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Case Number 39,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BENJAMIN RAUF,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	No. 39, 2016
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

ON CERTIFICATION OF QUESTIONS OF LAW
FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

APPELLANT'S OPENING BRIEF

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DATED: February 29, 2016

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NATURE AND STAGE OF PROCEEDINGS

The State has charged the Defendant, Benjamin Rauf ("Rauf") by indictment with one count of First Degree Intentional Murder, one count of First Degree Felony Murder, Possession of a Firearm During those Felonies and First Degree Robbery. The State has expressed its intention to seek the penalty of death in the event Rauf is convicted on either of the First Degree Murder counts. On January 12, 2016, the United States Supreme Court held in *Hurst v. Florida*, that Florida's capital sentencing scheme was unconstitutional because "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."[1] On January 25, 2016, the Superior Court certified five questions of law to this Court for disposition in accordance with Rule 41 of the Supreme Court rules. On January 28, 2016, this Court accepted revised versions of the questions certified by the Superior Court and designated Rauf as the appellant and the State as the appellee. This is Benjamin Rauf's opening brief on appeal.

[1] __ U.S. __ 2016 WL 112683, at *3 (Jan. 12, 2016).

SUMMARY OF ARGUMENT

1. Under the Sixth Amendment to the United States Constitution, a jury must find the existence of "any aggravating circumstance," statutory or non-statutory, that has been alleged by the State for weighing in the selection phase of the capital sentencing proceeding.

2. In order to comport with Federal Constitutional standards, the jury, in finding the existence of "any aggravating circumstance," statutory or non-statutory, that has been alleged by the state for weighing in the selection phase of a capital sentencing proceeding, must make such finding unanimously and beyond a reasonable doubt.

3. The Sixth Amendment to the United States Constitution requires a jury to find whether the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist because, under 11 *Del. C.* §4209, this is the critical finding upon which the sentencing judge "shall impose a sentence of death".

4. The finding that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist must be made by a jury unanimously and beyond a reasonable doubt to comport with federal constitutional standards.

5. If any procedure in 11 *Del. C.* §4209's capital sentencing scheme does not comport with federal constitutional standards, such procedure cannot be severed from the remainder of 11 *Del. C.* §4209 and the court cannot proceed with instructions to the jury. The constitution requires that the legislature correct any constitutional infirmities of the Delaware capital sentencing scheme.

STATEMENT OF FACTS

On December 21, 2015, a Grand Jury indicted Benjamin Rauf for two counts of First Degree Murder involving one victim. The indictment charges that Rauf, on or about August 23, 2015, in New Castle County: (i) Intentionally caused the death of Shazim Uppal by shooting him; and (ii) also recklessly caused Mr. Uppal's death while Rauf was engaged in the commission of, attempted commission of, or flight after committing or attempting First-Degree Robbery. Upon a motion for a Proof Positive hearing, the Superior Court conducted a hearing pursuant to Article I, Section 12 of the Delaware Constitution. Following that hearing, the Court determined that Benjamin Rauf should be held without bail since the State had established proof positive and presumption great that, pursuant to 11 *Del. C.* §4209 §(j) the murder was committed while the defendant was engaged in the commission of, or attempt to commit or flight after committing or attempting to commit robbery, and §(u) the murder was premeditated and the result of substantial planning.

I. UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION A SENTENCING JUDGE IN A CAPITAL JURY PROCEEDING INDEPENDENT OF THE JURY, MAY NOT FIND THE EXISTENCE OF "ANY AGGRAVATING CIRCUMSTANCE," STATUTORY OR NON-STATUTORY, THAT HAS BEEN ALLEGED BY THE STATE FOR WEIGHING IN THE SELECTION PHASE OF THE CAPITAL SENTENCING PROCEEDING.

Question Presented

Under the Sixth Amendment to the United States Constitution, may a sentencing judge in a capital jury proceeding, independent of the jury, find the existence of "any aggravating circumstance," statutory or non-statutory, that has been alleged by the State for weighing in the selection phase of a capital sentencing proceeding?

Standard and Scope of Review

"Preliminarily, we note that in addressing certified questions of law, as distinct from review of trial court rulings, the normal standards of review do not apply. This Court must review the certified questions in the context in which they arise." *State v. Anderson,* 697 A.2d 379, 382 (Del. 1997*) citing Rales v. Blasband,* 634 A.2d 927, 931 (Del. 1993). Here, the certified questions arise in the context of the pre-trial stages of a capital murder prosecution, thus the Court addresses these matters to the same extent as if they were presented in the first instance. The questions require this Court to interpret statutory provisions and to determine

whether the statute in question infringes upon Federal Constitutional rights. The Court thus considers this question as posing matters of law.

Argument

In an uninterrupted series of decisions spanning more than fifteen years, the United States Supreme Court has vigorously and consistently repeated a basic, bright-line rule mandated by the Sixth Amendment: "any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury." *Hurst v. Florida*, 136 S.Ct. 616, 621 (2016), quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000). In *Hurst v. Florida*, the Court recently restated this foundational principle, emphasizing that it applies with equal force to death-penalty sentencing statutes: "The Sixth Amendment requires a jury, not a judge, to find ***each fact necessary to impose a sentence of death***." *Id*. at 619 (emphasis added). The Supreme Court's Sixth Amendment precedent, culminating in *Hurst*, clearly illustrates that the Delaware capital sentencing statute, which requires a judge to make findings regarding aggravating and mitigating circumstances -- and their relative weight -- before a death sentence may be imposed, violates the United States Constitution.

It is now incontrovertible that, under the Sixth Amendment, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S.

at 490. "[T]he relevant 'statutory maximum,' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely v. Washington*, 542 U.S. 296, 303–304 (2004)(emphasis in original). The Court, therefore, has applied *Apprendi*'s unbending rule to invalidate judicial factfinding that increases or enhances an offender's sentence, including schemes involving sentencing enhancements, *Apprendi*, 530 U.S. at 490, mandatory sentencing guidelines, *United States v. Booker*, 543 U.S. 220, 226 (2005), and the death penalty, *Ring v. Arizona*, 536 U.S. 584, 589 (2002).

Apprendi's rule applies to ***all findings of fact*** necessary to the imposition of an increased sentence under state or federal law. While its precise impact depends on the particular sentencing scheme analyzed, legislative labels are in no way dispositive of the Sixth Amendment issue. *Ring*, 536 U.S. at 610 (Scalia, J., concurring)("the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt."). Neither is there a constitutionally significant distinction between "facts concerning the offense" and "facts concerning the offender." *Cunningham v. California*, 549 U.S. 270, 291 n. 14 (2007). The Sixth Amendment requires ***any***

factual finding that is a statutory prerequisite for an increased punishment to be made by a jury, beyond a reasonable doubt. *Id*.

This fundamental right is no less protective in death penalty cases. *Ring*, 536 U.S. at 589 ("Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."). In *Hurst*, the Court clearly stated, "The Sixth Amendment requires a jury, not a judge, to find *each fact necessary* to impose a sentence of death." *Hurst v. Florida*, 136 S.Ct. 616, 619 (2016)(emphasis added). As in *Ring*, the pertinent inquiry in *Hurst* was one of function: what is the maximum sentence the defendant could receive in the absence of judicial fact-finding?

> As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with *Ring*, a judge increased Hurst's authorized punishment based on her own factfinding. In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment.

Id. at 622.

The Court acknowledged that, under Florida law, the judicial findings necessary to authorize a death sentence were not limited to the presence of a single aggravating factor but rather extended to findings regarding mitigating circumstances, and the relative weight of each:

> [T]he Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla. Stat. § 775.082(1) (emphasis added). The trial court *alone* must find "the facts ... [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3); *see* [*State v.*] *Steele*, 921 So.2d [538,] 546 [(Fla. 2005)].

Id. (emphasis in original); *see also Kansas v. Carr*, 136 S.Ct. 633, 643 (2016)(approving constitutionality of Kansas death penalty statute where "the existence of aggravating circumstances and the conclusion that they outweigh mitigating circumstances must be proved beyond a reasonable doubt; mitigating circumstances themselves, on the other hand, must merely be 'found to exist.'").

Therefore, where a state statute requires a trial court to make factual findings that are necessary before a death sentence can be imposed, the Sixth Amendment is violated. Its protections cannot be satisfied by a jury verdict which merely determines a single aggravating factor. The holdings of *Ring* and *Hurst*, which specifically address Sixth Amendment violations caused by judicial findings of aggravating factors, do not suggest the opposite. In *Ring*, the Court noted, "Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him." 536 U.S. at 597 n.4. Hurst raised an identical claim. Petitioner's Brief on the Merits, *Hurst v. Florida*, No. 14-7505, at 17-18 ("Florida's capital sentencing scheme violates [the Sixth Amendment] because it entrusts to the trial court instead of the jury the task

of 'find[ing] an aggravating circumstance necessary for imposition of the death penalty.'").[2]

Therefore, it is no surprise that the Court's holdings specifically addressed the only constitutional infirmity *Ring* and *Hurst* challenged: the judicial determination of aggravating circumstances. *See Kasten v. Saint-Gobain Performance Plastics Corp*., 563 U.S. 1, 17 (2011)(" We do not normally consider a separate legal question not raised in the certiorari briefs."). These holdings, however, are narrow applications of a much broader principle. As the opinion in *Hurst* makes clear, any factfinding that is a necessary precursor to a death sentence, rather than one of imprisonment, must be performed by a jury. *Hurst*, 136 S.Ct. at 619, 622.

Justice Sotomayor, dissenting from the denial of certiorari in *Woodward v. Alabama*, 134 S.Ct. 405 (2013), made this precise observation. *Woodward* involved a challenge to Alabama's capital punishment scheme, which allows judges to independently weigh aggravating and mitigating circumstances and impose death sentences, even where a jury has recommended a sentence of life in prison. *Id*. at 406. Justice Sotomayor acknowledged,

> The very principles that animated our decisions in *Apprendi* and *Ring* call into doubt the validity of Alabama's capital sentencing scheme. Alabama permits a defendant to present mitigating circumstances that weigh against imposition of the death penalty. *See* Ala.Code §§ 13A–

[2] http://sblog.s3.amazonaws.com/wp-content/uploads/2015/06/Hurst-merits-brief.pdf.

> 5–51, 13A–5–52. Indeed, we have long held that a defendant has a constitutional right to present mitigating evidence in capital cases. *See Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). And a defendant is eligible for the death penalty in Alabama only upon a specific factual finding that any aggravating factors outweigh the mitigating factors he has presented. *See* Ala.Code §§ 13A–5–46(e), 13A–5–47(e). The statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is therefore necessary to impose the death penalty. It is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole. Under *Apprendi* and *Ring*, a finding that has such an effect must be made by a jury.

Id. at 410-11.

The highest courts and legislatures of several states have likewise acknowledged that the Supreme Court's Sixth Amendment jurisprudence requires the jury to determine the presence of aggravating and mitigating circumstances, as well as the weight of each. On remand from *Ring v. Arizona*, 536 U.S. 584 (2002), the Arizona Supreme Court rejected the State's argument that, as long as the jury found one aggravating circumstance, the defendant was "death eligible" and there was no Sixth Amendment error. *State v. Ring*, 204 Ariz. 534, 561 (Ariz. 2003)(*Ring* III). Specifically, the State had claimed, "Nothing in *Ring [v. Arizona]* … prevents a trial judge from finding the second and succeeding aggravating factors, as well as finding mitigating factors and balancing them against the aggravator." *Ring* III, 204 Ariz. at 561. The Arizona Supreme Court disagreed,

> In our view, however, *Ring* II [*Ring v. Arizona*] should not be read that narrowly. Although the Court there considered a death sentence based upon the existence of a single aggravating factor, we conclude that *Ring* II requires a jury to consider all aggravating factors urged by the state and not either exempt from *Ring* II, implicit in the jury's verdict, or otherwise established beyond a reasonable doubt.

Id. at 562.

The Court also refused to accede to the State's entreaty that it exempt findings of fact regarding mitigating circumstances and the relative weight of aggravators and mitigators from the jury's purview:

> Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency. A.R.S. §§ 13–703.E (Supp.2002) and 13–703.F (Supp.2001). The process involved in determining whether mitigating factors prohibit imposing the death penalty plays an important part in Arizona's capital sentencing scheme. We will not speculate about how the State's proposal would impact this essential process.

Id. As a result, in several subsequent cases, the Arizona Supreme Court reversed judge-imposed death sentences and remanded for jury sentencing where, although the judge's findings with respect to the aggravators was harmless error (because the aggravators were clearly established beyond a reasonable doubt), the jury may have reached a different conclusion regarding the weight of the mitigating evidence presented. *See, e.g.*, *State v. Nordstrom*, 206 Ariz. 242 (2003); *State v. Dann*, 206 Ariz. 371 (2003); *State v. Armstrong*, 208 Ariz. 360 (2003); *State v. Jones*, 205 Ariz. 445 (2003).

In *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003)(en banc), the Missouri Supreme Court reached a similar conclusion, specifically holding that the Sixth Amendment's scope in death penalty cases was not limited to a jury determination of a single aggravating factor:

> [In *Ring v. Arizona*, t]he Supreme Court held that not just a statutory aggravator, but every fact that the legislature requires be found before death may be imposed must be found by the jury…. Because Mr. Ring did not argue that Arizona's sentencing scheme required the jury to make a factual finding as to mitigating factors, the Supreme Court declined to specifically address whether a jury was also required to determine whether mitigating factors were present that called for leniency. *See Ring*, 536 U.S. at 597, n. 4, 122 S.Ct. 2428. Instead, it set out the general principle that courts must use in applying *Ring* to determine whether a particular issue must be determined by the jury or can be determined by a judge, stating, "[c]apital defendants ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id*. at 589, 122 S.Ct. 2428.

Whitfield, 107 S.W.3d at 257-58.

The Court determined that Missouri's death penalty statute, which permitted the trial judge to make findings of fact and determine whether a death sentence was warranted in cases where the jury was unable to reach a unanimous sentencing decision, violated the Sixth Amendment. *Id*. at 262. In so ruling, the Court specifically held that Missouri's death sentencing process involved three separate factual determinations. *Id*. at 261. Under the Missouri statute, the jury (or the

court, if the jury could not agree) was tasked with determining (1) the presence of at least one aggravating factor, (2) whether all of the aggravating factors, taken together, warrant imposition of the death penalty, and (3) whether the evidence in aggravation outweighs the evidence in mitigation. *Id*. at 258-59. Because a defendant was death-eligible only if these three inquiries were answered in the affirmative, the Court concluded each was a factual finding that the Sixth Amendment required a jury to make. *Id*. at 259; *see also Woldt v. People*, 64 P.3d 256, 266 (Colo. 2003) (*en banc*)(Sixth Amendment required jury to make all factual findings on which death sentence predicated, including that "(A) At least one aggravating factor has been proved; and (B) There are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved").

Similarly, several state legislatures have enacted capital sentencing statutes consistent with the Sixth Amendment's requirement that all factual determinations on which a death sentence is predicated, including those regarding mitigating circumstances, must be proven to a jury beyond a reasonable doubt. *See* ARK. CODE § 5-4-603 ("jury shall impose sentence of death if [it] unanimously returns written findings that: (1) [a]n aggravating circumstance exists beyond a reasonable doubt; (2) [a]ggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; and (3) [a]ggravating circumstances justify a sentence of death beyond a reasonable doubt"); KAN. STAT. ANN. § 21-

6617(e) (death penalty imposed if "by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances …. exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist"); OHIO REV. CODE § 2929.03(D) (jury shall return a death sentence if it "unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors"); TENN CODE ANN. § 39-13-204 (g)(1)(B) ("The sentence shall be death, if the jury unanimously determines that (A) At least one (1) statutory aggravating circumstance or several statutory aggravating circumstances have been proven by the state beyond a reasonable doubt; and (B) Such circumstance or circumstances have been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt"); UTAH CODE ANN. § 76-3-207 (5)(b) ("The death penalty shall only be imposed if... the jury is persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and is further persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances"); WASH. REV. CODE § 10.95.060 (4) (for death sentence to be imposed, jury must be "convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency").

An advisory jury verdict is an insufficient substitute for constitutionally-required factfinding by a jury. In *Hurst*, Florida attempted to defend its capital sentencing procedure by arguing that, in rendering an advisory verdict, the jury performed the factfinding required by the Sixth Amendment. 136 S.Ct. at 622. The Court rejected this contention, noting that Florida law required the court, not the jury, to make the necessary factual determinations supporting a death sentence, and the jury's role was only advisory. *Id*. As a result, Florida could not "now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires." *Id*. Thus, *Hurst*'s constitutional requirement, mandating that each factual precursor to a death sentence be proven to a jury beyond a reasonable doubt, demonstrates that the Delaware capital sentencing statute, 11 *Del. C.* § 4209, violates the Sixth Amendment. *Hurst v. Florida*, 136 S.Ct. 616 (2016).

In Delaware, like Florida, "'[a] person who has been convicted of a capital felony shall be punished by death' only if an additional sentencing proceeding 'results in findings by the court that such person shall be punished by death.'" *Id.* (quoting Fla. Stat. § 775.082(1)(2010)); *see* 11 *Del. C.* § 4209 (b). The sentencing proceeding in Delaware is a "hybrid" one like Florida's, "'in which a jury renders an advisory verdict but the judge makes the ultimate sentencing determinations.'" *Hurst*, 136 S.Ct. at 620 (quoting *Ring v. Arizona*, 536 U.S. 584, 608, n. 6 (2002)). At the conclusion of the sentencing proceeding, the jury must decide whether the

prosecution has proven, beyond a reasonable doubt, the existence of a statutory aggravating circumstance, and whether, by a preponderance of the evidence, the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist. 11 *Del. C.* § 4209 (c)(3). The Delaware jury reports the number of affirmative and negative votes in its weighing decision, "without specifying the factual basis of its recommendation." *Hurst*, 136 S.Ct. at 620; 11 *Del. C.* § 4209 (c)(3)(b). In this way, Delaware's statute, like Florida's, renders the jury's factual findings—the finding of aggravating circumstances, mitigating circumstances and their relative weight—mysterious and irrelevant.

After the jury's decision on the statutory aggravating circumstances, "the maximum punishment [that a Delaware capital defendant] could . . . receive[] without any judge-made findings [i]s life in prison without parole." *Hurst*, 136. S.Ct. at 622. Regardless of any differences between the Florida and Delaware statutes, in this respect they are identical. Even with the jury's verdict finding at least one aggravating circumstance, the judge must independently: (1) find the existence of aggravating circumstances; (2) find the existence of mitigating circumstances; and (3) determine if the aggravating circumstances "it finds to exist" outweigh the mitigating circumstances "it finds to exist." 11 *Del. C.* § 4209(d)(1). Only after each of these factual findings is made, and these determinations together reveal, by a preponderance of the evidence, that

aggravating circumstances found by the court outweigh mitigating circumstances found by the court, is a death sentence not only authorized but mandated.

The jury's aggravation findings need not be found by the judge and may in fact be irrelevant to the judge's independent determination of the aggravating circumstances to be weighed. Plain statutory language, case law, legislative history, and actual judicial practice uniformly demonstrate the judges' autonomy in capital sentencing. As an initial matter, the plain language of the statute limits the aggravating circumstances to be weighed to "the aggravating circumstances found to exist by the Court." Had the legislature intended the jury's findings to be binding on the judge, it could easily have so directed by supplementing this phrase with "and the jury." It is also notable that the statute prescribes the manner in which the penalty phase jury is to be instructed.[3] Omitted from the required instruction is any suggestion that the jury's finding of the statutory aggravating circumstance compels the court to find that circumstance. *See Brown v. State*, 36 A.3d 321, 325 (Del. 2012) (applying "[t]he maxim of statutory interpretation *'expressio unius est exclusio alterius'*—the 'expression of one thing is the exclusion of another,'" which "provides that 'where a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are

[3] *See* 11 *Del. C.* § 4209(c)(4) ("[t[he Court shall include instructions for it to weigh and consider any mitigating circumstances or aggravating circumstances and any of the statutory aggravating circumstances set forth in subsection (e) of this section which may be raised by the evidence. The jury shall be instructed to weigh any mitigating factors against the aggravating factors.")

affirmatively or negatively designated, there is an inference that all omissions were intended by the legislature.'"). Finally, subsection 4209(e)(2) further validates plain language directing the judge to independently find aggravators, rather than merely ratify the jury's work.

In listing Delaware's statutory aggravating circumstances, the statute designates which specific guilty verdicts by the jury compel the jury to find the concomitant statutory aggravating circumstance. Sec. 4209(e)(2). Had the legislature contemplated that the jury's findings of statutory aggravating circumstances compel identical findings by the court it could have simply provided so as it did in the analogous situation under Sec. 4209(e)(2). Instead, the inescapable conclusion is that the legislature intended for the judge to maintain autonomy over these findings. Second, statutory language flatly contradicts the notion that the judge must accept the jury's factfinding. It states that after the jury has found at least one statutory aggravator beyond a reasonable doubt, "the Court, after ***considering the findings*** and recommendation of the jury and without reviewing any additional evidence, shall impose a sentence of death if the Court finds by a preponderance of the evidence that the aggravating circumstances found by the Court to exist outweigh the mitigating circumstances found to exist by the Court." Had the legislature intended the jury's statutory aggravation findings to carry over to the judge's factfinding, it would have prescribed something more

than mere "consideration." The statute mandates that the judge determines the ultimate sentence: "The jury's recommendation shall not be binding on the Court." Sec. 4209(d). Indeed, the Court need only give the recommendation "the consideration as deemed appropriate by the Court." The unmistakable statutory language mandates that the judge have maximum sentencing authority. The Delaware statute leaves the judge free to nullify the jury's findings and death recommendation. Nothing in the statute permits abrogating to the jury the judicial factfinding the Delaware legislature reserved for the judge.

The legislature could not have expressed more clearly its intent that sentencing judges remain untethered by juries' findings. There is no basis to conclude this intent did not extend to the finding of the statutory aggravating circumstance. The legislative history of House Bill #287, in which the legislature expressed severe dissatisfaction with, and repealed, this Court's decision in *Garden v. State*, 815 A.2d 327 (Del. 2003), makes it crystal-clear that the judge is the independent and paramount capital sentencer. It states, "This Act re-affirms the intent of the General Assembly that the sentencing judge in a capital murder case shall be ultimately responsible for determining the penalty to be imposed." The *Garden* sentencing judge rejected the jury's 10-2 recommendation for life, and sentenced Garden to death based on its findings of aggravators. This court reversed the trial judge's override and death sentence finding that a jury's recommendation

may be rejected "[o]nly if *the facts suggesting a sentence of death"* were so clear and convincing no reasonable person could differ. *Garden,* 815 A.2d at 343. The legislature responded swiftly with House Bill #287 to emphatically repudiate this Court's expansion of the jury's sentencing even one iota beyond the statutory language. There is simply no authority for requiring a judge to accept the jury's findings. The intent of the amendment was to protect the judge's autonomy in capital sentencing against judicial interpretations that expanded a jury's authority beyond the letter of the statute language. It is precisely this judicial autonomy which is now unconstitutional.

Under the current Delaware capital sentencing scheme, the judge, without knowledge of which, if any, non-statutory aggravating circumstances the jury found, independently finds non-statutory aggravating circumstances. This violates the Sixth Amendment. In *Kansas v. Carr*, 136 S.Ct. 633, 642 (2016), the Court held that the finding that aggravating circumstances exist is without question a "purely factual determination," subject to a burden of proof. In this way, the existence of aggravating circumstances is akin to a criminal element in support of the ultimate penalty. *Hurst* clarified that sentencing schemes that "allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty," is impermissible under the Sixth Amendment. 136 S.Ct. at 624.

A review of a sampling of sentencing opinions and jury instructions reveal that Delaware judges follow the language of § 4209, which unconstitutionally permits them to find, independent of the jury's findings, the existence of a statutory aggravating circumstance. *See, e.g.*, *State v. Isaiah McCoy*, 2012 WL 5552033, at *5 (Del. Super. Oct. 11, 2012) ("In light of the jury recommendation, under 11 *Del. C.* § 4209(d) *the Court must determine, paraphrasing, whether: a. Beyond a reasonable doubt at least one statutory aggravating circumstance exists*; and b. By a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation bearing on the offense and the character and propensities of McCoy, the aggravating circumstances outweigh the mitigating circumstances.") (emphasis added); *id*. at *6 ("Since the nature of the crime has already been described, it is now appropriate for the Court to conduct *its own independent inquiry* in consideration of the jury's findings.") (emphasis added); *State v. Leslie Small*, 2011 WL 2992038, at *3 (Del. Super. July 22, 2011) ("As a result [of the jury's finding on the statutory aggravating circumstance], the Court must review the evidence, *and like the jury, make two findings*. *The Court must first find, beyond a reasonable doubt, the existence of at least one statutory aggravating factor*. If the answer is yes, the Court must then consider whether any aggravating factors, including statutory aggravating factors previously determined to exist, outweigh any mitigating factors relied upon by the Defendant.") (emphasis

added); *State v. Shannon Johnson*, No. 0609017045, Superior Court, New Castle County, 8/4/04 Tr. at 56-57 (jury instructed that "a sentence of death will be imposed after considering the recommendation of the jury, *if the court finds*: A, beyond a reasonable doubt at least one statutory aggravating circumstance . . . .") (emphasis added) (Ex. A); *State v. Jeffrey Phillips*, No. 1210013272, Superior Court, New Castle County, 12/11/2014 Tr. at 103 (jury instructed that after the jury's votes on the statutory aggravating circumstance and whether the aggravating circumstances outweigh the mitigating circumstances, "the court is required to conduct *the identical inquiry* [and] although the Court is not bound by your recommendation, your answers to the two questions are an important factor in this Judge's final determination of the appropriate sentence") (emphasis added) (Ex. B); *State v. Ambrose Sykes*, ID. No. 0411008300, Superior Court, Kent County, 6/30/06 Tr. at 93 (jury instructed that after the jury's votes on the statutory aggravating circumstance and whether the aggravating circumstances outweigh the mitigating circumstances, "the Court is required to conduct an identical inquiry. . . . Although the Court is not bound by your recommendation, your answers to the two questions is an important factor in this Judge's final determination.") (Ex. C).

Moreover, this Court's decision in *Ortiz v. State*, 869 A.2d 285 (Del. 2005) is incompatible with any notion that jury findings as to statutory aggravating circumstances are compulsory on the judge. In *Ortiz*, the jury found the existence

of one statutory aggravator, but rejected the second statutory aggravator proffered by the State. The trial court however, made a finding that the second statutory aggravator existed even though the jury rejected that aggravator. Under Delaware law, rejection of a statutory aggravator is a powerful finding: it amounts to an *acquittal* of that aggravator under state law. *Capano v. State*, 889 A.2d 968, 984 (Del. 2006) (under 2002 statute non-unanimous jury vote on statutory aggravator amounts to an acquittal of that aggravator). Nevertheless, as this Court found, even the jury's acquittal of the statutory aggravator has no bearing on the judge's factfinding, and the judge is perfectly able to find the existence of that aggravator, give it whatever weight it wishes, and use it as a basis to sentence a defendant to death. *Ortiz*, 869 A.2d 285 at 308. The fact that in *Ortiz*, this court found that the sentencing judge was free to find an aggravator formerly rejected by the jury, manifestly demonstrates a constitutional (i.e., *Ring*-implicated) violation relating to eligibility.

II. IN ORDER TO COMPORT WITH FEDERAL CONSTITUTIONAL STANDARDS, THE JURY, IN FINDING THE EXISTENCE OF "ANY AGGRAVATING CIRCUMSTANCE," STATUTORY OR NON-STATUTORY, THAT HAS BEEN ALLEGED BY THE STATE FOR WEIGHING IN THE SELECTION PHASE OF A CAPITAL SENTENCING PROCEEDING, MUST MAKE SUCH FINDING UNANIMOUSLY AND BEYOND A REASONABLE DOUBT.

Question Presented

If the finding of the existence of "any aggravating circumstance," statutory or non-statutory, that has been alleged by the State for weighing in the selection phase of a capital sentencing proceeding must be made by a jury, must the jury make the finding unanimously and beyond a reasonable doubt to comport with federal constitutional standards?

Standard and Scope of Review

Same standard and scope of review as preceding question.

Argument

The Sixth Amendment Requires Unanimous Verdicts in Capital Cases

Where the Sixth Amendment necessitates that facts supporting a death sentence are proven to a jury, beyond a reasonable doubt, the jury's verdict regarding those facts must be unanimous. Both Delaware and United States Supreme Court precedent mutually reinforce this inescapable conclusion.[4]

[4] While, as discussed *supra*, there is some disagreement about whether the Sixth Amendment to the United States Constitution incorporates all the protections inherent in the common law jury

The fundamental "purpose of trial by jury is to prevent oppression by the Government by providing a 'safeguard against the corrupt or overzealous prosecutor and against the complaint, biased, or eccentric judge.'" *Apodaca v. Oregon*, 406 U.S. 404, 410 (1972), quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). Under existing precedent, the scope of the Sixth and Fourteenth Amendments is slightly different in federal and state cases, respectively. In federal cases, the Sixth Amendment requires that all convictions for non-petty offenses be supported by a unanimous jury verdict. *Andres v. United States*, 333 U.S. 740, 748 (1948)("Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In criminal cases this requirement of unanimity extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury."); *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 766 n.14. (2010)("the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials").

The standard is somewhat different in state cases. This distinction results from the Court's splintered ruling in the companion cases of *Apodaca v. Oregon*, 406 U.S. 404 (1972), and *Johnson v. Louisiana*, 406 U.S. 356 (1972), involving constitutional challenges to state law provisions permitting non-unanimous jury

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trial right, there is no such confusion about the Delaware State Constitution. "[U]nder the Delaware Constitution, unanimity of the jurors is required to reach a verdict since such was the common law rule." *Claudio v. State*, 585 A.2d 1278, 1301 (Del. 1991), citing *Fountain v. State*, 275 A.2d 251 (Del. 1971). It necessarily follows, then, that any jury verdict that is a constitutional prerequisite to a death sentence must be unanimous.

verdicts in non-capital cases. Oregon law permitted convictions by a 10-2 jury vote, and Louisiana required a vote of 9-3 in favor of guilt. *Id*. In *Apodaca*, eight Justices agreed that the right to a jury trial "applied identically" in federal and state cases. *McDonald*, 561 U.S. at 766 n.14 (citing *Johnson v. Louisiana*, 406 U.S. 356, 395 (1972) (Brennan, J., dissenting in *Apodaca*)). But because those eight Justices were evenly divided on whether the Sixth Amendment required unanimity, Justice Powell's separate concurrence broke the tie, and he concluded that the Sixth Amendment requires unanimity in federal cases, but that the states' supermajority rule satisfied the Fourteenth Amendment. *Id*.; *Johnson*, 406 U.S. at 369-380 (Powell, J., concurring in the judgment in *Apodaca*); *id*. at 381-382 (Douglas, J., dissenting); *Apodaca*, 406 U.S. at 406 (plurality); *id*. at 414-415 (Stewart, J., dissenting).

The Supreme Court has not revisited *Apodaca* in the past forty years. In the intervening period, however, the Supreme Court has rejected Justice Powell's notion of inequivalent incorporation. In *McDonald v. City of Chicago*, a plurality of the Court confirmed that "incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" 561 U.S. at 765. The Court recognized that it had "abandoned the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective

version of the individual guarantees of the Bill of Rights," noting that "it would be incongruous to apply different standards depending on whether the claim was asserted in a federal or state court." *Id*. at 765 (internal quotation marks and citation omitted). Writing separately, Justice Thomas agreed that the Fourteenth Amendment makes applicable against the States all the "individual rights enumerated in the Constitution." *Id*. at 823 (Thomas, J., concurring).

Therefore, the continued validity of *Apodaca* is at best questionable. The only way to reconcile the Court's repeated recognition that the Sixth Amendment requires a unanimous jury verdict and *McDonald*, which made clear that the incorporated provisions of the Bill of Rights apply in the same manner, and with equal force, in state cases, is to conclude that the Sixth Amendment does, in fact, require state criminal convictions to be supported by a unanimous verdict.

Even if the holding of *Apodaca* were not predicated on a splintered ruling encompassing since-discredited principles, the Court's approval of non-unanimous verdicts in *Apodaca* addressed only *non-capital cases*. In both states where non-unanimous jury verdicts were permitted, Oregon and Louisiana, capital verdicts were and are required to be unanimous. La. Const. art. I, § 17(A); La. Code Crim. P. Ann. art. 782(A); Or. Const. art. I, § 11. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members

who concurred in the judgments on the narrowest grounds…'" *Marks v. United States*, 430 U.S. 188, 193 (1977), quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15, (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Therefore, *Apodaca*'s narrow holding cannot be extended to approve the constitutionality of a less-than-unanimous verdict in a capital case.

Neither has the Court ever explicitly countenanced such a practice. To the contrary, in the *Apprendi* line of cases, the Court clearly presumed that the required jury verdict would be unanimous. In *Blakely*, the Court noted that the *Apprendi* rule reflected the "longstanding tenet[] of common-law criminal jurisprudence…: that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours,'" *Blakely*, 542 U.S. at 301, quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769); *accord Booker*, 543 U.S. at 238-239 (also quoting Blackstone); *Apprendi*, 530 U.S. at 498 (Scalia, J. concurring) (charges against the accused, and the corresponding maximum exposure he faces, must be determined "*beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens*") (emphasis in original).

Further reinforcing this conclusion is the scarcity of state laws that permit any non-unanimous jury findings in capital cases. The Supreme Court has relied on a survey of the jury trial systems existing in the various States to set boundaries

on the rights guaranteed by the Sixth Amendment. In *Burch v. Louisiana*, 441 U.S. 130, 138 (1979), the Court held that a non-unanimous, six-person jury violated the Sixth Amendment. In so doing, it noted,

> We are buttressed in this view by the current jury practices of the several States. It appears that of those States that utilize six-member juries in trials of nonpetty offenses, only two, including Louisiana, also allow nonunanimous verdicts. We think that this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not.

Id. Other than Delaware, only Alabama permits a jury to recommend death by a less than unanimous vote. The "near-uniform judgment" of every other death penalty jurisdiction likewise demonstrates that the Sixth Amendment requires unanimous verdicts in capital cases.

There is a Nationwide Consensus Against Non-Unanimous Jury Determinations in Capital Cases

There is a nationwide consensus against non-unanimous jury verdicts in capital cases. No existing state statute currently permits a non-unanimous determination of aggravating factors, and only two, in Alabama and Delaware, permit a jury's sentencing determination to be less than unanimous. *See* Ala. Code § 13A-5-46 (f)(requiring a minimum jury recommendation of 10-2 in favor of death); 11 *Del. C.* § 4209 (sentence recommendation must contain a vote of the jurors, with no minimum requirement for number); *Outten v. State*, 650 A.2d 1291,

1294 n.3 (Del. 1994)(affirming death sentence imposed after jury recommended death by a vote of 7-5).

That only two states permit non-unanimous jury verdicts in capital cases weighs heavily against its constitutionality. In *Coker v. Georgia*, 433 U.S. 584 (1977), the Supreme Court found unconstitutional the imposition of a death sentence for the rape of an adult woman. At the time, Georgia was the only state in the country that authorized such a punishment. *Id*. at 595-96. The Court struck down the punishment, in part, because Georgia's outlier position revealed that the nation's collective judgment on the penalty "obviously weigh[ed] very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman." *Id*. at 596.

Non-Unanimous Jury Verdicts, Which Produce Less Reliable Results and Undermine the Discussion of Minority Viewpoints, Fail to Comport with Supreme Court Precedent and the Evolving Standards of Decency

In addition to evaluating consensus, the Court must also exercise its "'own judgment … on the question of the acceptability of the death penalty under the Eighth Amendment.'" *Hall v. Florida*, 134 S.Ct. 1986, 2000 (2014), *quoting Coker*, 433 U.S. at 597. A non-unanimous jury determination fails in this respect as well. Because of the severity and finality of the punishment, the Eighth Amendment demands "heightened reliability" in death penalty cases. *Sumner v. Shuman*, 483 U.S. 66 (1987). Non-unanimous jury decision-making undermines

the jury's valuable function and is markedly less reliable than unanimous decision-making, and therefore, its use in capital cases cannot pass constitutional muster.

Empirical studies suggest that "where unanimity is required, jurors evaluate evidence more thoroughly, spend more time deliberating and take more ballots." American Bar Association, American Jury Project, *Principles for Juries and Jury Trials,* 24.[5] According to a 2001 study, "several consistent findings have emerged" in research conducted over the last four decades: Juries not subject to a unanimity requirement "tend to take less time to reach a verdict, take fewer polls, … hang less often," and most importantly, "cease deliberating when [the minimum necessary vote] is reached." Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 669 (2001) (citations omitted); *see also* Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1272-1273 (2000) (reporting similar findings). Such careful deliberations substantially reduce the chance of error in the verdict.

Allowing a non-unanimous vote also has a deleterious effect on the decision-making process itself. When the members of a jury know that unanimity is not required, they do not feel compelled to give serious consideration to disagreements among the jurors. A non-unanimous decision rule "allows juries to reach a quorum

[5] Available at: http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf.

without seriously considering minority voices, thereby effectively silencing those voices and negating their participation." American Bar Association, American Jury Project, *Principles for Juries and Jury Trials*, 24. A non-unanimous jury may also suppress the voice of racial minorities in the process. When a jury contains no members of the defendant's race, there is an increased likelihood of conscious and unconscious biases influencing the vote. Riordan, *Ten Angry Men: Unanimous Jury Verdicts in Criminal Trials and Incorporation after McDonald*, 101 Northwestern J. Law and Crim. No. 4, 1431 (Fall 2011). Under a non-unanimous verdict system, members of racial and ethnic minority groups lose their power to bring to the attention of their fellow jurors information or evidence they may have missed, or to encourage their fellow jurors to consider a viewpoint that challenges stereotypes and assumptions. *Id.*

III. THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRES A JURY, NOT A SENTENCING JUDGE, TO FIND THAT THE AGGRAVATING CIRCUMSTANCES FOUND TO EXIST OUTWEIGH THE MITIGATING CIRCUMSTANCES FOUND TO EXIST BECAUSE, UNDER 11 *DEL. C.* §4209, THIS IS THE CRITICAL FINDING UPON WHICH THE SENTENCING JUDGE "SHALL IMPOSE A SENTENCE OF DEATH."

Question Presented

Does the Sixth Amendment to the United States Constitution require a jury, not a sentencing judge, to find that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist because, under 11 *Del. C.* §4209, this is the critical finding upon which the sentencing judge "shall impose a sentence of death"?

Standard and Scope of Review

Same standard and scope of review as preceding question.

Argument

After the court finds the existence of aggravating factors, it determines whether those aggravating factors outweigh the mitigating factors. This Court has long held that the weighing determination in Delaware's sentencing scheme is a factual finding necessary to impose a death sentence. "[A] judge cannot sentence a defendant to death without finding that the aggravating factors outweigh the

mitigating factors . . . ." *Brice v. State*, 815 A.2d 314, 322 (Del. 2003). Weighing in Delaware therefore comes within *Hurst*'s purview.

Under the Delaware statute, the weighing determination is treated as a factual one. The Delaware legislature "accorded a burden-of-proof instruction" to the weighing determination, which suggests it is treated as a fact that "either d[oes] or d[oes] not exist." *Carr*, 136 S.Ct. at 642; *see also* 11 *Del. C.* § 4209 (d)(1) (court must find by a preponderance of the evidence whether the aggravating circumstances outweigh the mitigating circumstances). "A standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of *factual conclusions* for a particular type of adjudication." *In re Winship*, 397 U.S. 358, 370, 90 S.Ct. 1068, 1075 (1970) (Harlan, J., concurring) (emphasis added).

In 1991, the Delaware legislature amended the statutory scheme to give judges a greater role in sentencing, by, *inter alia*, modifying the jury's weighing determination to be an advisory recommendation. In upholding the amendment, this Court stressed its factual nature. Calling it a "predicate factual finding," *State v. Cohen*, 604 A.2d 846, 855 (Del. 1992), the Court rejected an argument that the weighing determination was "simply a mechanical process devoid of judgment." *Id*. at 849. While the weighing process has a qualitative component, the Court has recognized that it is at bottom a factual determination, one that requires the

sentencer to assess the totality of the circumstances. For example, the Court has stated that "[t]he balancing of aggravating and mitigating circumstances is not a quantitative exercise, 'but rather a reasoned judgment as to what *factual situations* require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.'" *Zebroski v. State*, 715 A.2d 75, 84 (Del. 1998) (internal quotations omitted, emphasis added); *see also Capano v. State*, 781 A.2d 556, 657 (Del. 2001) ("in determining the punishment, the weighing of aggravating and mitigating circumstances is qualitative not quantitative and must take into account the totality of the circumstances present"); *Ferguson v. State*, 642 A.2d 772, 782 (Del. 1994) (noting that the qualitative nature of the weighing determination "requires that the jury and the judge carefully consider *the specific facts* of each case") (emphasis added); *See also Gattis v. State*, 955 A.2d 1276, 1288 (Del. 2008) (upholding preponderance of evidence standard for weighing determination without rejecting Gattis' argument that the weighing determination was a "finding of fact"); *Garden v. State* 815 A.2d 327, 343 (Del. 2003) (holding that jury's recommendation may be rejected "[o]nly if *the facts suggesting a sentence of death"* were so clear and convincing no reasonable person could differ) (superseded by statute) (emphasis added).

In *Garden*, this Court explained the importance of having the weighing determination be made by a jury, rather than a judge:

> "[A] jury reflects the common, non-legal sensibilities of the general public, as opposed to those of a single judge who may be influenced by his or her daily involvement with crime and its consequences. The decision of whether or not to impose the death penalty is not one within the sole legal province of a judge, but is, and should be, a decision based on community standards of whether, and under what circumstances, the ultimate penalty should be imposed. *State v. Cohen*, 604 A.2d 846, 856 (Del. 1992) ("Although not the final arbiters of punishment, jurors still play a vital and important role in the sentencing procedure. The jury sits as the conscience of the community in deciding whether to recommend life imprisonment or the death penalty.").

Garden, 815 A.2d at 345.[6] Although the *Garden* court thought the Constitution would be satisfied by requiring the judge to give the jurors' conclusion "great weight" – and although the legislature later lessened the amount of weight the judge had to give – the *Garden* Court's understanding of the jury's function anticipated the outcome in *Hurst* that the Sixth Amendment requires the jury to make the weighing determination.

The analysis in *Hurst* reveals that these judge-made findings regarding the presence of aggravating circumstances, not found by the jury, and the relative weight of the aggravating and mitigating circumstances are necessary factual prerequisites to the imposition of a death sentence. They thus must "be proved to a jury beyond a reasonable doubt." *Hurst*, 136 S.Ct. at 621. The Delaware statute clearly and unambiguously states that, even where the jury has determined

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[6] Following *Garden*, the Delaware legislature amended the sentencing statute to require that the judge give the jury's recommendation only "such consideration as deemed appropriate by the Court," rather than the "great weight" required in *Garden*. *See* Del. Code Ann tit. 11, § 4209(d) (West). The amendment did not undermine *Garden*'s view of the nature of the weighing determination.

aggravating circumstances exist, life imprisonment must be imposed unless the court makes an independent finding that the aggravating circumstances outweigh the mitigating circumstances by a preponderance of the evidence. 11 *Del. C.* § 4209. The Delaware legislature did not make a death sentence permissible, in the absence of any other findings, simply upon the jury's determination that an aggravating circumstance exists. *Id*. Rather, it chose to make this additional finding by the court statutorily necessary to the imposition of a death sentence. *Id*.

As in Florida's scheme struck down in *Hurst*, in Delaware, the court alone "must find the facts that sufficient aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances" before a death sentence may be imposed. 136 S.Ct. at 622 (internal quotation marks and alterations omitted). Therefore, the relevant "maximum" sentence, for Sixth Amendment purposes, that can be imposed under Delaware law, in the absence of any judge-made findings on the relative weights of the aggravating and mitigating factors, is life imprisonment. *Id*. ("the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole"). When the court alone makes these findings supporting a death sentence, it violates the Sixth Amendment. *Id*.

Hurst illustrated that Delaware's advisory verdict system, in which the jury provides its recommendation whether or not the aggravating circumstances

outweigh the mitigating circumstances, does not qualify as a "finding" for Sixth Amendment purposes. *See* 11 *Del. C.* § 4209; *Hurst*, 136 S.Ct. at 622. In *Hurst*, without any discussion of the specific jury instructions given, the underlying conclusions incorporated therein, or the number of jury votes in assent, the Supreme Court flatly rejected the notion that an "advisory" verdict, which was only a recommendation from the jury, could qualify as a "finding" under the Sixth Amendment. *Hurst*, 136 S.Ct. at 622. The same must also be true of the Delaware statute, which similarly provides for a jury "recommendation on the question as to whether, by a preponderance of the evidence, … the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist." 11 *Del. C.* § 4209; *see also Brice*, 815 A.2d at 318-19 (noting the similarities between the advisory jury system in capital cases in Florida and Delaware).

In 2003, this Court reached the opposite conclusion and ruled that the Delaware statute did not violate the Sixth Amendment under *Ring v. Arizona*, 536 U.S. 584 (2002). *Brice v. State*, 815 A.2d 314, 322 (Del. 2003). In *Brice*, this Court determined that the jury's verdict reflecting proof of an aggravating circumstance satisfied the Sixth Amendment because it was this finding alone that served to increase the maximum punishment to death:

> Although a judge cannot sentence a defendant to death without finding that the aggravating factors outweigh the mitigating factors, it is not that determination that increases the maximum punishment. Rather, the maximum punishment is increased by the finding of the

> statutory aggravator. At that point a judge can sentence a defendant to death, *but only if the judge finds* that the aggravating factors outweigh the mitigating factors. Therefore, the weighing of aggravating circumstances against mitigating circumstances does not increase the punishment.

Id. at 322 (emphasis added); *see also Ortiz v. State*, 869 A.2d 285 (Del. 2005)(same).

The inherent contradiction in this position is evident. This Court's observation, that after an aggravating circumstance is found by the jury, the judge is free to sentence the defendant to death, is immediately qualified by reference to the necessary judge-made findings regarding the relative weight of aggravating and mitigating circumstances. *Id*. This Court's holding was apparently premised on the not-unique but now-discredited conclusion that "*Ring* does not extend to the weighing phase." *Id*. As the U.S. Supreme Court's decision in *Hurst v. Florida* makes clear, however, *Ring* applies to all factual findings necessary to impose a death sentence under state statute, including the relative weight of aggravating and mitigating circumstances. 136 S.Ct. at 622. Moreover, it is important to note that this Court's holding in *Brice* is shouldered by the U.S. Supreme Court's decisions in *Hildwin v. Florida* and *Spaziano v.* Florida.[7] *Brice*, 815 A.2d at 319. However, in light of *Hurst*, those decisions have been "overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's

[7] 468 U.S. 447 (1984); 490 U.S. 638 (1989).

factfinding, that is necessary for imposition of the death penalty." *Hurst,* 136 S.Ct. at 624. Thus, just as "[t]ime and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*", the reasoning of *Brice* has also been rinsed away in similar fashion. *Id.*

The State is likely to argue, in the alternative, that determining the relative weight of aggravating and mitigating circumstances is not a factual finding, but rather a judgment call that *Hurst* permits a court to make. The reasoning of *Hurst*, cited above, which extends *Ring* to determinations about the relative weight of aggravating and mitigating circumstances, refutes this claim. In addition, the text of the Delaware statute itself belies this conclusion. The legislature specified that the aggravating circumstances must outweigh the mitigating circumstances "by a preponderance of the evidence." 11 *Del. C.* § 4209. As the U.S. Supreme Court observed in *Cunningham*, this language is "a clear factfinding directive to which there is no exception." 549 U.S. at 279; *Cf. Nunnery v. State*, 263 P.3d 235, 252 (Nev. 2011)(Nevada weighing provision not a factual finding in part because "the Nevada Legislature did not specify any burden of proof for the weighing determination.")

That the weighing process also involves a judgment call does not shield it from the jury's purview. The judgment call is one *premised on facts*. The judgment about the relative weight of those facts cannot be divorced from the

underlying determinations that the jury must make regarding which circumstances have been proven, to what degree, and what significance that proof carries for the appropriate penalty in the case. In addition, these determinations regarding the strength, weight, and significance of aggravating and mitigating evidence are indistinguishable from the tasks juries are required to perform every day while fulfilling their fact-finding duties in criminal cases. *See, e.g.*, Delaware Criminal Pattern Jury Instructions 2.1 ("you, the jury, are the sole and exclusive judges of the facts of the case; the credibility of the witnesses; and the weight and the value of the evidence."); 2.7 ("You decide the weight to be given to each witness's testimony."); 4.3 ("As with any other evidence, you must decide whether an out-of-court statement is credible, or believable, and how much weight it should be given."); 4.4 ("As with any other evidence presented at trial, you, the jurors, are the sole finders of fact. You must decide what, if any, weight the evidence should be given."). There is nothing unique about findings regarding the relative weight of aggravating and mitigating circumstances in a capital case. Juries can, and do, routinely make these types of determinations.

Furthermore, the plain language of Section 4209(d)(1) flatly contradicts the assumption that the judge does not independently determine whether the statutory aggravating circumstance has been established. Section 4209(d)(1) states in pertinent part that the Court must sentence the defendant to death if the

"aggravating circumstances *found by the Court to exist* outweigh the mitigating circumstances . . . ." These words have meaning to jurors when they are included—either verbatim, or by reference—in jury instructions, as they often are. Instructions that track this language diminish the jury's sense of gravity and responsibility regarding its task of determining the statutory aggravating circumstance. The instructions direct that regardless of the jury's decision on the statutory aggravator, the judge will make an independent and ultimate decision as to its existence, converting the jury's role to an advisory one. A sampling of actual jury instructions given in Delaware cases reveals that judges are actually telling juries that the whether a statutory aggravating circumstance exists is a determination that the court makes independently. *See*, *e.g.*, *State v. Shannon Johnson*, No. 0609017045, Superior Court, New Castle County, 8/4/04 Tr. at 56-57 (jury instructed that "a sentence of death will be imposed after considering the recommendation of the jury, *if the court finds*: A, beyond a reasonable doubt at least one statutory aggravating circumstance . . . .") (emphasis added) (Ex. A); *State v. Jeffrey Phillips*, No. 1210013272, Superior Court, New Castle County, 12/11/2014 Tr. at 103 (jury instructed that after the jury's votes on the statutory aggravating circumstance and whether the aggravating circumstances outweigh the mitigating circumstances, "the court is required to conduct the identical inquiry [and] although the Court is not bound by your recommendation, your answers to

the two questions are an important factor in this Judge's final determination of the appropriate sentence) (Ex. B); *State v. Ambrose Sykes*, ID. No. 0411008300, Superior Court, Kent County, 6/30/06 Tr. at 93 (jury instructed that after the jury's votes on the statutory aggravating circumstance and whether the aggravating circumstances outweigh the mitigating circumstances, "the Court is required to conduct an identical inquiry. . . . Although the Court is not bound by your recommendation, your answers to the two questions is an important factor in this Judge's final determination.")[8] (Ex. C).

Hurst also illustrated that Delaware's advisory verdict system, in which the jury, by majority vote, believes the aggravating circumstances outweigh the mitigating circumstances, does not qualify as a "finding" for Sixth Amendment purposes. *See* 11 *Del. C.* § 4209; *Hurst*, 136 S.Ct. at 622. In *Hurst*, without any discussion about the specific jury instructions given, the underlying conclusions incorporated therein, or the number of jury votes in assent, the Supreme Court flatly rejected the notion that an "advisory" verdict, which was only a recommendation from the jury, could qualify as a "finding" under the Sixth Amendment. *Hurst*, 136 S.Ct. at 622. The same must also be true of the Delaware statute, which similarly provides for a jury "recommendation on the question as to

[8] In *Sykes* the statutory aggravating circumstance was established by the jury's guilt phase verdict, and thus *arguably* did not prejudice the defendant. It is included here to further demonstrate the prevalence of an instruction informing the jury that the Court makes an independent determination as to the statutory aggravating circumstance.

whether, by a preponderance of the evidence, … the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist." 11 *Del. C.* § 4209; *see also Brice*, 815 A.2d at 318-19 (noting the similarities between the advisory jury system in capital cases in Florida and Delaware).[9]

[9] Several state courts have held that the process of weighing aggravating and mitigating circumstances, under their specific state statutes, is not a factual finding subject to the Sixth Amendment. *See, e.g.*, *Nunnery v. State*, 263 P.3d 235, 252 (Nev. 2011); *Commonwealth v. Roney*, 866 A.2d 351, 361 (Pa. 2005); *Ritchie v. State*, 809 N.E.2d 258, 266 (Ind. 2004); *Oken v. State*, 835 A.2d 1105, 1117 (Md. 2003); *Ex Parte Waldrop*, 859 So.2d 1181, 1189 (Ala. 2002). However, all but one of these opinions interpreted statutes in which their legislature had not applied any burden of proof to the weighing process. *Nunnery*; *Roney*; *Ritchie*; *Waldrop*. Of these cases, the only one interpreting a statute that, like Delaware's, imposed a burden of proof on the weighing of aggravating and mitigating circumstances was *Oken*, which addressed the Maryland capital punishment statute. The Maryland legislature repealed its death penalty in 2013.

IV. THE FINDING THAT THE AGGRAVATING CIRCUMSTANCES FOUND TO EXIST OUTWEIGH THE MITIGATING CIRCUMSTANCES FOUND TO EXIST MUST BE MADE BY A JURY UNANIMOUSLY AND BEYOND A REASONABLE DOUBT TO COMPORT WITH FEDERAL CONSTITUTIONAL STANDARDS.

Question Presented

If the finding that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist must be made by a jury, must the jury make that finding unanimously and beyond a reasonable doubt to comport with federal constitutional standards?

Standard and Scope of Review

Same standard and scope of review as preceding question.

Argument

As stated in Argument # 2, where the Sixth Amendment necessitates that facts supporting a death sentence be proven to a jury, the proof of those facts must be beyond a reasonable doubt, and the jury's verdict regarding those facts must be unanimous. As the United States Supreme Court noted in *Sullivan v, Louisiana*, "[i]t is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt. In other

words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Sullivan v. Louisiana*, 508 U.S. 275, 278, (1993). The rule is the same whether the fact finding concerns the existence of aggravating circumstances or the determination that aggravating circumstances outweigh the mitigating circumstances. In order to satisfy the Sixth Amendment, therefore, the finding that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist must be made by a unanimous jury beyond a reasonable doubt.

V. IF ANY PROCEDURE IN 11 *DEL. C.* §4209'S CAPITAL SENTENCING SCHEME DOES NOT COMPORT WITH FEDERAL CONSTITUTIONAL STANDARDS, SUCH PROCEDURE CANNOT BE SEVERED FROM THE REMAINDER OF 11 *DEL. C.* §4209 AND THE COURT CAN NOT PROCEED WITH INSTRUCTIONS TO THE JURY. THE CONSTITUTION REQUIRES THAT THE LEGISLATURE CORRECT ANY CONSITUTIONAL INFIRMITIES OF THE DELAWARE CAPITAL SENTENCING SCHEME.

Question Presented

If any procedure in 11 *Del. C.*§4209's capital sentencing scheme does not comport with federal constitutional standards, can the provision for such be severed from the remainder of 11 *Del. C.* §4209, and the Court proceed with instructions to the jury that comport with federal constitutional standards?

Standard and Scope of Review

Same standard and scope of review as preceding question.

Argument

As to the Court's fifth inquiry, the Delaware statute contains a number of unconstitutional provisions that cannot be excised by this Court in an effort to salvage the statute. The statute does not suffer from a single, isolated, constitutional deficiency. Rather, it designates the court as the primary finder of facts involving aggravating and mitigating circumstances and their relative weight, imposes an unconstitutional burden of proof on the determination that aggravating

circumstances outweigh mitigating circumstances (preponderance of the evidence rather than beyond a reasonable doubt), and fails to require unanimity where the jury recommends death. Each of these characteristics of the scheme must be addressed and remedied. Because these multiple constitutional problems require Delaware's death penalty scheme to be substantially restructured, that task is for the legislature, not the courts. As the U.S. Supreme Court noted, "Ours, of course, is not the last word: The ball now lies in [the legislature's] court. The … Legislature is equipped to devise and install, long term, the sentencing system, compatible with the Constitution, that [it] judges best for [its] system of justice." *Booker*, 543 U.S. at 265.

Therefore, this Court must answer its last certified question, "If any procedure in 11 *Del. C.* § 4209's capital sentencing scheme does not comport with federal constitutional standards, can the provision for such be severed from the remainder of 11 *Del. C.* § 4209, and the Court proceed with instructions to the jury that comport with federal constitutional standards?" in the negative.

CONCLUSION

Based on the reasons and authorities set forth herein, 11 *Del. C.* § 4209 violates the Sixth Amendment to the United States constitution. The constitutional deficiencies are so fatal that they render Delaware's capital sentencing scheme entirely invalid.

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