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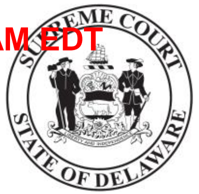

IN THE SUPREME COURT OF DELAWARE

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

BRIEF OF THE ATLANTIC CENTER FOR CAPITAL REPRESENTATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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

The Atlantic Center for Capital Representation (the "Center") is a nonprofit organization based in Philadelphia, Pennsylvania. The Center's mission is to serve as a clearinghouse for capital litigation, and to provide litigation support to attorneys with clients facing capital prosecution or execution. The Center focuses on the Mid-Atlantic Region. It furthers its mission through consultation with capital defense teams, training lawyers and mitigation specialists, and conducting trial and post-conviction litigation. The Center has conducted trainings and consultations in Delaware, including with the Delaware Office of Defense Services. The Center has a significant interest in the manner in which capital jurisprudence is administered in Delaware.

PRELIMINARY STATEMENT

This Court is compelled to apply its decision in *Rauf v. State*, 2016 WL 4224252 (Del. Aug. 2, 2016), which declared that Delaware's capital punishment scheme is unconstitutional, retroactively to Appellant. This brief focuses on a single argument additive to the collective Appellant and amicus briefing—explaining that the trend in federal and state case law concerning retroactivity warrants this Court applying an equities-based approach to determine the retroactivity of *Rauf*, as opposed to the analysis set forth in *Teague v. Lane*, 489 U.S. 288 (1989). Preliminarily, to explain how the Center's argument fits into the larger assessment of *Rauf*'s retroactive application, an outline of the questions collectively presented by Appellant and amici follows:

First, does *Rauf* announce a new rule subject to the general non-retroactivity ban set forth in *Teague*? No. In *Rauf*, this Court recognized that *Hurst v. Florida*, 136 S. Ct. 616 (2016) is an application of the existing precedents of *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See Rauf*, 2016 WL 4224252, at *16 (Concurring Opinion by Strine, C.J., joined by Holland and Seitz, J.J.) ("In 2000, the Supreme Court decided *Apprendi*, which marked a major shift in the U.S. Supreme Court's Sixth Amendment jurisprudence and created the momentum behind the line of cases leading directly to *Hurst*."); *id.* at *37 (Concurring Opinion by Holland, J., joined by Strine, C.J., and Seitz, J.)

("In *Hurst*, the Supreme Court applied its prior holdings in *Apprendi v. New Jersey*, and *Ring v. Arizona*."). Because *Rauf* applies *Hurst*, like *Hurst*, it does not announce a new rule and applies retroactively, both under *Teague* and under this Court's jurisprudence. *See Penry v. Lynaugh*, 492 U.S. 302, 319-20 (1989); *Younger v. State*, 580 A.2d 552 (Del. 1990).

Second, if the *Teague* standard applies, does it bar a retroactive application of *Rauf*? No. New substantive and watershed procedural rules are both exceptions to the retroactivity ban of *Teague*. *Rauf* falls into both exceptions. *Rauf* held that, in a capital case, the existence of aggravators and the weighing determination, which are prerequisites to a death sentence, must be found by a jury unanimously and *beyond a reasonable doubt*. *Rauf*, 2016 WL 4224252, at *2 (emphasis added). Before *Rauf*, the burden of proof in the weighing process was governed by the lesser standard of a preponderance of the evidence. 11 Del. C. § 4209(d)(1). The burden of proof is a substantive aspect of a claim, *see, e.g.*, *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843, 849 (2014) ("'the burden of proof' is a 'substantive' aspect of a claim" (citations omitted)), and narrows the class of persons to whom the rule applies, *Welch v. United States*, 136 S. Ct. 1257 (2016). Because *Rauf* addresses the applicable burden of proof, it is distinguishable from *Schriro v. Summerlin*, 542 U.S. 348 (2004), a case the State relies upon in an effort to show that the *Rauf* is not substantive. But *Summerlin*

addresses only the misallocation of fact-finding responsibility (judge versus jury) and not, like *Rauf*, the applicable standard of review. *Summerlin*, 542 U.S. at 351 n.1 ("Because Arizona law already required aggravating factors to be proved beyond a reasonable doubt, . . . that aspect of *Apprendi* was not at issue [in *Ring*]."). Separately, *Rauf* announced a "bedrock" or "watershed" procedural rule that contributed to the reliability of the fact-finding process and thus applies retroactively. *See Saffle v. Parks*, 494 U.S. 484, 495 (1990).

Third, would a failure to apply *Rauf* retroactively violate the Eighth Amendment and Article I, section 11 of the Delaware Constitution? Yes. The execution of Mr. Powell would offend "the evolving standards of decency" inherent in the Eight Amendment. *See Trop v. Dulles*, 356 U.S. 86, 101 (1958). After the invalidation of capital sentencing statutes, many states, including Delaware, have determined not to execute the defendants previously sentenced under the invalidated statutes. Twenty-one states, including Delaware, have vacated death sentences retroactively after their capital sentencing statutes were determined to be unconstitutional. Delaware has done this twice, once after *Furman v. Georgia*, 408 U.S. 238 (1972) and once after this Court invalidated Delaware's mandatory death-sentencing statute. *State v. Dickerson*, 298 A.2d 761, 771 (Del. 1973); *State v. Spence*, 367 A.2d 983, 989-90 (Del. 1976).

Fourth, and finally, is the issue addressed by this brief: must Delaware apply *Teague*, even if *Rauf* announced a new rule? As explained herein, the answer to this question is no. In *Danforth v. Minnesota*, 552 U.S. 264 (2008), the United States Supreme Court held that states can fashion their own retroactivity rubrics, something many states have done. In so doing, many states have applied the analytical framework set forth in *Linkletter v. Walker,* 381 U.S. 618 (1965), to the question of retroactivity. In light of the flexibility given to states by *Danforth*, this Court should apply its own retroactivity analysis to reach a fundamentally fair result. For those capital petitioners who filed before the 2014 amendments to Supreme Court Rule 61, *Rauf*'s retroactive application is necessary to prevent a "miscarriage of justice," by the terms of pre-amended Supreme Court Rule 61. For those capital petitioners who filed after the 2014 amendments to Rule 61, *Rauf*'s retroactive application is, in any event, appropriate under the *Linkletter* framework. *See Ivan V. v. City of New York*, 406 U.S. 203 (1972) (1972) (applying *Linkletter* to require retroactive application of a rule requiring proof of all elements of crime beyond a reasonable doubt). Moreover, recent decisions by the United States Supreme Court in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) and *Welch v. United States*, 136 S. Ct. 1257 (2016), expanding the substantive rule exception to *Teague*, further counsel in favor of retroactivity in this case.

ARGUMENT

I. THIS COURT SHOULD APPLY *RAUF* AND *HURST* RETROACTIVELY ON INDEPENDENT STATE GROUNDS.

Twenty-five years ago, in *Flamer v. State*, 585 A.2d 736, 749 (Del. 1990), this Court adopted the "general rule of non-retroactivity" for collateral review set forth in *Teague v. Lane*, 489 U.S. 288 (1989). In 2008, the United States Supreme Court clarified in *Danforth v. Minnesota*, 552 U.S. 264 (2008) that *Teague*'s reach is circumscribed. States may grant *state* collateral review of claims based on new *federal* rules that could not survive *Teague*'s scrutiny on federal habeas review. More recently, the 2014 amendments to Rule 61 have strengthened procedural bars to relief, while continuing to allow Delaware petitioners to present claims based on "new rule[s] of constitutional law, made retroactive to cases on collateral review by the United States Supreme Court" or this Court. Super. Ct. Crim. R. 61(d)(2)(ii). Together, *Danforth* and the 2014 amendments should focus attention on Delaware's own law, as an alternative to *Teague*, as the source of retroactivity principles. Those principles require the same relief under *Rauf* for the few prisoners whose convictions are already final as for the prisoners whose convictions are still on direct review.

A. *Danforth v. Minnesota* Requires States to Independently Assess Whether to Grant Collateral Effect to New Rules.

In *Danforth*, the postconviction petitioner presented a constitutional claim based on a case the Supreme Court decided after his conviction became final. 552

U.S. at 267. The Minnesota Supreme Court denied relief. "We are not free to fashion our own standard of retroactivity[.]" *Id.* at 268 (quoting *Danforth v. State*, 718 N.W.2d 451, 455-57 (Minn. 2006)).

The Supreme Court reversed. It explained that nothing in its prior precedents, including *Teague*, "constrained the authority of the States to provide remedies for a broader range of constitutional violations than are redressable on federal habeas." *Id.*, 552 U.S. at 275. Further, because *Teague* applied the federal habeas statute, it could not impose a "binding obligation" on state courts. *Id.* at 278-79. *Teague*'s rule stemmed from "comity and respect for the finality of state convictions," a concern unique to "*federal* habeas review[.]" *Id.* at 279. In contrast, the "remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law." *Id.* at 288.

Since *Danforth*, other state courts have applied state retroactivity principles to decide claims based on new federal rules. For example, in *Commonwealth v. Sylvain*, 995 N.E.2d 760, 770 (Mass. 2013), the Massachusetts Supreme Judicial Court observed that *Danforth* allowed the states to determine whether to apply new federal rules independently of *Teague*. "[B]ased on our authority to conduct an independent review, "[we] are not required to blindly follow [the Supreme Court's] view of what constitutes a new rule." The court declared that it would not follow the Supreme Court's increasingly broad definition of a "new rule," and concluded

that the rule at issue was not new. *Sylvain*, 995 N.E.2d at 770-71; *see also State v. Smart*, 202 P.3d 1130, 1132 (Alaska 2009) (observing that *Danforth* allows states to determine retroactivity independently of *Teague*, and applying three-part state test originally modeled on *Linkletter v. Walker,* 381 U.S. 618 (1965)); *Rhoades*, 233 P.3d 61, 70 (Idaho 2010) (recognizing obligation under *Danforth* to apply retroactivity principles independently of federal requirements); *Miller v. State*, 77 A.3d 1036 (Md. 2013) (making independent state retroactivity determination in light of *Danforth*); *People v. Maxson*, 759 N.W.2d 817 (Mich. 2008) (recognizing *Danforth* and applying *Linkletter*-based state test); *People v. Baret*, 16 N.E.3d 1216, 1225, 1231 (N.Y. 2014) (recognizing *Danforth* and applying *Linkletter*-based state retroactivity test); *Lucero v. State*, 777 S.E.2d 409, 417-18 (S.C. 2015) (acknowledging *Danforth*).

Even before *Danforth*, many states had charted an independent course in deciding whether to apply new rules retroactively. The Center's research has disclosed nineteen states that have (pre- and post-*Danforth*) followed *Teague* non-exclusively[1] or relied on the test that *Teague* supplanted, set forth in *Linkletter,* 381

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[1] *State v. Towery*, 64 P.3d 828, 835 (Ariz. 2003) (applying both *Teague* and an approach based on *Linkletter v. Walker*, 381 U.S. 618 (1965)); *In re Gomez*, 199 P.3d 574, 576-577 & n.3 (Cal. 2009) (applying *Teague* to decide retroactivity of federal constitutional rule, while noting that court can "give greater retroactive impact to a decision than the federal courts choose to give"); *Thiersaint v. Comm'r of Corr.,* 111 A.3d 829, 840-843 (Conn. 2015) ("adopt[ing] the framework

U.S. 618, which assesses "the purpose of the [new] rule, the reliance of the States on prior law, and the effect on the administration of justice of a retroactive

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established in *Teague*" but stating that, "this court will not be bound by [decisions applying *Teague*] in any particular case, but will conduct an independent analysis and application of *Teague*"); *Gathers v. United States*, 977 A.2d 969, 971-973 (D.C. 2009) (beginning with *Teague* principles but also applying D.C. retroactivity law); *Rhoades v. State*, 233 P.3d 61, 64, 70 (Idaho 2010) (starting with the *Teague* framework but noting that the court will apply its "independent judgment, based upon the concerns of this Court and the uniqueness of our state, our Constitution, and our long-standing jurisprudence"); *Miller v. State*, 77 A.3d 1030, 1042-1044 (Md. 2013) (noting that Maryland "ha(s) never expressly adopted *Teague*," then applying *Teague* and state-law standards); *Commonwealth v. Sylvain*, 995 N.E.2d 760, 765-766, 768-770 (Mass. 2013) (applying *Teague* but using different approach to determine whether rule is "new"); *People v. Maxson*, 759 N.W.2d 817, 819 (Mich. 2008) (using *Linkletter* factors); *Danforth v. State*, 761 N.W.2d 493, 498-500 (Minn. 2009) (adopting *Teague* but noting that court "will independently review cases to determine whether they meet our understanding of fundamental fairness"); *Colwell v. State*, 59 P.3d 463, 471-472 (Nev. 2002) (per curium) ("adopt[ing] the general framework of *Teague*" but "reserve[ing] our prerogative to define and determine within this framework whether a rule is new and whether it falls within the two exceptions to nonretroactivity"); *State v. Gaitain*, 37 A.3d 1089, 1103-1104, 1008, 1009 & n.11 (N.J. 2012) (applying *Teague* and *Linkletter*-based test to decide retroactivity of federal rules); *State v. Forbes*, 119 P.3d 144, 146-147 (N.M. 2005) (applying *Teague* to decide retroactivity of federal rule but also relying on state-specific considerations); *In re Tsai*, 351 P.3d 138, 143-144 (Wash. 2015) (applying *Teague* to decide retroactivity of a federal rule but also relying on state-specific considerations); *State v. Mares*, 335 P.3d 487, 499-504 (Wyo. 2014) (applying *Teague* to decide retroactivity of new constitutional rules but reserving right to "apply the *Teague* analysis more liberally than the United States Supreme Court would otherwise apply it where a particular state interest is better served by a broader retroactivity ruling").

application of the [new] rule."[2] *Teague*, 489 U.S. at 302 (citing *Linkletter*, 381 U.S. at 636-40); *accord Stovall v. Denno*, 388 U.S. 293, 297 (1967).

For example, in *State v. Whitfield*, the jury had deadlocked 11-1 in favor of life imprisonment. Under the circumstances, the Missouri capital sentencing statute permitted the trial judge to determine the sentence. The trial judge sentenced the defendant to death, and the Missouri Supreme Court affirmed. *State v. Whitfield*, 939 S.W.2d 361 (Mo. 1997). After *Ring* was decided, the defendant successfully moved to recall the mandate. *State v. Whitfield*, 107 S.W.3d 253, 265-69 (Mo. 2003). The court accessed the *Linkletter* framework and observed that *Teague* sets a minimum constitutional standard but that states are free to provide greater protection.

> The [*Linkletter*] test permits this Court to consider the particular facts and legal issues relevant to the specific issue before the Court—for instance, here, to consider that the right asserted is the fundamental right to trial by jury and that the stake is of the highest magnitude—the defendant's life.

107 S.W.3d at 267. The Court concluded that the factors favored retroactivity. It held that applying *Ring* retroactively was not burdensome to the State because only a few cases were affected and because it was directing the imposition of a life

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[2] *State v. Smart*, 202 P.3d 1130, 1136-1138, 1140 (Alaska 2009) (using *Linkletter*-based test); *Falcon v. State*, 162 So. 3d 954, 956, 960-961 (Fla. 2015) (same); *State v. Whitfield*, 107 S.W.3d 253, 267-268 (Mo. 2003) (same); *Labrum v. Utah State Bd. Of Pardons*, 870 P.2d 902, 911-912 (Utah 1993) (same); *State v. Kennedy*, 735 S.E.2d 905, 923-924 (W. Va. 2012) (same).

sentence instead of remanding for a new sentencing hearing. *Id*. at 268-69; *see also Saylor v. State*, 808 N.E.2d 646, 650-51 (Ind. 2004) (reversing judicial override of jury recommendation against death sentence where "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"); *Kelley v. Gordon*, 465 S.W.2d 842, 846 (Ark. 2015) (affirming grant of re-sentencing to a juvenile sentenced to life without parole because the U.S. Supreme Court granted such relief to another similarly situated Arkansas defendant).

B. In Light of *Danforth*, This Court Should Apply *Rauf* to The Claims of Petitioners Whose Convictions Became Final Before Those Cases Were Decided.

In light of the flexibility given to states by *Danforth*, this Court should independently assess *Rauf*'s retroactivity to reach the fairest result for capital postconviction petitioners. Regardless of whether petitioners filed their petitions before, or after, the 2014 amendments to Supreme Court Rule 61, the fundamentally fair result is *Rauf*'s retroactive application

For those capital petitioners who filed before the 2014 amendments to Rule 61, *Rauf*'s retroactive application is necessary to prevent a "miscarriage of justice" under the terms of pre-amended Rule 61. *Danforth* makes clear that this Court is free to apply *Hurst* (and thus *Rauf*) to these claims through the application of its

own rules. Former Rule 61(i)(1) set forth a one-year statute of limitations, with an exception for "a retroactively applicable right that is newly recognized after the judgment of conviction is final[.]" Even petitioners whose claims did not rely on new rules and thus did not qualify for this exception, however, were entitled to review under Rule 61(i)(5), which provided:

> The bars to relief [contained elsewhere in the Rule] shall not apply to a claim that the court lacked jurisdiction or to a colorable claim that there was 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.

Rauf easily satisfies (i)(5). A constitutional claim for relief under *Rauf* is not only "colorable" but conclusive. *Rauf* undermines not only individual death sentences but the statute on which they are based. And *Rauf* indicates that Delaware's statute violates not only the United States Constitution but also the Delaware Constitution. The unconstitutionality of the state's death sentencing scheme "undermine[s] the fundamental legality, reliability, integrity [and] fairness" of any death sentence imposed under it.

For those capital petitioners who filed after the 2014 amendments, *Rauf*'s retroactive application is, in any event, appropriate under the *Linkletter* framework. The amended rules provide that procedural bars, including a time limitation and a restriction on second or successive petitions, shall not apply to "a new rule of constitutional law, made retroactive to cases on collateral review by the United

States Supreme Court or the Delaware Supreme Court[.]" Rule 61(d)(2)(ii); *see also* Rule 61(i)(5). These provisions, like *Danforth*, squarely impose a responsibility on this Court to decide whether new rules will apply to cases on collateral review. As discussed above, many states rely on the test that *Teague* supplanted, set forth in *Linkletter,* 381 U.S. 618, which assesses "the purpose of the [new] rule, the reliance of the States on prior law, and the effect on the administration of justice of a retroactive application of the [new] rule." *Teague*, 489 U.S. at 302 (citing *Linkletter*, 381 U.S. at 636-40). This Court should also use the *Linkletter* framework, or employ a fundamental fairness analysis, to make retroactivity determinations under the 2014 amendments.

Applying the *Linkletter* factors, the purpose of *Rauf* is fundamental. As Chief Justice Strine wrote:

> If, as I conclude, the jury right is a fundamental one that was understood at founding to involve the right to have a jury determine whether a death sentence should be imposed, then that right should be enforced. The recognition that death is different is not one first made by judges in the 1970s. It was recognized throughout our nation's history, and was a key reason why a jury was required to unanimously agree that any death sentence would be imposed. There is no more important part of the criminal trial process than the sentencing phase in a capital case. In allowing judges rather than juries to make "a choice between life and death," the Delaware statute "sanctions a practice that the Framers never saw and would not have tolerated." Throughout our history, capital sentencing has been a "responsibility traditionally left to juries," and the decision of whether a "fellow citizen should live or die" has been considered a responsibility too great for any one person to make alone.

Rauf, 2016 WL 4224252, at *33 (Del. Aug. 2, 2016) (footnotes omitted). While actors in the criminal justice system have previously assumed that a judicially imposed death sentence would be an available punishment for first degree murder in Delaware, the state has used the punishment so sparingly that the number of death-sentenced prisoners remains small. Vacating their death sentences would have only a negligible effect on the administration of justice.

More fundamentally, failing to apply *Hurst* and *Rauf* to this small group of the condemned, while other current and potential death row prisoners received relief from, or avoided, the most severe punishment available on American soil, would be a miscarriage of justice. *See Chao v. State*, 931 A.2d 1000, 1001-03 (Del. 2007) (disregarding *Teague* and applying miscarriage test to require retroactive application of new rule). In *Rauf*, this Court restored Delaware's historic reliance on the collective wisdom of twelve jurors to wield the awful power over life and death. It should insure that all of Delaware's judicially death-sentenced petitioners have the benefit of that decision.

II. THE UNITED STATES SUPREME COURT'S DECISION IN *MONTGOMERY V. ALABAMA* SUGGESTS THAT ITS DECISION IN *SCHRIRO V. SUMMERLIN* HAS BEEN ERODED AND THAT IT IS UNCERTAIN ABOUT ITS CURRENT APPROACH TO RETROACTIVITY ANALYSIS.

This year the United States Supreme Court suggested that it is expanding its retroactivity analysis for new constitutional rules and eroding its non-retroactivity decision in *Schriro v. Summerlin*, 542 U.S. 348 (2004). In *Summerlin*, the Court held that the rule in *Ring v. Arizona*, 536 U.S. 584 (2002), which changed the process by which defendants might be sentenced to death – giving more responsibility to the jury – was not retroactive. However, in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), it held that a rule that changed the process by which a juvenile could be sentenced to life without parole was retroactive. In both cases, the defendant's sentence could be the same as before the rule change, either (a) death as in *Summerlin*, or (b) life without parole as in *Montgomery*. By making retroactive a new rule that could lead to the same result, *Montgomery* suggests that the holding in *Summerlin* may no longer be correct. *Montgomery* further suggests that the U.S. Supreme Court is uncertain about the future course of its retroactivity analysis, which it has pegged to the plurality opinion in *Teague v. Lane*, 489 U.S. 288 (1989).

As this Court is aware, the United States Supreme Court's plurality opinion in *Teague* held that a new rule of criminal procedure is available collaterally in

federal habeas review only to petitioners whose convictions are not yet final at the time the new rule is announced. There are two exceptions to this rule of non-retroactivity: a new substantive rule and a watershed procedural rule. 489 U.S. at 311-13.

In this case, the State relies on *Summerlin*, a narrow 5-4 decision, in which the United States Supreme Court applied *Teague*, holding that the decision in *Ring* was not retroactive. *Ring* of course held that "[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589. In *Summerlin*, the Court held that *Ring* created neither a substantive rule nor a watershed procedural rule that would permit it to be applied retroactively.

The U.S. Supreme Court reached a different result more recently in *Montgomery*. In that case, the Court decided that its opinion in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), was retroactive. *Miller* had held that mandatory life without parole for juvenile homicide offenders violated the Eighth Amendment's prohibition on cruel and unusual punishments. The Court rejected Louisiana's argument that *Miller* was procedural because it did not place any punishment beyond the State's power to impose, i.e., it was still possible for one of the offenders to receive a sentence of life without parole. The Court agreed that *Miller* had a "procedural component," specifically, the sentencing hearing it required.

However, the Court held that such a hearing "gives effect to the substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Id*. at 735.

More recently, in *Welch v. United States*, 136 S. Ct. 1257 (2016), the Court held retroactive its decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which had declared the residual clause in the Armed Career Criminal Act to be void for vagueness. *Welch* held that, even though the void-for-vagueness doctrine is based on procedural due process, it would be applied retroactively. The Court explained, "Decisions from this Court show that a rule that is procedural for *Teague* purposes still can be grounded in a substantive constitutional guarantee." *Welch*, 136 S. Ct. at 1266.

Justice Thomas dissented. He complained that the Court was eroding *Teague*:

> *Montgomery* . . . redefined substantive rules to include rules that require sentencers to follow certain procedures in punishing juveniles. Now [in *Welch*] the majority collapses *Teague*'s substantive-procedural distinction further, allowing any rule that has the incidental effect of invalidating substantive provisions of a criminal statute to become a substantive rule.

Id. at 1276 (Thomas, J., dissenting). And he asserted that the Court is expanding *Teague*. *Id*.

The Supreme Court's decisions in *Montgomery* and *Welch* undercut *Summerlin* and leave this Court leeway to determine that *Rauf* should apply

retroactively. Justice Scalia's dissent in *Montgomery* supports that result. In *Rauf*, this Court held that, to impose a capital sentence, a jury must unanimously find beyond a reasonable doubt that the aggravating circumstances found outweigh the mitigating circumstances found. This weighing process -- Justice Scalia pointed out in *Montgomery* -- is substantive:

> When in *Lockett v. Ohio*, 438 U.S. 586, 608 (1978), the Court imposed the thitherto unheard-of requirement that the sentence in capital cases must consider and weigh all "relevant mitigating factors," it at least did not impose the substantive (and hence judicially reviewable) requirement that the aggravators must outweigh the mitigators; it would suffice that the sentencer *thought* so.

Montgomery, 136 S. Ct. at 744 (Scalia, J., dissenting, joined by Thomas, J., and Alito, J.) (emphasis in original). In Justice Scalia's view, a capital sentencing weighing requirement would receive retroactive application in habeas review.

Because *Montgomery* inserted uncertainty into the future path of the United States Supreme Court's retroactivity analysis, the Center respectfully submits that this Court should conduct an independent retroactivity analysis, as described herein. [3]

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[3] The United States Supreme Court's retroactive application of a new sentencing procedure for juveniles sentenced to life without parole demonstrates that retroactive application of *Rauf* is also appropriate under a *Teague* analysis. *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

CONCLUSION

Under Delaware's Rules, this Court's application of a state retroactivity analysis, the principle of fundamental fairness and the recent decision in *Montgomery*, this Court should hold that its decision in *Rauf v. State* applies to those defendants already sentenced to death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nicholas J. Rohrer, hereby certify that on this 17th day of October, 2016, a copy of the foregoing *Memorandum of the Atlantic Center for Capital Representation as Amicus Curiae in Support of Appellant* was served on the following counsel of record by e-filing:

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