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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

JOINT SUPPLEMENTAL BRIEF OF AMICI IN SUPPORT OF APPELLANT

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PRELIMINARY STATEMENT RESPECTING CITATIONS

This brief will abbreviate citations to the briefs of the parties and amici thus:

AOM	Appellant Powell's Opening Memorandum
SOM	State's Opening Memorandum
ARM	Appellant's Reply Memorandum
SAM	State's Answering Memorandum
LCB	Brief of Amicus Curiae Luis Cabrera
FPD	Amended Brief of Amicus Curiae Federal Public Defender
ACCR	Brief of Amicus Curiae Atlantic Center for Capital Representation
ACLU	Brief of Amicus Curiae American Civil Liberties Union Capital Punishment Project and American Civil Liberties Union Foundation of Delaware

INTRODUCTION

In their prior submissions to the Court, amici curiae have shown that death-row prisoner Derrick Powell is entitled to application of this Court's landmark decision in *Rauf v. State*, 145 A.3d 430 (Del. 2016), even though his conviction is already final on direct appeal. Mr. Powell's execution under the statute *Rauf* struck down therefore should not proceed.

Amici have shown that *Teague v. Lane*, 489 U.S. 288 (1989), in no way bars Mr. Powell's relief under *Rauf*. First, the component of *Rauf* requiring jury findings on every fact necessary for a death sentence is not a new rule, but instead a mere application of an old one, *Ring v. Arizona*, 536 U.S. 584 (2002). *See* LCB at 7-10. Second, the component of *Rauf* requiring a unanimous jury to find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors is a new substantive rule giving effect to the narrowing function of the Eighth Amendment, and/or a watershed rule implicating the fundamental fairness and accuracy of the criminal proceeding. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016); *Ivan V. v. New York*, 407 U.S. 203 (1972) (holding retroactive *In Re Winship*, 397 U.S. 358 (1970), because the "reasonable doubt standard" reduces the risk of factual error); *see generally* FPD at 5-16. Third, executing Mr. Powell based on a statutory scheme that this Court has invalidated would disrespect the societal consensus against executions based on invalidated

statutes and thus violate the Eighth Amendment to the United States Constitution and article I, section 11 of the Delaware Constitution. *See* ACLU at 11-17.

Finally, amici have shown that this Court need not decide any of these federal constitutional questions. Instead, it may apply under Delaware law a broader retroactive construction to federal rules than a federal court – which is encumbered by the constraints of comity and federalism – can employ. *See Danforth v. Minnesota*, 552 U.S. 265 (2008); *see generally* ACCR at 5-14. Accordingly, in deciding whether *Rauf* should receive retroactive application, the Court should treat federal retroactivity principles as instructive but not dispositive.

In its October 21, 2016 letter to the parties and amici, the Court asked for submissions addressing "those cases where the U.S. Supreme Court has declared a death penalty unconstitutional and whether the case was applied retroactively or prospectively only." This brief provides the requested information. The relevant U.S. Supreme Court decisions fall into several categories: (1) some decisions are mere applications of old rules that apply "retroactively" in later cases; (2) some decisions announce substantive rules, including procedural rules that give effect to substantive changes, and also apply retroactively; (3) the only decision that – like *Rauf* – constitutionally increases the State's burden of proof has applied retroactively; and (4) the remaining decisions – unlike *Rauf* – involve

incremental changes to procedure, evidence, or the identity of the decision-maker, and have not received uniform retroactive application.

The State contends that Mr. Powell is not entitled to the benefit of *Rauf* retroactively because it announced a new procedural rule, and that rule is not necessary to the fundamental fairness and accuracy of a capital sentencing. SOM at 4-23 (relying on *Teague v. Lane*, 489 U.S. 288 (1989)); SAM 26-27. In both respects, the State is incorrect. The State tries to hammer a square peg into a round hole by contending that the part of *Rauf* applying *Ring* is not an old rule, but a new one, and that the new rule of *Rauf* is merely procedural, incremental, and narrow, like the cases in which the Supreme Court has found new rules not retroactive.

ARGUMENT

I. *Rauf* Fits Comfortably Among U.S. Supreme Court Decisions Applied Retroactively

In *Rauf*, the Court overruled its prior decisions in part,[1] and found three different provisions of the Delaware capital sentencing procedure unconstitutional under the Sixth Amendment, as incorporated into the Fourteenth Amendment. 145 A.2d at 430 (striking 11 *Del. C.* § 4209 (2013)).

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[1] The State identifies the overruled decisions as *Swan v. State*, 28 A.3d 362 (Del. 2011); *Ortiz v. State*, 869 A.2d 285 (Del. 2005); *Reyes v. State*, 816 A.2d 305 (Del. 2003); *Norcross v. State*, 816 A.2d 757 (Del. 2003); *Brice v. State*, 815 A.2d 314 (Del. 2003); and *State v. Cohen*, 604 A.2d 846 (Del. 1992). SOM at 21 n.95.

First, the Court held that the statute improperly permitted a death sentence upon two judicial findings that the Sixth Amendment reserves for the jury: (a) that an aggravating circumstance alleged by the State has been proven; and (b) that the aggravating circumstances outweigh the mitigating circumstances. *Id.* at 433. Second, the Court held that the Sixth Amendment requires these two findings be made by a *unanimous* jury, which the statute fails to require. Third, the Court held that the Sixth Amendment requires that the critical allegation needed for a death sentence under 11 *Del. C.* § 4209 (that the aggravating circumstances must outweigh the mitigating circumstances) must be proven beyond a reasonable doubt, while the statute unconstitutionally requires mere proof by a preponderance of the evidence. *Id.* at 433-34. The Court also found that it would be impossible to sever these unconstitutional provisions from § 4209. *Id.* at 434.

Chief Justice Strine and Justice Holland supported the per curiam decision with detailed concurrences demonstrating that throughout our Nation's history "the Sixth Amendment right to a jury is most *important and fundamental* when the issue is whether a defendant should live or die." *Id.* at 436 (emphasis added). *See also id.* ("If the right to a jury means anything, it means the right to have a jury drawn from the community and acting as a proxy for its diverse views and mores, rather than one judge, make the awful decision whether the defendant should live or die."); *id.* at 435 (describing the question as invoking "a fundamental

constitutional right that is easy to state – the right to a trial by a jury"); *id.* at 437 ("From the inception of our Republic, the unanimity requirement and the beyond a reasonable doubt standard have been integral to the jury's role in ensuring that no defendant should suffer death unless a cross section of the community unanimously 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."); *id.* at 465 (describing "fundamental guarantee of a jury trial as it was understood throughout most of our history," including by founders); *id.* at 468 (finding "perhaps the most fundamental protection of the Sixth Amendment" to be "the right to be put to death only if twelve members of his community agree that should happen"); *id.* at 479 (discussing the "fundamental, historical right" of a defendant "to have a jury say whether he should live or die"); *id.* at 481 (showing that, historically, "the beyond a reasonable doubt standard was, along with the unanimity requirement, a critical feature in ensuring that no one was executed unless the jury was highly confident that that was the equitable result"); *id.* at 482 (finding no reason to depart from the long-standing beyond a reasonable doubt standard when the jury is making the crucial fact-laden judgment of whether the defendant should be executed."); *id.* at 485 (Holland, J., concurring) (observing the historical, essential role of unanimity in the jury right and that the "fundamental" meaning of the jury right is for the jury to find every fact necessary for the

sentence unanimously and beyond a reasonable doubt) (quoting *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring)).

As shown below, the extensive constitutional changes to constitutional sentencing that *Rauf* requires to honor the fundamental Sixth Amendment jury right – including especially its heightened burden of proof and unanimity requirement – place the case squarely in the same category as Supreme Court decisions (death penalty and otherwise) that have been applied retroactively. Those decisions establish both new substantive constitutional rules and new watershed procedural rules.

The discrete portion of *Rauf* reserving for the jury the factual findings necessary for a death sentence, however, also entitles Mr. Powell to relief because his judge made those findings. AOM at 2-4. This part of the *Rauf* ruling (sufficient for Mr. Powell's relief) merely applies the old rule of *Ring*, and therefore simultaneously places this case in the same category as the Supreme Court's many rulings in which *Teague* presents no bar to retroactive relief so long as the prisoner's death sentence had not been final at the time of the original decision setting out the constitutional rule.

The only category of decisions in which *Rauf* claims do not belong is the one primarily relied upon by the State, SOM at 8-9 n. 39 – mere procedural rulings affecting nothing more than the evidence permitted, the instructions to be

given, and/or the entity to make the decision (judge or jury). Those cases neither involve an increase in the State's burden of proof before it may obtain a death sentence nor require the extensive changes *Rauf* has now imposed to protect Sixth Amendment rights.

Finally, *Rauf*'s wholesale invalidation of the Delaware sentencing statute places this case into the category of Supreme Court rulings finding capital-sentencing statutes void *ab initio*, rulings universally applied retroactively. This history strengthens the arguments that this Court can and should apply a Delaware-specific retroactivity standard permitting retroactive application of *Rauf*, and that allowing an execution based on an invalidated statute would violate the Delaware and U.S. Constitutions.

II. The Overwhelming Majority Of U.S. Supreme Court Death-Penalty Reversals Have Resulted In Retroactive Application

The following table lists U.S. Supreme Court decisions reversing death sentences and indicates whether they have been applied retroactively.[2] The table documents 35 such decisions, a vast majority of which have been

[2] Not included in the table are Supreme Court decisions in which death sentences were reversed based on constitutional violations applicable to non-capital criminal trials. For example, reversals of death sentences due to ineffective assistance of trial counsel are not included. *Williams v. Taylor*, 529 U.S. 362 (2000). Nor are decisions in which the Court reversed based on the State's failure to disclose exculpatory evidence in its possession, *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), or its use of peremptory challenges to exclude jurors based on race. *Snyder v. Louisiana*, 552 U.S. 472 (2008).

retroactively applied. Amici set forth decisions in which the U.S. Supreme Court has expressly held that rules will apply retroactively, decisions the Court has applied retroactively without discussion of retroactivity principles, and decisions applied retroactively by lower courts. The table also includes cases that rely on "old rules" applied "retroactively." In this last set of cases, the table lists the old, controlling rule (and its date) applied (or potentially applied) in later decisions.

Death Penalty Reversals

Decision	Year	Holding	Retroactivity Status	Authority and/or Old Rule Applied
Powell v. Alabama, 287 U.S. 45	1932	Indigent defendants facing death penalty constitutionally entitled to appointed counsel	Retroactively applied	*Mothershead v. King*, 112 F.2d 1004 (8th Cir. 1940)[3]
United States v. Jackson, 390 U.S. 570	1968	Federal statute limiting death sentences to trial cases unconstitutionally burdened right to trial	Unresolved	*Natale v. United States*, 424 F.2d 725 (9th Cir. 1970)[4]

[3] The federal habeas court applied *Powell* to a 1928 conviction in the District of Columbia. *See Mothershead*, 112 F.2d at 1006. *See also Wright v. Johnston*, 77 F. Supp. 687, 694 (N.D. Cal. 1948) (similar); *Commonwealth ex rel. Schultz v. Smith*, 11 A.2d 656, 661 (Pa. Super. Ct. 1940) (granting *Powell* relief in state habeas proceeding of prisoner who never appealed).

[4] In *Natale*, the Ninth Circuit granted post-conviction relief to a prisoner who avoided a death sentence by pleading guilty in 1962 (and who apparently never had a direct appeal). Other federal court decisions found such claims not to be valid under *Jackson*, without addressing the retroactivity question. *See Robinson v. United States*, 394 F.2d 823, 824 (6th Cir. 1968). The U.S. Supreme Court agreed

(Continued . . .)

Decision	Year	Holding	Retroactivity Status	Authority and/or Old Rule Applied
Witherspoon v. Illinois, 391 U.S. 510	1968	Statute may not afford state unlimited cause challenges to jurors with objection to the death penalty	Retroactive	*Witherspoon* (announced within opinion)[5]
Furman v. Georgia, 408 U.S. 238	1972	Striking existing death penalty statutes	Substantive, Retroactive	*United States v. Johnson*, 457 U.S. 537, 550 (1982)[6]
Woodson v. North Carolina, 428 U.S. 280, and *Roberts v. Lou isiana*, 428 U.S. 153	1976	Striking mandatory death sentences	Substantive, Retroactive	*Sumner v. Shuman*, 483 U.S. 66 (1987); *Montgomery v. Louisiana*, __ U.S. __, 136 S. Ct. 718, 732 (2016)
Gardner v. Florida, 430 U.S. 349	1977	Death sentence improperly relied on secret presentence report	Retroactively applied	*Dobbert v. State*, 375 So. 2d 1069 (Fla. 1979)[7]

(. . . continued)

that *Jackson* could not be used to attack guilty pleas. *See Brady v. United States*, 397 U.S. 742, 746 (1970). Although dissenting on the merits in a companion case from North Carolina, Justice Brennan, joined by Justices Marshall and Douglass, would have also held *Jackson* could be applied retroactively. *Parker v. N. Carolina*, 397 U.S. 790, 805 n.9 (1970) (Brennan, J., dissenting).

[5] The Court also ordered retroactive relief in various cases. *See Mathis v. Alabama*, 403 U.S. 946 (1971) (conviction final in 1967); *Segura v. Patterson*, 403 U.S. 946 (1971) (petitioner initiated postconviction proceedings in 1967); *Crain v. Beto*, 403 U.S. 947 (1971) (conviction final in 1965).

[6] *See also Robinson v. Neil*, 409 U.S. 505, 508 (1973).

[7] *See also Raulerson v. Wainwright*, 508 F. Supp. 381, 384 (M.D. Fla. 1980) (granting *Gardner* relief on habeas review); *Alford v. State*, 355 So. 2d 108, 108-09 (Fla. 1977) (denying a post-conviction petition raising *Gardner* error on the merits).

Decision	Year	Holding	Retroactivity Status	Authority and/or Old Rule Applied
Coker v. Georgia, 433 U.S. 584	1977	Eighth Amendment bars execution of persons convicted of non-homicide rape	Substantive, Retroactive	*Montgomery*, *supra* (holding that new substantive rules apply retroactively)[8]
Lockett v. Ohio, 438 U.S. 586	1978	Sentencer must be able to consider mitigation	Applied retroactively	Ohio Department of Rehabilitation & Correction, *Capital Punishment*[9]

[8] *See also Eberhart v. Georgia*, 433 U.S. 917 (1977) (holding death penalty unconstitutional in light of *Coker* in case that became final in 1974); *Hooks v. Georgia*, 433 U.S. 917 (1977) (same); *State v. Glenn*, 558 So.2d 4, 5 (Fla. 1990) (recognizing retroactivity of *Coker*).

[9] http://www.drc.ohio.gov/capital-punishment (last visited Nov. 3, 2016) (explaining that "97 condemned prisoners, including four women, had their sentences commuted to life in prison"). On August 16, 1978, the Ohio Supreme Court issued a summary order modifying "the judgments in 54 listed cases affirming the death sentence of each defendant named therein . . . [requiring] that the death sentence of each such defendant be reduced to life imprisonment. *State v. Garduno*, No. 2012-P-0139, 2013 WL 5445074 * 1 (Ct. App. Ohio 2013) (recounting this history). Not all death-sentenced prisoners were on this list because some still had their cases pending in the trial court or intermediate appellate court. *Id.* Although amici have been unable to verify that any of Ohio's death sentences were final in the sense that the Ohio Supreme Court had affirmed them and the time to file a petition for certiorari had expired, the Ohio Department of Corrections article suggests *Lockett* was universally applied. Similarly, all prisoners sentenced under an Arizona statute that similarly prevented the consideration of mitigating evidence were resentenced under *Lockett*-compliant procedures. *Knapp v. Cardwell*, 513 F. Supp. 4, 9 (D. Ariz. 1980) (recounting this history).

Decision	Year	Holding	Retroactivity Status	Authority and/or Old Rule Applied
Godfrey v. Georgia, 446 U.S. 420	1980	Death sentence based on single vague aggravator is invalid	Retroactively applied, but unresolved by Supreme Court	*Jordan v. Watkins*, 681 F.2d 1067, 1070 (5th Cir. 1982)[10]
Beck v. Alabama, 447 U.S. 625, 631	1980	Capital jury must be able to consider lesser-included offense of felony murder	Unresolved by Supreme Court, lower courts divided	*Lewis v. State*, 535 So. 2d 228 (Ala. Crim. App. 1988)[11]
Eddings v. Oklahoma, 455 U.S. 104	1982	Right to present mitigation violated	Retroactive to July 3, 1978 (date of old rule)	*Lockett v. Ohio*, 438 U.S. 586 (1978)

[10] In *Jordan*, the court relied on *Godfrey* to vacate a death sentence that had become final in 1979. 681 F.2d at 1070. *See also Proffitt v. Wainwright*, 685 F.2d 1227, 1265-66 (11th Cir. 1982) (same for conviction final in 1976). In *Zant v. Stephens*, 462 U.S. 862 (1983), the Supreme Court reviewed a death sentence that become final in 1976, providing an opportunity for the Court to hold that *Godfrey* (relied on in part by the habeas court below to reverse the death sentence) could not be applied retroactively. Instead, the Court reiterated the importance of *Godfrey*, 462 U.S. at 878, but found it not controlling in denying relief. *Id.* at 880.

[11] *Lewis* was the direct appeal from a resentencing trial that ended in a new murder conviction and a sentence of life imprisonment. The cited decision recounts the case's prior history, including that federal habeas relief had been granted (after Lewis's conviction had become final) on *Beck* grounds. 535 So. 2d at 231. *See also State v. Carriger*, 692 P.2d 991, 996-97 (Ariz. 1984) (deciding *Beck* claim on the merits, despite noting *Beck* was decided after affirmance on direct appeal); *Reddix v. Thigpen*, 805 F.2d 506, 512 (5th Cir. 1986) (addressing *Beck* claim on merits without addressing question of retroactivity). *But see Andrews v. Deland*, 943 F.2d 1162, 1187 (10th Cir. 1991) (employing *Teague* analysis and declining to apply *Beck* retroactively to case final two years before *Beck*).

Decision	Year	Holding	Retroactivity Status	Authority and/or Old Rule Applied
Enmund v. Florida, 458 U.S. 782	1982	Eighth Amendment bars execution of those who neither killed nor intended to kill	Substantive, Retroactive	*Montgomery, supra*[12]
Caldwell v. Mississippi, 472 U.S. 320	1985	Constitutional error in prosecutor's argument misleading jury to believe other body will decide sentence	Not Retroactive.	*Sawyer v. Smith*, 497 U.S. 227, 242-43 (1990)
Skipper v. South Carolina, 476 U.S. 1	1986	Right to present evidence of good conduct in jail	Retroactive to July 3, 1978	*Lockett v. Ohio*, 438 U.S. 586 (1978)
Ford v. Wainwright, 477 U.S. 399	1986	Eighth Amendment bars execution of persons insane	Substantive, Retroactive	*Montgomery, supra*[13]
Hitchcock v. Dugger, 481 U.S. 393	1987	Right to present mitigation that had been precluded by Florida statute	Applied retroactively (under state law)	*Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987)

[12] *See also Jones v. Thigpen*, 741 F.2d 805, 810-12 (5th Cir. 1984), *judgment vacated on other grounds*, 475 U.S. 1003 (1986) (expressly holding that *Enmund* is entitled to "full retroactive application"); *Reddix v. Thigpen*, 728 F.2d 705, 708 (5th Cir. 1984) (vacating a death sentence that became final in 1980 on the ground that *Enmund* precludes jury from imputing to defendant intent of another participant); *Adams v. Wainwright*, 709 F.2d 1443, 1447 (11th Cir. 1983) (analyzing a challenge to a death sentence that became final in 1978 under *Enmund*, but ultimately denying relief).

[13] *See Penry v. Lynaugh*, 492 U.S. 302, 329-30 (1989) (noting first *Teague* exception applies not only to new rules that place "certain kinds of … conduct beyond the power of the criminal law-making authority to proscribe," but also to new rules "placing a certain class of individuals beyond the State's power to punish by death," and citing *Ford* as an example).

Decision	Year	Holding	Retroactivity Status	Authority and/or Old Rule Applied
Booth v. Maryland, 482 U.S. 496 and *South Carolina v. Gathers*, 490 U.S. 805 [14]	1987 & 1989	Barring most types of victim-impact testimony	Unresolved by Supreme Court; lower courts divided	*Williams v. Chrans*, 742 F. Supp. 472, 484 (N.D. Ill. 1990)[15]
Maynard v. Cartwright, 486 U.S. 356	1988	Finding violation of *Godfrey v. Georgia*	Retroactive to May 19, 1980	*Godfrey v. Georgia*, 446 U.S. 420 (1980). *See Stringer v. Black*, 503 U.S. 222 (1992)
Mills v. Maryland, 486 U.S. 367	1988	Right to present mitigation violated by requiring juror unanimity	Not Retroactive.	*Beard v. Banks*, 542 U.S. 406 (2004)
Thompson v. Oklahoma, 487 U.S. 815	1988	Eighth Amendment bars execution of juveniles age 15 and under	Substantive, Retroactive	*Montgomery, supra*[16]

[14] The window for retroactive application would have been small. *Booth* and *South Carolina v. Gathers*, 490 U.S. 805 (1989), which applied *Booth*, were overruled in 1991. *See Payne v. Tennessee*, 501 U.S. 808 (1991).

[15] In *Williams*, the federal habeas court applied *Teague* and found *Booth* either based on an old rule, or a new rule that would seriously diminish the accuracy of the death sentence. *Williams*, 742 F. Supp. at 484; *Jackson v. Dugger*, 547 So.2d 1197, 1199 (Fla. 1989) (finding *Booth* retroactive under state retroactivity standard). *But see Daniels v. State*, 561 N.E.2d 487 (Ind. 1990) (adopting *Teague*, finding *Booth/Gathers* a non-retroactive new rule); *State v. Reeves*, 453 N.W.2d 359, 384 (Neb.1990) (similar), *vacated on other grounds, Reeves v. Nebraska*, 498 U.S. 964 (1990).

[16] *See Penry*, 492 U.S. at 331 (citing *Thompson* as example of case that falls within first *Teague* exception because it placed class of individuals beyond State's power to put to death).

Decision	Year	Holding	Retroactivity Status	Authority and/or Old Rule Applied
Penry v. Lynaugh, 492 U.S. 302	1989	Application of Texas special issues precluded consideration of mitigation	Retroactive to July 2, 1976	*Jurek v. Texas*, 428 U.S. 262 (1976); *see Saffle v. Parks*, 494 U.S. 484, 492 (1990)
McKoy v. North Carolina, 494 U.S. 433	1990	Finding violation of *Mills*	Generally not, but retroactive to date of *Mills*	*Beard v. Banks*, 542 U.S. 406 (2004)
Shell v. Mississippi, 498 U.S. 1	1990	Finding violation of *Maynard v. Cartwright*	Retroactive to May 19, 1980	*Godfrey v. Georgia*, 446 U.S. 420 (1980)
Morgan v. Illinois, 504 U.S. 719	1992	A juror who would automatically impose the death penalty is excludable for cause	Unresolved in Supreme Court, but lower courts say not[17]	
Espinosa v. Florida, 505 U.S. 1079	1992	Jury's consideration of unconstitutionally vague instruction on aggravator tainted judge's sentencing decision	Not Retroactive	*Lambrix v. Singletary*, 520 U.S. 518 (1997)
Simmons v. South Carolina, 512 U.S. 154	1994	When future dangerousness at issue, right to instruction that life sentence would carry no possibility of parole	Not Retroactive	*O'Dell v. Netherland*, 521 U.S. 151 (1997)

[17] *Ford v. Schofield*, 488 F. Supp. 2d 1258, 1302 (N.D. Ga. 2007), *aff'd sub nom. Ford v. Hall*, 546 F.3d 1326 (11th Cir. 2008); *People v. Caballero*, 688 N.E.2d 658, 665 (Ill. 1997) ("Application of the *Teague* test indicates that *Morgan* should not be applied retroactively because it constituted a new rule."); *Commonwealth v. Blystone*, 725 A.2d 1197, 1203 (Pa. 1999).

Decision	Year	Holding	Retroactivity Status	Authority and/or Old Rule Applied
Schafer v. South Carolina, 532 U.S. 36	2001	Finds violation of *Simmons*	Retroactive to June 17, 1994	*Simmons v. South Carolina*, 512 U.S. 154 (1994)
Atkins v. Virginia, 536 U.S. 304	2002	Eighth Amendment bars execution of persons intellectually disabled	Substantive, Retroactive	*Montgomery, supra*[18]
Ring v. Arizona, 536 U.S. 584	2002	Jury must find aggravating circumstance needed for death sentence	Not retroactive, but some state courts have applied it retroactively	*Schriro v. Summerlin*, 542 U.S. 348 (2004)[19]
Roper v. Simmons, 543 U.S. 551	2005	Eighth Amendment bars execution of juveniles (at time of crime)	Substantive, Retroactive	*Montgomery, supra*[20]

[18] *See, e.g., Ochoa v. Simmons*, 485 F.3d 538, 540 (10th Cir. 2007); *Davis v. Norris*, 423 F.3d 868, 879 (8th Cir. 2005); *In re Holladay*, 331 F.3d 1169, 1172-73 (11th Cir. 2003); *In re Morris*, 328 F.3d 739, 740 (5th Cir. 2003); *Hill v. Anderson*, 300 F.3d 679, 681 (6th Cir. 2002).

[19] Indiana and Missouri have applied their own state-based retroactivity standards to find *Ring* error in their own statutes retroactive. *Saylor v. Indiana*, 808 N.E.2d 646, 648-49 (Ind. 2004); *State v. Whitfield*, 107 S.W.3d 253, 268-69 (Mo. 2003). Other states have held otherwise. *Head v. Hill*, 587 S.E.2d 613, 619 (Ga. 2003); *Porter v. State*, 102 P.3d 1099, 1104 (Idaho 2004); *Colwell v. State*, 59 P.3d 463, 471-73 (Nev. 2002); *Moeller v. Weber*, 689 N.W.2d 1, 19 (S.D. 2004). In Florida, before *Hurst*, while adhering to its longstanding rejection of *Ring* errors on the merits, the Florida Supreme Court also issued a decision stating *Ring* would not be available to cases on collateral review. *Johnson v. State*, 904 So. 2d 400, 407 (Fla. 2005). As indicated in the table, the question of the retroactivity of *Hurst* itself is pending in the Florida Supreme Court.

[20] *See In re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011); *Schafer v. Clark*, No. CIV S-08-1114 EFB P, 2009 WL 3157453, at *4 (E.D. Cal. Sept. 25, 2009); *Holly v. Mississippi*, No. 3:98CV53-D-A, 2006 WL 763133, at *1 (N.D. Miss.

(Continued . . .)

Decision	Year	Holding	Retroactivity Status	Authority and/or Old Rule Applied
Kennedy v. Louisiana, 554 U.S. 407 (2008)	2008	Eighth Amendment bars execution for non-homicide child rape	Substantive, Retroactive	*Montgomery, supra*[21]
Hall v. Florida, 134 S. Ct. 1986	2014	Striking jurisprudential practice of summarily denying *Atkins* claim for any prisoner who scored above 70 on IQ test	Retroactive, under Florida law	*Walls v. State*, __ So.3d __, 2016 WL 6137287 (Fla. Oct. 20, 2016)
Hurst v. Florida	2016	Jury must find all facts necessary for a death sentence	Decision pending in Florida Supreme court	*Asay v. Julie Jones*, No. 16-102 (Fla.); *Lambrix v. Florida*, No. 16-56 (Fla.)[22]

The State maintains that "it is misleading and unhelpful to evaluate death row inmates spared before 1989 [the date of *Teague*]" along with those whose collateral attacks originated after *Teague*'s "seismic shift." SAM at 17. The chart above, however, includes many cases decided after 1989, and

(. . . continued)
Mar. 24, 2006); *Little v. Dretke*, 407 F. Supp. 2d 819, 824 (W.D. Tex. 2005). *See also Moore v. State*, 749 S.E.2d 660, 662 (Ga. 2013) (holding that *Roper* is retroactive under *Teague*); *Duncan v. State*, 925 So. 2d 245, 252 (Ala. Crim. App. 2005) (same).

[21] When *Kennedy* was decided, only two individuals were on death row for non-homicide offenses: the petitioner in *Kennedy* and Richard Davis, both of whose cases were on direct appeal, obviating the need to address retroactivity. *See Kennedy*, 554 U.S. at 434; *State v. Davis*, 995 So. 2d 1211 (La. 2008).

[22] *See also Guardado v. Jones*, 2016 WL 3039840, *2 (N.D. Fla. May 27, 2016) (retroactivity of *Hurst* is open question)

Mr. Powell's case more closely resembles those given retroactive application. As discussed in more detail below, *Rauf* fits within the categories of new substantive rulings (with its new requirements of proof beyond a reasonable doubt and unanimity) and old rules (based on its application of prior precedent requiring the jury to make the findings needed for a death sentence). As further shown below, it does not fit in the category of death penalty decisions creating new procedural rulings that are not retroactive, because the requirement of proof beyond a reasonable doubt is so central to our system of justice and to accuracy in death sentencing that it can only be regarded as fundamental and watershed. As also shown, the State's attempts to cram the *Rauf* decision into the box of narrow new, non-retroactive procedural rules distorts the decision beyond recognition.

III. *Rauf* Applies an Old Rule

As shown in the amicus curiae submission of Luis G. Cabrera, *Rauf*'s requirement that the jury find all facts necessary for a death sentence is a straightforward application of *Ring v. Arizona*, 536 U.S. 584 (2002).[23] *See* LCB at 7-10*; see also Rauf*, 2016 WL 4224252, at *38 (Holland, J., concurring) (finding Sixth Amendment violation based on *Ring*, as reaffirmed in *Hurst v. Florida*, 136

[23] The State suggests that Cabrera is ill-situated to make this argument because he is "not even currently subject to a Delaware death sentence." SAM at 24. Not so. The State's appeal of Cabrera's grant of relief is pending before this Court, and the State is actively seeking his execution.

S.Ct. 616 (2016), because "a Delaware judge alone can increase a defendant's jury authorized punishment of life to a death sentence, based on her own additional factfinding of non-statutory aggravating circumstances"). The old rule of *Ring* applies to Mr. Powell's case because it was already the law when his conviction became final in 2012. *Powell v. State*, 49 A.3d 1090, 1096 (Del. 2012).

Similarly, a significant number of U.S. Supreme Court decisions reversing death sentences are applications of rules from prior decisions. The new rules announced in the prior decisions applied prospectively to all cases that became final after those decisions, even years later.

The best example is *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989), *abrogated on other grounds Atkins v. Virginia*, 536 U.S. 304 (2002). The Supreme Court held that Texas's special-issue questions to the jury did not permit the jury to give effect to Penry's intellectual disability as mitigation, in violation of the Eighth Amendment. *Id.* at 328. Penry's conviction and sentence had become final on January 13, 1986, when the Court denied his petition for a writ of certiorari. *Id.* at 314-15. The decisions Penry was asking the Court to apply had been issued years earlier. *Id.* at 314-15 (citing *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings*

v. Oklahoma, 455 U.S. 104 (1982), and *Jurek v. Texas*, 428 U.S. 262 (1976)). The Court upheld Penry's claim, applying these "old rules."[24]

Penry had enormous impact in Texas. Although it was decided in 1989, it was an application of a 1976 decision – the very first death sentence final on appeal under Texas's post-*Furman* capital-sentencing statute.[25] *Penry* claims were, in other words, retroactively available to anyone improperly sentenced under the statute: no Texas prisoner with a *Penry* claim would ever have had it rejected on non-retroactivity grounds. *See, e.g.*, *Pierce v. Thaler*, 604 F.3d 197, 216 (5th Cir. 2010) (granting *Penry* relief for prisoner sentenced to death in 1986).

Other U.S. Supreme Court decisions reversing death sentences based on the application of old rules involved the application of constitutionally vague aggravating circumstances. The decision in *Stringer v. Black*, 503 U.S. 222 (1992), offers a teaching example of how far back in a succession of cases the Court looks.

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[24] One year after *Penry*, the Court confirmed that *Penry* was an application of its 1976 decision in *Jurek*. *See Saffle v. Parks*, 494 U.S. 484, 492 (1990) ("We did not view *Lockett* and *Eddings* as creating a rule different from that relied upon in *Jurek*; rather, we indicated that *Lockett* and *Eddings* reaffirmed the reasoning in *Jurek* . . . and confirmed the necessity of its application to Penry's claim.").

[25] "The Texas Court of Criminal Appeals first considered the new Texas statutes in *Jurek v. State*." George E. Dix, *Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness*, 55 Tex. L. Rev. 1343, 1353 (1977).

The prisoner's death sentence in *Stringer* became final before the Court had decided *Maynard v. Cartwright*, 486 U.S. 356 (1988), a decision on which he relied as a basis for reversing his death sentence due to an aggravating circumstance (heinous, atrocious and cruel) found to be unconstitutionally vague. *Stringer*, 503 U.S. at 224-27. The Court, however, rejected the State's argument that *Maynard* announced a new rule. *Id.* at 228-29. Instead, the Court held that *Maynard* – a decision that found unconstitutionally vague an Oklahoma aggravating circumstance that the killing was "especially, heinous, atrocious, or cruel" – was merely an application of the foundation-stone case, *Godfrey v. Georgia*. *Id.* at 228. That decision had found unconstitutionally vague a Georgia aggravating circumstance that the killing was "outrageously or wantonly vile, horrible and inhuman." *Id.* (internal citations and quotation marks omitted). "*Maynard* was, therefore, for purposes of *Teague*, controlled by *Godfrey*, and it did not announce a new rule." *Id.*[26] *See also Saffle*, 494 U.S. at 492 (1990) (explaining that *Lockett* and *Eddings* did not "creat[e] a rule different from that relied upon in *Jurek*" but instead merely reaffirmed *Jurek*'s reasoning).

The State maintains that *Hurst* must be a new rule because it overrules earlier precedents, *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v.*

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[26] Because the prisoner's sentence became final in 1985, *id.* at 226, and *Godfrey* was decided in 1980, he was entitled to the protections of *Godfrey*, even if the clarification of *Maynard* helped his claim.

Florida, 490 U.S. 638 (1989). SAM at 25. This misconceives the analysis. *Spaziano* and *Hildwin* were decided long before *Ring*, and it is the old rule of *Ring* on which *Hurst* (and this component of *Rauf*) rely. In the same vein, the State maintains that *Rauf* must announce a new rule because it overrules several Delaware cases, including *Brice v. State*, 815 A.2d 314 (Del. 2003). SAM at 26. The answer to that argument is that, for federal retroactivity purposes, only federal rules matter. The component of *Rauf* that draws on *Hurst* and *Ring* relies on the "old" rule of *Ring*, regardless of how the Delaware courts interpreted it in the past.

The preceding discussion shows that, contrary to the State's contentions, the old rule that *Rauf* applies is *Ring*.

IV. *Rauf* Applies a Substantive Rule

A. Substantive Constitutional Rulings, Like *Rauf*, Are Applied Retroactively

The State concedes that new substantive rules apply retroactively. SOM at 4; SAM at 17. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016). As set forth in the chart above, the Supreme Court has repeatedly treated rules as "substantive" when they required states to narrow the category of death-eligible offenders, established that the State had no authority to impose the death penalty

under invalid statutory schemes,[27] or created categorical exemptions from the death penalty for particular classes of offenders or categories of crime.[28]

B. *Rauf* Is A Substantive Ruling

As shown in the initial brief of amicus curiae Federal Public Defender, *Rauf*'s requirement that the constitutionally required jury findings be made unanimously and beyond a reasonable doubt is a substantive ruling because it effects the constitutional narrowing of the class of offenders who may be executed. *See* FPD at 10-16; *see generally* Rollins, Angela J. and Nolas, Billy H., *The Retroactivity of Hurst v. Florida, 136 S. Ct. 616 (2016) To Death-Sentenced Prisoners on Collateral Review* (November 14, 2016), Southern Illinois University Law Journal. Available at SSRN: https://ssrn.com/abstract=. The State offers a cramped and outdated reading of the relevant precedent, contending that a decision

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[27] *See Furman v. Georgia,* 408 U.S. 238 (1972); *Woodson v. North Carolina,* 428 U.S. 280 (1976); *Roberts v. Louisiana,* 428 U.S. 153 (1976).

[28] *See Kennedy v. Louisiana,* 554 U.S. 407 (2008) (banning execution for non-homicide child rape); *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (same for juveniles); *Atkins v. Virginia*, 536 U.S. 304, 313-16 (2002) (same for persons with intellectual disability); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (same for juveniles age 15 and under); *Ford v. Wainwright*, 477 U.S. 399 (1986) (same for those found insane); *Enmund v. Florida*, 458 U.S. 782 (1982) (same for those who did not kill or intend to kill); *Coker v. Georgia*, 433 U.S. 584 (1977) (same for those convicted of adult rape). It is not disputed that such rulings are substantive and applied retroactively.

must find capital punishment to be unconstitutional to qualify as substantive. SOM at 4 & nn.15, 16, 6.[29]

The State's contention ignores the Supreme Court's rejection of a nearly identical argument, offered recently by the State of Louisiana. *See Montgomery*, 136 S. Ct. at 734. There, the state argued that the Supreme Court decisions constitutionally barring mandatory sentences of life imprisonment without parole for juveniles announced mere procedural rules, because the decisions did not invalidate this form of punishment altogether. *Id.* ("Louisiana . . . argues that [*Miller v. Alabama*, 132 S. Ct. 2455 (2012)] is procedural because it did not place any punishment beyond the State's power to impose; it instead required sentencing courts to take children's age into account before condemning them to die in prison"). The Supreme Court held otherwise. It explained that procedural rules that give effect to substantive protections remain substantive. *Id.* at 734-35. Similarly, Supreme Court decisions that "affect the reach of the underlying statute rather than the judicial procedures by which the statute is applied" are also substantive decisions, with retroactive effect. *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016); *see also Walls v. State*, 2016 WL 6137287,

[29] At times, the State appears to attempt to persuade this Court that *Hurst* should not be applied retroactively. SOM at 17. That is not the question. Although *Rauf* builds on *Hurst*, the two decisions are distinct. They require distinct analyses, particularly with respect to the constitutional change in the burden of proof *Rauf* requires.

at *6 (Fla. Oct. 20, 2016) (holding that Supreme Court's ruling invalidating procedures for determining if capital defendant is intellectually disabled applies retroactively under state law standard because decision removes additional cases from the state's authority to impose death sentences).

The *Montgomery* Court also held that "'[a]n unconstitutional law is void, and is as no law'" and thus "warrants habeas relief." 136 S. Ct. at 734 (quoting *Ex parte Siebold*, 100 U.S. 371, 376 (1880)). As Justice Holland stated, the entirety of the Delaware statute is void under the United States Constitution due to its "multiple infirmities." *Rauf*, 145 A.3d at 487. Of the post-*Teague* cases cited by the State, except for *Ring*, none invalidated even a portion of a statute, let alone the entire statute. *Ring* invalidated only severable portions of a statute. *Rauf* sweeps broadly, and fits within the *Montgomery* Court's paradigm: "A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the Constitution forbids." *Montgomery*, 136 S. Ct. at 731. Indeed, the state can point to no case in which a death statute was struck in its entirety that was not retroactively applied.

Rauf's holding that the State must prove that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt (not merely by a preponderance of the evidence) on the critical finding upon which a death sentence

is permitted is a constitutional ruling that gives effect to a substantive guarantee. It is a ruling necessarily affecting the *reach* of the Delaware capital sentencing statute, rather than its mere procedures. As reviewed in *Rauf*, the hallmark of U.S. Supreme Court death-penalty jurisprudence under the Eighth Amendment has been the establishment or rules to "meaningfully narrow[] . . . the class of offenders eligible for the death penalty." 145 A.3d at 453 (Strine, C.J., concurring). *See also id.* at 456 (noting Delaware statute addressed the constitutional "need to narrow the class of defendants who could be executed"). This is undoubtedly a substantive function, to bar execution of those whose crimes, personal circumstances, and life history do not place them among the worst of the worst. *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (describing court's "narrowing jurisprudence").

In turn, this Court's requirement in *Rauf* of proof beyond a reasonable doubt gives effect to the substantive guarantee that the State may execute only those most deserving of execution. *Rauf*, 2016 WL 4224252, at *36 (describing the history of death penalty showing that proof beyond a reasonable doubt was "[p]art of the protective armor the right gave to a defendant against unwarranted imposition of the death penalty") (Strine, C.J., concurring). Decades ago, and well before *Teague*, the Supreme Court held that the beyond-a-reasonable-doubt requirement of *In Re Winship*, 397 U.S. 358 (1970), must be applied retroactively. *Ivan V. v. New York*, 407 U.S. 203, 204-05 (1972). Just as requiring the State to

prove its contentions beyond a reasonable doubt necessarily narrows the class of defendants who will be criminally convicted to those whose guilt is proven by a "'subjective state of certitude,'" *id.* at 205 (quoting *Winship,* 397 U.S. at 364 (internal citations and quotations omitted)), the new burden imposed in *Rauf* ensures that only those most deserving of the death penalty will be executed. The resulting limitation on the ability of Delaware to execute its citizens constitutes a substantive change in the law. *Welch*, 136 S. Ct. at 1265.

Rauf's new requirement effects the constitutionally-required substantive narrowing of the population most deserving of execution. It therefore is a substantive rule that must be applied retroactively.

V. *Rauf* Applies A Watershed Rule

Under *Rauf,* Mr. Powell's death sentence violates the Sixth Amendment because the jury did not find unanimously all of the facts needed to support it, and because a unanimous jury did not find *beyond a reasonable doubt* that the aggravating factors outweighed the mitigating factors. Even if these rules are new, "watershed" rules of criminal procedure that implicate fundamental fairness and accuracy apply retroactively under *Teague.* 489 U.S. at 311. As shown in the initial brief of amicus curiae Federal Public Defender, *Rauf* sets forth a watershed rule. FPD at 5-10. As shown further below, the sweeping, fundamental, accuracy-ensuring change that *Rauf* requires for Delaware capital

sentencing distinguishes it from the incremental changes that the Supreme Court has treated as non-retroactive.

As the Federal Public Defender's brief describes, the Supreme Court held in *Ivan V. v. New York*, 407 U.S. 203 (1972), that the new constitutional rule of *In re Winship*, 397 U.S. 358 (1970), which increased the burden of proof required for conviction or adjudication of delinquency, must apply retroactively. Both cases described the "beyond a reasonable doubt" requirement in terms nearly identical to those the Court later employed to describe "watershed" rules in *Teague*: a "bedrock axiomatic and elementary principle," one that is "indispensable" to the "truth-finding function." *Ivan V.*, 406 U.S. at 204; *Winship*, 397 U.S. at 33-64. Bedrock; foundational; indispensable; truth-finding function: the Supreme Court's words in *Winship* and *Ivan V.* carry decisive meaning on the question whether *Rauf* satisfies T*eague*'s second exception. Although *Ivan V.* is a case that preceded *Teague*, and *Winship* was therefore not evaluated under the *Teague* standard, *Winship* is a quintessential new fundamental rule. To say it is essential to accurate fact finding would be an understatement. Requiring proof beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors – rather than proof by a preponderance of evidence – is, as *Ivan V.* shows, fundamental, foundational and bedrock. *Compare with Sawyer v. Smith*, 497 U.S. 227, 242 (1990) (stating that to qualify under *Teague*'s second exception a rule

"must not only improve accuracy, but also alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding") (citations and internal quotation marks omitted).

Subsequently, in *Hankerson v. North Carolina*, 432 U.S. 233 (1977), the Supreme Court gave retroactive application to the rule of *Mullaney v. Wilbur*, 421 U.S. 684 (1975), which struck down a presumption that shifted the burden of disproving the "malice" element of murder to the defendant. The *Hankerson* Court relied on *Ivan V.*:

> We have never deviated from the rule stated in *Ivan V.* that where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule is given complete retroactive effect.

Id. at 242-43 (internal quotation marks omitted).

Ivan V. is not only on point, but remains good law. It has never been reversed or abrogated. It is therefore binding on lower courts, including this Court. And although the State predicts that no new watershed rules will ever emerge, leaving as the last example *Gideon v. Wainwright*, 372 U.S. 335 (1963), the contention is myopic. *See* SOM at 8, SAM at 16. The "beyond a reasonable doubt" burden of proof is a signature requirement of American justice, so historic that there would be little if any cause to evaluate it as a watershed rule in a post-

Teague era.[30] That the Supreme Court has not reached back and cited *Winship* as a companion to the *Gideon* example by no means resolves the issue. Instead, the purpose of the rule, its function, and its fundamental nature control.

When this Court ruled in *Rauf* that the Sixth Amendment requires the State to prove the critical allegation needed for a death sentence beyond a reasonable doubt, rather than by a mere preponderance of the evidence, that ruling was necessary for fundamental fairness and accuracy in capital sentencing. *Teague*'s second exception is thus satisfied.[31]

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[30] Although *Winship* was decided in 1970, the decision traces the beyond a reasonable doubt standard to "our early years as a Nation." 397 U.S. at 361. The need for the Supreme Court to hold as constitutionally required a standard so universally and historically applied arose only because *Winship* involved a proceeding to determine a juvenile's alleged delinquency. The decision explains why the criminal standard applies in even in such proceedings. *Id.* at 365-68.

[31] Indeed, the Eleventh Circuit has held a state court's mere failure to *describ*e proof beyond a reasonable doubt accurately in a jury charge – rather than, as here, the complete failure of the legislature to *require* proof beyond a reasonable doubt – to be an error, retroactively applied under *Teague*'s exception for new, watershed procedural rules. *See Nutter v. White*, 39 F.3d 1154, 1157-58 (11th Cir.1994) (applying *Cage v. Louisiana*, 498 U.S. 39, 41 (1990)); *see also Adams v. Aiken*, 41 F.3d 175, 177-78 (4th Cir. 1994) (finding *Cage* retroactive under similar analysis), *cert. denied*, 515 U.S. 1124 (1995). The U.S. Supreme Court has expressly reserved decision whether *Cage* applies retroactively under *Teague*. *See Tyler v. Cain*, 533 U.S. 656, 667-68 (2001). In *Tyler*, the Court held that it had not *implicitly* decided the issue in *Sullivan*, and declined to answer that question *explicitly* because its ruling "would be dictum" in a federal habeas case hinging, not on *Cage*'s retroactivity, but on the strict requirements of Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Id.* But *Teague*, not AEDPA, is at issue here.

The State cites *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004), where the Court found *Ring* to not apply retroactively. SOM at 8 n.39, 17-18, SAM at 23-25. According to the State, because the Supreme Court held in *Summerlin* that *Ring* was not retroactive and not a watershed rule entitled to retroactive application, *Hurst* is not either. SOM at 17-18. But the retroactivity of *Hurst* is not the question. The question is *Rauf*'s retroactivity, and *Rauf* addressed far more than the *Ring* rule that *Summerlin* addressed. *Rauf* upends the prior law far beyond the "mechanics of a sentencing scheme." SOM at 19. *Rauf* affects which body must decide all of the decisive death-penalty questions (the jury, not the judge); by what vote the jury must act on the critical weighing question (unanimously, not mere majority); and under what standard of proof the critical weighing question must be evaluated (beyond a reasonable doubt, not preponderance of the evidence).

In contrast, *Ring* presented a claim that was "tightly delineated[.]" He "contend[ed] only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him." *Ring*, 536 U.S. at 597, n.4. His claim is distinct from Rauf's because "Arizona law already required aggravating factors to be proved beyond a reasonable doubt." *Summerlin*, 542 U.S. at 351, n.1;

Ring, 536 U.S. at 597.[32] The Supreme Court thus specifically noted "that aspect of *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000)] was not at issue." *Summerlin*, 542 U.S. at 351, n.1. *Summerlin* therefore does nothing to rebut the showing above that the sweeping ruling of *Rauf* satisfies *Teague*'s exception.[33]

The other decisions the State cites offer no more help to its position. None of the new procedural rules in these cases rise anywhere close to the level of imposing the bedrock protection of a jury making its life-and-death findings by a unanimous vote, beyond a reasonable doubt. *See Beard v. Banks*, 542 U.S. 406, 420 (2004) (declining to hold retroactive new rule of *Mills v. Maryland*, 486 U.S. 367 (1988), which struck a rule that jurors must be unanimous in finding mitigation because the *Mills* rule has "none of the primacy and centrality" of *Gideon*, "applies fairly narrowly and works no fundamental shift" in the understanding of procedural requirements for fundamental fairness) (internal quotation marks and citations omitted); *O'Dell v. Netherland*, 521 U.S. 151, 157-

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[32] Some state courts have found that even such relatively limited new rules should be applied retroactively under state law. *Saylor v. Indiana*, 808 N.E.2d 646, 650-51 (Ind. 2004) ("But we conclude it is not appropriate to carry out a death sentence that was the product of a procedure that has since been revised in an important aspect that renders the defendant ineligible for the death penalty."); *State v. Whitfield*, 107 S.W.3d 253, 268-69 (Mo. 2003) (applying state-law retroactivity doctrine).

[33] In fact, except for *Ring*, none of the post-*Teague* cases rejecting retroactivity invalidated even a portion of a statute. *Ring* invalidated a severable judicial sentencing. *Rauf* was more sweeping.

166 (1997) (same as to new procedural rule of *Simmons v. South Carolina*, 512 U.S. 154 (1994), which forbade the misleading of a jury about defendant's parole eligibility when prosecutor argues future dangerousness); *Lambrix v. Singletary*, 520 U.S. 518, 527-39 (1997) (same respecting the new rule of *Espinosa v. Florida*, 505 U.S. 1079 (1992), that a Florida jury's consideration of a vague aggravating factor taints a judge's later death sentence because the judge relies on the jury's recommendation, and noting prisoner did not even argue he met the rule); *Sawyer*, 497 U.S. at 244 (same with respect to new rule of *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985), which forbade leading the jury to believe the responsibility for the ultimate decision rested elsewhere, finding that *Caldwell* effected mere "incremental changes").[34]

Rauf represents no mere "incremental change." *Sawyer*, 497 U.S. at 244. Requiring proof beyond a reasonable doubt, found by a unanimous jury, of the contention necessary and critical to the State's ability to execute a person – where it had not been required before – dramatically returns Delaware to the fundamental values of our criminal justice system. The right to this basic

[34] The table addresses other new procedural rules not addressed in this section. All of them except *Morgan v. Illinois*, 504 U.S. 718 (1992), were applied retroactively by the Supreme Court, by unanimous lower courts, or by divided lower courts.

protection is on a par with the right to counsel in *Gideon v. Wainright*, 372 U.S. 335 (1963).

The only thing worse than a conviction based on factual error, *Winship*, 397 U.S. at 463, is an irreversible execution based on factual error. *Rauf*'s rules, even if new, meet the second *Teague* exception.

VI. This Court May and Should Apply *Rauf* Retroactively As a Matter of State Law

The preceding sections explain the compelling federal grounds for retroactive application of *Rauf*. Moreover, as the State recognizes, *Danforth v. Minnesota*, 552 U.S. 264 (2008), establishes that state courts may grant state petitioners collateral review of federal constitutional claims regardless of whether federal habeas courts applying *Teague* would treat the federal rules as "new," "old," "procedural," "substantive," or "watershed." SOM at 10, SAM at 9. The initial Brief of amicus curiae Atlantic Center for Capital Representation explains why this Court should apply *Rauf* retroactively as a matter of state practice. ACCR at 5-13. In brief, this Court can conclude as a matter of state law that the rule it announced is "old," or "substantive," and/or a procedural rule of such fundamental importance that it requires retroactive application.

The table above includes numerous state court decisions applying new federal constitutional rules retroactively as a matter of state practice. One significant example recently arose in Florida. In *Hall v. Florida*, 134 S. Ct. 1986,

2001 (2014), the Supreme Court found strict Florida procedures denying *Atkins* relief to prisoners who scored above 70 on IQ tests to violate the Eighth Amendment. Last month, the Florida Supreme Court found *Hall* to be retroactive, under Florida retroactivity jurisprudence, finding "the *Hall* decision *removes from the state's authority to impose death sentences* more than just those cases in which the defendant has an IQ score of 70 or below." *Walls*, 2016 WL 6137287, at *6.[35]

The State urges this Court to hew closely to *Teague*'s bright-line rule of non-retroactivity, arguing that other states have "held fast" to its "functional guidance." SOM at 11. Many states, however, unconstrained by the demands of comity that bind federal courts, have applied more flexible tests that supplement or supplant *Teague*. ACCR at 7-9. Since *Danforth*, several states have concluded that justice required collateral review of claims that rely on new constitutional rules, including *Ring*. *Id.* at 6-7, 9 (citing *State v. Whitfield*, 107 S.W.3d 253, 265-69 (Mo. 2003)).

The State contends broadly that this Court has followed *Teague* in its own retroactivity jurisprudence, but ignores the Court's independent approach to *Teague*. SOM at 11(citing *Bailey v. State*, 588 A.2d 1121 (Del. 1991), and *Flamer*

[35] Although this decision applies state retroactivity grounds, the reasoning would equally support a finding that *Hall*'s procedural rule (barring automatic denial of *Atkins* claims based on an IQ score above 70) is one in service of the substantive protection of *Atkins* and therefore that *Hall* too is a substantive rule.

v. State, 585 A.2d 736 (Del. 1990)); SAM at 3-5, 9. This Court has employed its own definition of "new rule" and applied "miscarriage of justice" or "interest of justice" exceptions to the procedural bars of Superior Court Rule 61[36] to determine whether to give retroactive effect to "new" rules that merely applied or clarified principles set forth in earlier cases.

In *Bailey*, for example, this Court interpreted former Rule 61(i)(1), which then allowed a petitioner to file an otherwise untimely petition within three years after the Court announced a newly recognized retroactive right. 588 A.2d at 1127. Although the Court began by invoking *Teague*, *id.* at 1128, it immediately qualified its adherence to its definitional scheme. The Court noted that the Supreme Court had adopted an extremely "expansive view" of what constitutes a new rule (thus denying retroactive effect). *Id.* It announced that Delaware would follow a less expansive approach:

> In *Younger*[37] . . . this Court took a somewhat less expansive view of the meaning of a "new rule." We held in *Younger* that a case decided after the defendant's conviction becomes final does not create a new rule when it merely clarifies a previous decision. We also found in *Younger* that the subsequent decision does not create a new rule when it merely 'applies principles which governed the earlier' decision. We reiterated this point in

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[36] Although this rule was amended on June 4, 2014, the amendments by their own terms apply only to petitions filed after the effective date.

[37] *Younger v. State*, 580 A.2d 552 (1990).

> *Flamer*, finding that 'the general rule of non-retroactivity' does not apply 'to cases announcing rules which are merely an application of the principle that governs a prior case decided before a defendant's trial took place.'
>
> In view of . . . the current evolution of the *Teague* 'new rule' doctrine, *we decline to adopt a formal static test for determining the meaning of a 'new rule' for purposes of our own state collateral relief provisions.*

Bailey, 588 A.2d at 1128 (citations omitted; emphasis added); *accord Flamer*, 585 A.2d at 749 (decisions that merely apply principles announced in earlier cases are not "new" rules); *see also State v. Desmond*, No. 91009844DI, 2013 WL 1090965, at *2-3 (Del. Super. Feb. 26, 2013) (ruling did not establish "new rule" because it merely applied prior Supreme Court precedent), *aff'd*, 74 A.2d 653 (Del. 2013); *State v. Re*, No. IN76-07-0016, 1994 WL 89020, at *2-*7 (Del. Super. Mar. 2, 1994) (Supreme Court holdings did not announce new rules but merely applied principles established in earlier case), *aff'd*, 655 A.2d 308 (Del. 1995).

The *Bailey* Court recognized that, even if a petitioner failed to satisfy the (i)(1) time bar exception because the rule was not "new" under Delaware practice, section (i)(5) required a post-conviction court to assess whether the petitioner had "a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity, or fairness leading to the judgment of conviction." *Id.* at 1129.

Similarly, as discussed in Appellant Powell's Reply Memorandum, Delaware courts sometimes considered whether retroactive application of constitutional rules was required by operation of Rule 61(i)(4)'s "interest of justice" exception for subsequent legal developments, changed circumstances, or "the equitable concern of preventing injustice." ARM at 20 (citing *State v. Weedon*, 750 A.2d 521, 527 (Del. 2000)).

Thus, Delaware practice provided an avenue for review of claims based on recent constitutional decisions even before *Danforth* clarified that this Court is free to use its own judgment about whether to allow review. Now that this Court's independent responsibility is clear, it should apply *Rauf* retroactively. Although the initial brief of amicus curiae Luis Cabrera explains why *Hurst* did not announce a new rule under *Teague*, it is unnecessary for this Court to rest its ruling on that federal analysis. Instead, it can rely on its own developed jurisprudence, under which the *Rauf* rule is not new because it merely clarified the application of principles announced in *Ring*, *Apprendi*, and *Winship*. It can consider, under former Rule 61(i)(4) or (i)(5), whether the judicial fact-finding that sent Mr. Powell – and all of Delaware's condemned prisoners – to death row was a "miscarriage of justice," or whether retroactive application is required in the "interest of justice."

Alternatively, the Court may join other states in following the flexible standard of *Linkletter v. Walker*, 381 U.S. 618, 636-40 (1965), which assesses the purpose of the new rule, the State's reliance on prior law, and the effect the retroactive application of the new rule would have on the administration of justice. As amici curiae have shown, the purpose of *Rauf* could not be more fundamental. *Rauf* requires unanimous juries and not judges, convinced beyond a reasonable doubt, for the most important decision the criminal justice system can make: whether the State may execute a person for his crimes. 145 A.3d at 436 (Strine, C.J., concurring). Thus, the decision returns juries to their historic, decisive role. *Id.*

Although the State has relied on this Court's prior rulings upholding § 4209, a relatively small number of prisoners will be impacted by the retroactive application of *Rauf*. And, from an efficiency approach, the administration of justice may well run more smoothly if the Court applies *Rauf* retroactively, thereby ending the prospect of continued litigation on *Rauf*, *Hurst*, and *Ring* grounds.

Under any test, this Court should grant retroactive application to *Rauf* under Delaware law regardless of its retroactivity under federal standards.

VII. The Pattern Of Retroactivity Of Death-Penalty Reversals Supports The Claims That The Execution Of Derrick Powell Would Violate The Constitution

To deny Powell the protections this Court found fundamental in *Rauf*, based on the historical accident of timing, would be fundamentally unfair. As shown in the amicus curiae brief of the ACLU, no state has ever imposed execution based on a sentencing scheme that has been completely invalidated. Although Arizona saw executions after *Ring*, *Ring*'s concededly limited holding is nothing like *Rauf*'s broad ruling, which upholds basic, fundamental, and bedrock protections.

The decisions reviewed in the table in this brief only strengthen the conclusion: every decision reversing a death sentence by the U.S. Supreme Court by reversing an entire capital-sentencing scheme has been applied retroactively. To make Powell the first prisoner executed under a completely invalidated sentencing scheme would violate the evolving standards of decency that mark the progress of a maturing society, *Trop v. Dulles*, 356 U.S. 86, 101 (1958), and thereby deprive Powell of his rights under the U.S. and Delaware Constitutions. *See* U.S. Const. amends. VIII, XIV; Del. Const. art. I, § 11. The Court should not allow it.

CONCLUSION

For the reasons above and in the prior submissions of appellant Powell and amici, this Court should hold that its decision in *Rauf v. State* applies to those defendants whose death sentences are already final.

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