requires a "heightened standard of reliability"[90] in determining that "death is the appropriate punishment."[91]

If the Supreme Court chooses to sacrifice the "death is different" principle in its mission to minimize federal habeas review, it does not follow, especially in a

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[88] *Rauf v. State,* 145 A.3d 430, 436 (Del. 2016).
[89] *Ford v. Wainwright,* 477 U.S. 399, 411 (1986).
[90] *Id.*
[91] *Woodson*, 428 U.S. at 305. *See also, Rauf* at 469.

post-*Danforth* landscape that this Court must walk that path. To put it another way, if death is different for Benjamin Rauf, it must also be so for Derrick Powell.

3. This Court Should Apply a Standard that Respects Constitutional Protections While Adhering to Established Precedent.

This Court should review a challenge to the imposition of a death sentence for compliance with constitutional imperatives, without interposing a retroactivity review. In fact, *stare decisis* compels vacation of Mr. Powell's death sentence. Twice before, this Court vacated all existing death sentences when our death penalty statute was ruled unconstitutional.[92] If a threshold applicability review is employed, this Court should rely on Rule 61, not *Teague.*

Mr. Powell's motion should be granted by operation of Rule 61(i)(4).

On June 30, 2010, trial counsel filed a Motion to Declare Delaware Death Penalty Statute Unconstitutional.[93] Counsel argued that after *Apprendi* and *Ring*, the fact that our statute did not require factual findings to be made by a jury beyond a reasonable doubt violated the Constitution.[94] The trial judge denied this motion.[95] On January 26, 2016, postconviction counsel filed a Motion to Vacate a

[92] *State v. Dickerson,* 298 A.2d 761,764 (Del. 1972); *State v. Spence,* 367 A.2d 983, 988 (Del. 1976). *See also, Brief of the American Civil Liberties Union as Amicus Curiae* at 5-6 (October 17, 2016).
[93] D.I. 66.
[94] *Id.* at ¶ 5.
[95] D.I. 87.

Death Sentence or Alternatively to Certify a Question of Law,[96] in light of *Hurst.* That motion was likewise denied, on January 28, 2016.[97]

Rule 61(i)(4) then in effect provided, "any ground for relief that was formerly adjudicated is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice."[98] To merit reconsideration, the movant "must show that subsequent legal developments have revealed that the trial court lacked the authority to convict or punish him."[99] *State v. Weedon* added two more grounds: an important change of circumstances, typically factual, and "the equitable concern of preventing injustice."[100]

Mr. Powell's motion fits precisely within the interest of justice exception: subsequent legal developments have revealed that the judge lacked the authority to punish him. *Hurst* and *Rauf* firmly establish that if a defendant is to be sentenced to death, all the factual findings must be made by a unanimous jury beyond a reasonable doubt.[101] This legal development, which exposed our statute as "starkly

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[96] D.I. 499.
[97] D.I. 500.
[98] *Super Ct. Crim. R.* 61(i)(4).
[99] *Flamer* at 746.
[100] *State v. Weedon,* 750 A.2d 521, 527 (Del. 2000).
[101] *Rauf* at 437.

out of keeping with predominant American practices,"[102] means that Mr. Powell's sentence must be vacated.[103]

Moreover, the equitable concern of preventing injustice could not be more urgent—the injustice would be permanent and irrevocable. To execute Mr. Powell because he was sentenced during the time when the Supreme Court wandered from constitutional fundamentals is an injustice. To do so when Otis Phillips' death sentence will never be imposed because his case happened to be on direct appeal is an injustice. And to execute him when on two prior occasions, this Court vacated all death sentences after finding our statute unconstitutional is an injustice.

4. Even if this Court Applies *Teague*, Mr. Powell's Death Sentence Must Be Vacated.

Hurst *and* Rauf *did not create a new rule.*

This Court's explication of *Hurst* in *Rauf* applies constitutional principles that existed when Mr. Powell's conviction became final. Those principles are the right to have the facts determinant of a death sentence to be found by a unanimous jury beyond a reasonable doubt. Those principles have existed since the Founding and before. But we need not go back that far. *Rauf's* affirmation of the jury trial

[102] *Id.* at 436.
[103] As the ACCR *Amicus* Brief demonstrates, even a petitioner who had not asserted a prior claim would satisfy the miscarriage of justice exception embodied in Rule 61(i)(5). ACCR brief at 11.

right is expressly based on "principles established by the U.S. Supreme Court cases pre-dating *Hurst*."[104] The Supreme Court in *Hurst* also reached back to prior cases, principally *Apprendi*. It held that Florida's contention that the Sixth Amendment did not require specific jury findings authorizing the imposition of a death sentence "was wrong, and irreconcilable with *Apprendi.*"[105]

The Supreme Court also made it clear that its decision in *Hurst* is a direct application of *Apprendi* and *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.[106]

The Court expressly held that *Hurst* is one of a continuum of cases restoring Sixth Amendment protections and not a new rule. Any consideration of *Hurst* must be informed by the consistency of the holdings applying *Apprendi* in *Blakely, Booker, Ring,* and *Alleyne*.[107] As such, *Hurst* did not announce a new rule as defined by *Younger* and *Flamer*, so it applies retroactively to Mr. Powell's motion.

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[104] *Rauf* at 435-436.
[105] *Hurst v. Florida,* 136 S.Ct. 616, 623 (2016).
[106] *Id.* at 622.
[107] *Hurst* at 621, citing *Blakely v. Washington*, 542 U.S. 296 (2004) (applying *Apprendi* to plea bargains); *United States v. Booker*, 543 U.S. 220 (2005) (federal

Alternatively, if* Hurst *is a new rule, it applies retroactively.

Despite the plain language of *Hurst,* the State asserts it is a new rule, primarily because *Brice* controlled at the time of finality.[108] *Rauf,* of course, overrules *Brice.* But assuming *arguendo* that *Hurst* and *Rauf* announce a new rule, the rule must be applied retroactively.

The State cites *Summerlin* to assert that *Hurst/Rauf* is purely procedural.[109] But *Summerlin's* holding that *Ring* was not retroactive is limited to its terms. The *Summerlin* Court was not called upon to assess the beyond a reasonable standard,[110] which is a substantive due process guarantee.[111] Moreover, just as "time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin,*"[112] *Summerlin's* holding has been eroded by later cases that redraw the substantive-procedural line.

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sentencing guidelines); (criminal fines); *Alleyne v. United States*, 133 S.Ct. 2151 (2013)(mandatory minimum sentences); *Ring v. United States,* 536 U.S. 584 (2002)(capital punishment).

[108] *State's Op. Mem.* at 16, *citing Brice v. State,* 815 A.2d 314 (Del. 2003).

[109] *Id.* at 19, *citing Schriro v. Summerlin,* 542 U.S. 348, 351 (2004).

[110] *See, Summerlin,* 542 U.S. 348, at 356-57, n. 1.

[111] *See Ivan V v. New York,* 407 U.S. 203 (1972)(holding that *in re Winship* mandating beyond a reasonable doubt standard retroactive); *in re Winship,* 397 U.S. 358, 364 (1970).

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

As the Supreme Court held four months after *Hurst*, even rules that have procedural elements "still can be grounded in a substantive constitutional guarantee."[113] The *Welch* Court reasoned: "where the conviction or sentence in fact is not authorized by substantive law, then finality interests are at their weakest. As Justice Harlan wrote, 'there is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose.'"[114] Because Mr. Powell's sentence deprived him of the *substantive* constitutional guarantee of the beyond a reasonable doubt standard, his case rests where it should not.

Montgomery v. Louisiana, decided two weeks after *Hurst,* explains, sentencing procedures that carry a significant risk of an excessive sentence are substantive new rules.[115] Applying *Miller v. Alabama*[116] retroactively, the Court held, "when a new substantive rule of constitutional law controls the outcome of the case, the Constitution requires state collateral review courts to give retroactive effect to that rule."[117] The Court explained that *Teague's* first exception pertains to

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[113] *Welch v. United States,* 136 S.Ct. 1257, 1266 (2016)(holding that the Court's decision finding the Armed Career Criminal Act's residual clause is void for vagueness applies retroactively).
[114] *Welch* at 1266, *citing Mackey,* 401 U.S. at 693.
[115] 136 S.Ct. 718, 734 (2016)(holding that mandatory life sentences for juveniles carries a significant risk that the vast majority of juvenile offenders "face a punishment that the law cannot impose on them.").
[116] 132 S.Ct 2455 (2012).
[117] *Montgomery* at 729.

"substantive categorical guarantees accorded by the Constitution, regardless of the procedures followed."[118] The right to a beyond a reasonable doubt standard is such a substantive guarantee.

The State's assertion that *Hurst* is procedural because it did not hold the death penalty itstelf unconstitutional has lost its force after *Montgomery*.[119] Just as defendants can still receive the death penalty after *Hurst,* juveniles can still be resentenced to life after *Montgomery*. The State's argument—like Justice Scalia's in *Summerlin*—that since the new rule did not alter the maximum punishment, it must be procedural, is no longer tenable. Moreover, *Montgomery* makes substantive rule changes binding on State courts. *Hurst,* as expounded in *Rauf,* establishes that the beyond a reasonable doubt standard of proof is a substantive due process rule that must be applied retroactively to Mr. Powell's motion.

The 5-4 decision in *Summerlin* would likely be resolved differently today given the 2016 developments of *Hurst, Welch* and *Montgomery.* And since this Court has held in *Rauf* that the fundamental protection of the Sixth Amendment is "the right to be put to death only if twelve members of this community agree it should happen,"[120] then retroactivity of that rule is required because the right is

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[118] *Id.*
[119] *State's Op. Mem.* at 17.
[120] *Rauf* at 468.

implicit in the concept of ordered liberty. Because Justice Harlan cited *Gideon* as such a rule, and *Teague* endorsed it, the Supreme Court has refused to hold that any new rule is such a bedrock development. But is the right to not be executed without a cross-section of the community unanimously saying so of any lesser magnitude than the right to counsel? Surely there is no fairness more fundamental.

The accuracy component of the procedural exception, relied upon in *Summerlin*, but not adopted in *Flamer*, has no place in a capital sentencing. The jury's role is to find and weigh facts in aggravation and mitigation, and *also* "apply its discretionary sense of conscience and mercy to the case at hand."[121] That community value judgment cannot be expressed in terms of accuracy.

Summerlin presents a false postulate: whether judges or juries are more accurate.[122] The real question is whether Mr. Powell's sentencing procedure preserved his inviolate right to have the jury decide the ultimate question of life or death unanimously and beyond a reasonable doubt. If *Rauf* does in fact present a new rule, it must be applied retroactively to cure the bedrock procedural errors that pervade his death sentence.

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[121] *Rauf* at 468.

[122] *Summerlin* at 355-56. In any event, studies have shown that jurors are not fully engaged when they know that their vote is only a recommendation. *See, Powell Opening Memorandum (Op. Mem.)* at 22-23.

5. The Delaware Constitution Requires that Mr. Powell's Death Sentence Be Vacated.

Relying solely on *Teague* and its progeny, the State has not mentioned the Delaware Constitution in its Opening Memorandum. But in *Sanders v. State,* this Court held, "death is no less different in Delaware than anywhere else."[123] Our independent sovereignty as a State requires this Court to decide whether the Delaware Constitution permits the execution of Derrick Powell in light of *Rauf.* In doing so, this Court is not bound by *Teague, Summerlin,* or any other Supreme Court explication of federal law. Certainly, this Court has not hesitated to invoke independent State grounds, even in the face of United States Supreme Court remands.[124] Moreover, our two constitutions are not in accord as to jury unanimity,[125] so an independent State analysis is warranted.

As explained in the Opening Memorandum,[126] the right to trial by jury in Delaware was preserved from the common law with all its characteristics. Among these cherished characteristics is the unanimity requirement, which is embedded in

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[123] 585 A.2d 117, 146 (Del. 1990)(considering whether death sentence after a guilty but mentally ill verdict comports with the Delaware Constitution).
[124] *See, e.g., Van Arsdall v. State,* 524 A.2d 3 (Del. 1987)(holding that a violation of the Confrontation Clause was not harmless error after remand on State grounds, even though applying the same legal standard).
[125] *Rauf* at 493-494 (Valihura, J, concurring in part and dissenting in part from the *per curiam* opinion)(*citing Apodaca v. Oregon,* 406 U.S. 404 (1972)).
[126] *Op. Mem.* at 15-16.

the 1776 and 1792 Constitutions.[127] Now that the continuum of cases from *Apprendi* to *Hurst* have restored the fundamental Sixth Amendment right to a jury, this Court must give Delaware's jury trial right, and its concomitant unanimity requirement, its proper due.

Until 1991, our State gave voice to its constitutional mandate by requiring unanimous jury verdicts for death sentences. The result of a high-profile murder case[128] then prompted our General Assembly to rewrite our statute. Delaware became one of the very few States without jury sentencing, a concept that would have been "alien to the founders."[129] But the fundamental right to a unanimous jury long preceded our constitutionally anomalous period of 1991-2016, and will carry on long after.

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 Rights."[130] For that principle to have meaning, remedies must be granted when violations of the constitutions are revealed. For Mr. Powell, the only available and appropriate relief is that his death sentence be vacated.

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[127] *Claudio* at 1295-1297, *citing Wilson v. Oldfield,* Clayton 169, 1 Delaware Cases 622, 624-27 (1818).
[128] *Robertson v. State,* 630 A.2d 1084 (Del. 1993).
[129] *Rauf* at 436.
[130] *Dorsey v. State,* 761 A.2d 807, 820 (Del. 2000).

Moreover, an application of Rule 61 permits such a remedy. Mr. Powell could not have filed this Motion to Vacate a Death Sentence until *Hurst,* and then *Rauf,* held that all facts necessary for the imposition of the death penalty must be found by a jury, unanimously, and beyond a reasonable doubt. Prior to that, the issue was controlled by *Brice v. State*,[131] now overruled.

Consideration of this motion is warranted by Rule 61(i)(5), which overcomes procedural bars of timeliness and procedural default when there is a "colorable claim that there is a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity, or fairness of the proceedings leading to the judgment of conviction."[132] A violation of the Delaware Constitution occurred when Mr. Powell's sentence of death was imposed by a judge and not a unanimous jury under a reasonable doubt standard. As such, to remedy that violation, his sentence must be vacated.

6. The Execution of Derrick Powell Would Violate Evolving Standards of Decency.

Another important consideration not mentioned in the State's memorandum is the Eighth Amendment dimension bearing upon the issue. Derrick Powell's death sentence can only be carried out if it comports with the "evolving standards of decency that mark the progress of a maturing society" embedded in both the

[131] 815 A.2d 314 (Del. 2003).
[132] *Super. Ct. Crim. R.* 61(i)(5).

federal and Delaware Constitutions.[133] That weighty evaluation is informed by decisional law, legislation, and our State heritage.[134]

***Judge sentencing violates the Eighth Amendment under* Hurst *and* Rauf.**

As noted in *Rauf,* the invalidation of our death penalty statute "can be reached by a more oblique and alternative route, which is holding that the practice of executing a defendant without the prior unanimous vote of a jury is so out of keeping with our history as to render the resulting punishment cruel and unusual."[135] This statement recognizes that even before *Hurst*, our State was an outlier—one of only three States left with judicial determination of imposition facts.

The standard of decency implicated is the essential principle that "no defendant should suffer death unless a cross section of the community determines that should be the case, under a standard that requires them to have a high degree of confidence that execution is the just result."[136] This was the essence of evolving decency since the Founding, and was reaffirmed as the remaining States with judge sentencing amended their statutes after *Ring.* Mr. Powell's death sentence is a

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[133] *See, Trop* at 100 (1958); *Roper v. Simmons,* 543 U.S. 551, 560 (2005); *Hall v. Florida,* 134 S.Ct. 1986, 1992 (2014). 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).
[134] *Sanders* at 146.
[135] *Rauf* at 437.
[136] *Id.*

repudiation of that standard and must be vacated under Article 1, Section 11 of our Constitution.

Moreover, the Supreme Court's approval of judge sentencing schemes is withdrawn by *Hurst.* The cases authorizing such schemes were overruled because "time and subsequent cases have washed away [their] logic."[137] After *Hurst,* the Supreme Court vacated the death sentences of three Alabama defendants "in light of *Hurst.*"[138] So while the death penalty does not violate the Eighth Amendment,[139] it is now clear that the imposition of death without a jury's unanimous approval beyond a reasonable doubt certainly does.

This Court must vacate Mr. Powell's sentence to comport with evolving standards of decency.

This Court has twice vacated all death sentences after Supreme Court decisions invalidated the existing death penalty statute.[140] In doing so, Delaware was not an outlier but was part of a consensus establishing that standards of decency require that a person may not be executed after the sentencing statute has

[137] *Hurst* at 624.
[138] *Johnson v. Alabama,* 136 S.Ct. 1837 (2016); *Wimbley v. Alabama,* 136 S.Ct. 2387 (2016); *Kirksey v. Alabama,* 136 S.Ct. 2409 (2016).
[139] *Gregg v. Georgia,* 428 U.S. 153 (1976).
[140] *State v. Dickerson,* 298 A.2d 761,764 (Del. 1972); *State v. Spence,* 367 A.2d 983, 988 (Del. 1976). *See also, Brief of the American Civil Liberties Union as Amicus Curiae* at 5-6 (October 17, 2016).

been declared unconstitutional.[141] That Arizona continued to execute inmates after *Summerlin* does not disturb the force of this consensus.[142] As the Supreme Court has held, the crucial determinant of evolving standards is "the consistency of the direction of the change."[143]

The longstanding practice in this State and others, of vacating death sentences after invalidation of the statute by which they were sentenced, establishes a benchmark of evolving standards of decency which cannot be ignored. When combined with the commutations of existing death sentences in the repeal states,[144] there can be no doubt that our constitutional prohibition of cruel and unusual punishments requires the same result for Mr. Powell.

Executing Mr. Powell would have no deterrent effect.

The Supreme Court has expressed two societal purposes of the death penalty: "retribution and deterrence of capital crimes by prospective offenders."[145] After *Rauf*, there are no capital crimes to deter. This sea change has fundamental consequences for the continuing viability of Mr. Powell's death sentence under the

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[141] *See, ACLU Amicus Brief* at 11-14 for an extensive list of sentences vacated after *Lockett* and *Woodson. See also, e.g.,Sullivan v. State,* 229 Ga. 731, 732 (Ga. 1972)(vacating death sentences after *Furman*).
[142] *See, e.g., State v. Comer,* 799 P.2d 333, 347 (Ariz. 1990); *ACLU Amicus Brief* at 15.
[143] *Atkins v. Virginia,* 536 U.S. 304, 315 (2002).
[144] *See, Op. Mem.* at 30-32.
[145] *Gregg v. Georgia,* 428 U.S. at 183.

Delaware Constitution. The fact that no prospective capital offender will be deterred by Mr. Powell's execution further erodes the societal value of the death sentence.

This Court has held that it is "'cruel punishment' within the meaning of Article 1 Section 11 to end an individual's life without pausing to examine the logical basis for his sentence, without asking whether his execution would serve any purpose."[146] After *Rauf*, that inquiry rests on a severely lessened premise of societal value. It would be anathema to our State constitutional principles to carry out an execution when the logical basis for it has been significantly undermined.

7. Conclusion: This Court Must Vacate Derrick Powell's Death Sentence.

The State still seeks the execution of Derrick Powell after *Rauf*. It urges the application of a retroactivity rubric it asserts is "utilitarian" and "easier to administer." As this Reply has demonstrated, there are more weighty constitutional considerations in play that dwarf whatever pragmatic value the State ascribes to *Teague* and *Flamer*. Those considerations are at the very core of our constitutional rights: due process, the freedom from cruel and unusual punishments, and the right not to be executed unless that sentence is imposed by unanimous decision of a jury beyond a reasonable doubt. Protection of these

[146] *Sanders* at 146-47.

cherished rights must be given priority over competing considerations of utilitarian practicality.

For the reasons stated in the Opening Memorandum and this Reply, Derrick Powell respectfully seeks an order granting his Motion to Vacate a Death Sentence.

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Dated: November 10, 2016

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.	)	

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