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Case Number 310,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

STATE'S OPENING MEMORANDUM

Capital defendant Derrick Powell is appealing the Superior Court's denial of postconviction relief. *See State v Powell*, 2016 WL 3023740 (Del. Super. Ct. May 27, 2016). On August 24, 2016, Powell moved to vacate his death sentence based on the United States Supreme Court decision in *Hurst v. Florida*[1] and this Court's interpretation of that decision as expressed in *Rauf v. State*.[2] This Court requested briefing on the motion and scheduled oral argument. Pursuant to this Court's September 6, 2016 Scheduling Order, this is the State's Opening Memorandum in support of its position that neither *Hurst* nor *Rauf* apply retroactively to Powell's May 20, 2011 death sentence.

Background

In February 2011, a Superior Court jury found Derrick Powell guilty of first

[1] 136 S. Ct. 616 (2016).

[2] __A.3d__, 2016 WL 4224252 (Del. Aug. 2, 2016).

degree murder for recklessly causing the death of Officer Chad Spicer while in flight from an attempted robbery, four counts of possession of a firearm during the commission of a felony, resisting arrest with force or violence, attempted robbery in the first degree, and reckless endangering in the first degree. Following a penalty hearing, the same jury unanimously found beyond a reasonable doubt the existence of two statutory aggravators and, by a vote of seven to five, found that the aggravating factors outweighed the mitigating factors and recommended that a sentence of death be imposed. The Superior Court sentenced Powell to death on May 20, 2011.[3] On August 9, 2012, this Court affirmed Powell's convictions and sentence.[4]

Soon after this Court affirmed his convictions and sentence, Powell, acting *pro se*, filed a motion for postconviction relief in the Superior Court. The court appointed counsel, who, on October 1, 2013, filed an amended motion for postconviction relief. Over the next two years, the record was expanded to include attorney affidavits and an evidentiary hearing; the parties also submitted additional briefing and presented oral arguments on Powell's postconviction claims.[5] On May 24, 2016, the Superior Court issued its decision denying Powell postconviction

[3] *Powell v. State*, 49 A.3d 1090, 1096 (Del. 2012).

[4] *Id.* at 1105.

[5] *State v. Powell*, 2016 WL 3023740, at *5 (Del. Super. Ct. May 24, 2016).

relief.[6] Powell appealed.

On January 12, 2016, the United States Supreme Court issued its decision in *Hurst*, finding Florida's death penalty statute unconstitutional.[7] On January 25, 2016, the Superior Court certified five questions to this Court in accordance with Delaware Supreme Court Rule 41.[8] On January 28, 2016, this Court accepted the five questions certified by the Superior Court, but revised the questions to remove any reference to the Delaware Constitution.[9] On August 2, 2016, after briefing and oral argument, this Court, sitting *en banc*, answered the revised certified questions; the majority concluded that the Delaware death penalty statute, 11 *Del. C.* § 4209, is unconstitutional under federal law.[10]

In *Rauf*, this Court did not address whether *Hurst* or *Rauf* should be applied retroactively to capital cases currently in various stages of collateral review. Consequently, Powell, whose case is before this Court on appellate review from the denial of postconviction relief, moved to vacate his death sentence arguing that *Hurst* should be retroactively applied to his case. The State disagrees.

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[6] *Id.* at *94.

[7] 136 S. Ct. at 624.

[8] *State v. Rauf*, 2016 WL 320094 (Del. Super. Ct. Jan. 25, 2016).

[9] *Rauf v. State*, Del. Supr., No. 39, 2016, Strine, C.J., order at 3-4 (Jan. 28, 2016) (en banc).

[10] *Rauf*, 2016 WL 4224252, at *1-2.

***Teague v. Lane* retroactivity analysis**

"The normal framework for determining whether a new rule applies to cases on collateral review stems from the plurality opinion in *Teague v. Lane*, 489 U.S. 288 [] (1989)."[11] *Teague* defined a new rule as a rule that "breaks new ground," "imposes a new obligation on the States or the Federal Government," or was not "*dictated* by precedent existing at the time the defendant's conviction became final."[12] When a judicial decision results in a "new rule," that rule applies to all criminal cases still pending on direct review.[13] However, for convictions that are already final, the rule applies only in limited circumstances.[14] Only new substantive rules "that narrow the scope of a criminal statute by interpreting its terms generally"[15] or constitutional holdings "that place particular conduct or persons covered by the statute beyond the State's power to punish" apply retroactively.[16] "Such rules apply retroactively because they 'necessarily carry a significant risk that a defendant stands convicted of "an act that the law does not make criminal"' or

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[11] *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016). *See also Penry v. Lynaugh*, 492 U.S. 302, 313 (1989) (affirming and applying *Teague* analysis in a capital case).

[12] *Teague*, 489 U.S. at 301 (emphasis in original).

[13] *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

[14] *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004).

[15] *Bousley v. United States*, 523 U.S. 614, 620-621 (1998).

[16] *Saffle v. Parks*, 494 U.S. 484, 494-95 (1990); *see Summerlin*, 542 U.S. at 352; *Teague*, 489 U.S. at 311.

faces a punishment that the law cannot impose upon him."[17] New rules of criminal procedure generally do not apply retroactively.[18] "[T]here can be no dispute that a decision announces a new rule if it expressly overrules a prior decision, but 'it is more difficult ... to determine whether we announce a new rule when a decision extends the reasoning of our prior cases.'"[19] "'[T]he "new rule" principle ... validates reasonable, good-faith interpretations of existing precedents made by state courts,' even if those good-faith interpretations 'are shown to be contrary to later decisions.'"[20] "Thus, unless reasonable jurists hearing petitioner's claim at the time his conviction became final "would have felt compelled by existing precedent" to rule in his favor," the later decision will constitute a "new rule" under *Teague*.[21]

The *Teague* doctrine bars retroactive application on collateral review of any new constitutional rule of criminal procedure that had not been announced at the time the movant's conviction became final, with two narrow exceptions.[22] "A new rule should be applied retroactively only if it (1) 'places certain kinds of primary

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[17] *Summerlin*, 542 U.S. at 352 (quoting *Bousley*, 523 U.S. at 620 (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974))).

[18] *Teague*, 489 U.S. at 311.

[19] *Graham v. Collins*, 506 U.S. 461, 467 (1993) (quoting *Parks*, 494 U.S. at 488).

[20] *Id.* (quoting *Butler v. McKellar*, 494 U.S. 407, 414 (1990)).

[21] *Id.* (quoting *Parks*, 494 U.S. at 488).

[22] *McCoy v. United States*, 266 F.3d 1245, 1255 (11th Cir. 2001) (citing *Teague*, 489 U.S. at 310-13).

private individual conduct beyond the power of the criminal law-making authority to proscribe,' or (2) 'requires the observance of those procedures that ... are implicit in the concept of ordered liberty.'"[23]

In undertaking a *Teague* procedural analysis, "[f]irst, the court must ascertain the date on which the defendant's conviction and sentence became final."[24] Second, the court must "determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution."[25] A rule is "new" whenever "it breaks new ground or imposes a new obligation on the states or the federal government."[26] Accordingly, a "new rule" is one where "the result was not dictated by precedent existing at the time the defendant's conviction became final."[27] Finally, "the court must decide whether that rule falls within one of the two narrow exceptions to [Teague's] nonretroactivity principle."[28]

The first *Teague* exception allows retroactive application of decisions that narrow the scope of a criminal statute by interpreting its terms, and constitutional

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[23] *Id.* (citing *Teague*, 489 U.S. at 307 (internal quotations omitted)).

[24] *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994).

[25] *Bohlen*, 510 U.S. at 390 (quoting *Parks*, 494 U.S. at 488).

[26] *Teague*, 489 U.S. at 301.

[27] *Id.*

[28] *Bohlen*, 510 U.S. at 390 (citing *Gilmore v. Taylor*, 508 U.S. 333, 345 (1993)).

determinations that place particular conduct or persons covered by the statute beyond the State's power to punish.[29] "Such rules apply retroactively because they 'necessarily carry a significant risk that a defendant stands convicted of "an act that the law does not make criminal"' or faces a punishment that the law cannot impose upon him."[30] The first *Teague* exception is not relevant here, because neither *Hurst* nor *Rauf* found capital punishment to be unconstitutional and application of the *Hurst* capital sentencing requirements "would not accord constitutional protection to any primary activity whatsoever."[31]

Teague's second exception provides that "unless a new rule of criminal procedure is of such a nature that 'without [it] the likelihood of an accurate conviction is seriously diminished,' there is no reason to apply the rule retroactively on [collateral] review."[32] "New rules of procedure ... generally do not apply retroactively. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise."[33] Under

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[29] *Summerlin*, 542 U.S. at 351-52 (citing *Bousley*, 523 U.S. at 620; *Saffle v. Parks*, 494 U.S. 484, 494-95 (1990); and *Teague*, 489 U.S. at 311).

[30] *Summerlin*, 542 U.S. at 352 (quoting *Bousley*, 523 U.S. at 620 (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974))).

[31] *Teague*, 489 U.S. at 311.

[32] *Bousley*, 523 U.S. at 620 (quoting *Teague*, 489 U.S. at 313).

[33] *Summerlin*, 542 U.S. at 352.

Teague, the courts "give retroactive effect to only a small set of 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."[34] "That a new procedural rule is 'fundamental' in some abstract sense is not enough; the rule must be one 'without which the likelihood of an accurate conviction is seriously diminished.'"[35] This class of rules is extremely narrow.[36] To date, only the *Gideon v. Wainwright*[37] entitlement to counsel for an indigent criminal accused has qualified as a watershed rule under *Teague*'s second exception.[38] Given the extremely limited nature of the two exceptions to non-retroactivity, it is not surprising that since *Teague* the United States Supreme Court has found few new constitutional rules of criminal procedure retroactively applicable to cases on collateral review.[39]

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[34] *Id.* (citing *Parks*, 494 U.S. at 495 (quoting *Teague*, 489 U.S. at 311)).

[35] *Id.* (quoting *Teague*, 489 U.S. at 313 (emphasis added)).

[36] *Id.* (citing *Tyler v. Cain*, 533 U.S. 656, 667, n.7 (2001)). *See Sepulveda v. United States*, 330 F.3d 55, 61 (1st Cir. 2003) ("examples of watershed rules are hen's-teeth rare").

[37] 372 U.S. 335 (1963).

[38] *Ruiz v. State*, 2011 WL 2651093, at *2, n.19 (Del. July 6, 2011).

[39] *See, e.g., Chaidez v. United States*, 133 S. Ct. 1103 (2013) (new rule of *Padilla v. Kentucky*, 559 U.S. 356 (2010), that Sixth Amendment requires an attorney for a non-citizen criminal defendant to advise about deportation risk arising from guilty plea not retroactive to cases that became final before decision announced); *Whorton v. Bockting*, 549 U.S. 406 (2007) (rule of *Crawford v. Washington*, 541 U.S. 36 (2004), restricting use of testimonial hearsay evidence not within either *Teague* exception and not retroactive to cases on collateral review); *Beard v. Banks*, 542 U.S. 406 (2004) (new rule of *Mills v. Maryland*, 486 U.S. 367 (1988), concerning

Delaware Law

This Court adopted the *Teague* rule of non-retroactivity twenty-six years ago[40] and has consistently adhered to that analysis in deciding whether new state and federal rules are to be applied retroactively in Delaware. In June 1989, the Delaware Superior Court rejected a capital postconviction petitioner's request to adopt a different retroactivity rule under the Delaware State Constitution.[41] On appeal, this Court adopted *Teague*'s non-retroactivity rule for Delaware criminal cases.[42]

In *Flamer*, also a capital case, this Court specifically held: "A postconviction relief court need apply only the constitutional standards at the time the original proceedings took place."[43] The *Flamer* Court explained:

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certain capital murder jury instructions not retroactive); *O'Dell v. Netherland*, 521 U.S. 151 (1997) (new rule of *Simmons v. South Carolina*, 512 U.S. 154 (1994), permitting capital defendant to inform sentencing jury of parole ineligibility if prosecution argued future dangerousness not retroactive under *Teague*); *Lambrix v. Singletary*, 520 U.S. 518 (1997) (new sentencing rule announced in *Espinosa v. Florida*, 505 U.S. 1079 (1992), not retroactive under *Teague* to case on collateral review); *Gilmore v. Taylor*, 508 U.S. 333 (1993) (new rule of *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), concerning jury instruction not retroactive under *Teague*). *See also Daniels v. State*, 561 N.E.2d 487 (Ind. 1990) (decision in *South Carolina v. Gathers*, 490 U.S. 805 (1989), prohibiting capital penalty phase jury from considering victim impact statements involving factors of which the defendant was unaware at time of the offense not retroactive to state postconviction proceeding).

[40] *See Flamer v. State*, 585 A.2d 736, 745 (Del. 1990).

[41] *State v. Flamer*, 1989 WL 70893, at *10 (Del. Super. Ct. June 16, 1989).

[42] *Flamer*, 585 A.2d at 745.

[43] *Id.* at 749.

> The application of a constitutional rule not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect. Therefore, we hold that new constitutional rules of criminal procedure will *not* be applicable to those cases which have become final before the new rules are announced, unless the rules fall within one of two exceptions.[44]

This Court then adopted the two exceptions articulated in *Teague*, and ultimately found that Flamer's claim that the rule announced in *Michigan v. Jackson*,[45] that police could not initiate an interrogation after a defendant has asserted his right to counsel, was a new rule that did not fall within either *Teague* exception.[46] Consequently, the rule had no retroactive application to Flamer's case.[47]

The United States Supreme Court has explained that "*Teague*'s general rule of nonretroactivity was an exercise of this Court's power to interpret the federal habeas statute" and "cannot be read as imposing a binding obligation on state courts."[48] Accordingly, state courts may "grant habeas relief to a broader class of individuals than is required by *Teague*."[49] Nonetheless, state courts hold fast to the

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[44] *Id.* (citation omitted).

[45] 475 U.S. 625 (1986).

[46] 585 A.2d at 749-50.

[47] *Id.* Flamer was ultimately executed on January 30, 1996, after his federal habeas corpus proceedings concluded.

[48] *Danforth v. Minnesota*, 552 U.S. 264, 275, 278-79 (2008).

[49] *Id.* at 279-80.

functional guidance of Teague. The Minnesota Supreme Court concluded that it was *required* to follow the *Teague* general rule of non-retroactivity.[50] The United States Supreme Court reversed and remanded the case.[51] On remand, the Minnesota Supreme Court still adhered to the *Teague* federal habeas corpus general non-retroactivity rule to deny Danforth state postconviction relief, showing particular concern with "the finality of convictions," and noting that while "*Teague* may not be a perfect rule, ... we believe it is preferable to the alternative. *Teague* provides a bright line rule on the issue of when relief is to be retroactive."[52]

Delaware has not wavered from *Teague*'s general rule of retroactivity; nor should it. Five months after adopting *Teague*'s rule for cases on collateral review, this Court applied the *Flamer* holding to a murder defendant seeking retroactive application of *Perry v. Leeke*,[53] and affirmed the trial court's denial of postconviction relief.[54] This Court stated:

> In *Flamer*, we announced a general rule barring retroactive application of new decisions to cases on collateral review. Instead, we found that a court considering an application for post-conviction relief should only apply "the constitutional standards that prevailed at the time the original proceeding took place." We held that a general bar to retroactivity was

[50] *Danforth v. State*, 718 N.W.2d 451, 456 (Minn. 2006).

[51] *Danforth*, 552 U.S. at 291.

[52] *Danforth v. State*, 761 N.W.2d 493, 498-500 (Minn. 2009).

[53] 488 U.S. 272 (1989).

[54] *Bailey v. State*, 588 A.2d 1121, 1127-28 (Del. 1991).

> necessary to ensure the finality of convictions, which is an integral part of the deterrent effect of the criminal justice system.[55]

Twenty years after *Flamer*, this Court again reaffirmed the *Teague* non-retroactivity rule in *Richardson v. State.*[56] Richardson sought retroactive application of *Allen v. State,*[57] concerning a jury instruction under 11 *Del. C.* § 274; but this Court, applying *Teague*, found that *Allen* was not a "new rule" and was not retroactive to Richardson's earlier conviction.[58] In dicta in 2011, this Court also noted that it was not likely that a former inmate seeking to avoid deportation could argue that *Padilla v. Kentucky*,[59] was retroactive to his assault conviction twenty-two years earlier.[60]

Delaware was one of the first states to adopt *Teague* and apply the rule to state postconviction relief motions.[61] This Court has recognized the utility of "bright line" rules for determining retroactivity.[62] A bright line rule is easier to administer and it provides clear guidance to a trial judge. Just as *Teague* considered the statutory

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[55] *Id.* at 1127 (citations omitted).

[56] 3 A.3d 233, 238-39 (Del. 2010).

[57] 970 A.2d 203, 213 (Del. 2009).

[58] *Richardson*, 3 A.3d at 240.

[59] 559 U.S. 352 (2010).

[60] *Ruiz v. State*, 2011 WL 2651093, at *2, n.9 (Del. July 6, 2011).

[61] *See* Mary C. Hutton, "Retroactivity in the States: The Impact of Teague v. Lane on State Postconviction Remedies," 44 Ala. L. Rev. 421, 461 (1993).

[62] *Flamer*, 585 A.2d at 749.

posture of federal habeas collateral review of convictions, this Court has looked at retroactivity questions in amending state postconviction procedures to more closely adhere to the federal collateral review process. The June 4, 2014 amendment of Superior Court Criminal Rule 61(d)(2) and (i)(5), provides for summary dismissal of second or subsequent postconviction relief motions. To fall within the exception of Rule 61(d)(2)(ii), a defendant seeking postconviction relief in a successive motion must now plead "with particularity a claim that a new rule of constitutional law, made retroactive to cases on collateral review … applies to the movant's case and renders the conviction or death sentence invalid" in order to escape summary dismissal. Determining retroactivity is now crucial for evaluating successive Rule 61 motions based upon a new court decision. Having a bright line rule to apply in deciding retroactivity of new constitutional rules of criminal procedure aids in the summary disposal of abusive repetitive postconviction relief matters as now required by Rule 61(d)(5).[63] The *Teague* bright line non-retroactivity rule this Court adopted in *Flamer* is well-defined, utilitarian, and ultimately helpful to the judiciary and attorneys.

Not only is the continued application of the *Teague* retroactivity analysis a practical way to handle a complex legal issue by application of a bright line rule, but

[63] *See* Del. Super. Ct. Crim. R. 61(i)(5) (requiring adherence to pleading requirements of subparagraphs (2)(i) or (2)(ii) of subdivision (d) of the rule to avoid procedural bars).

the *Teague/Flamer* general non-retroactivity rule for collateral review proceedings advances the jurisprudential goal of finality of criminal judgments.[64] This Court has long recognized the importance of finality of criminal convictions when determining whether new constitutional rules should have retroactive application to earlier convictions that had already been affirmed on direct appeal. "The application of a constitutional rule not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect."[65] "It is a matter of fundamental importance that there be a definitive end to the litigable aspect of the criminal process."[66]

When criminal convictions are subject to later review because of subsequent legal changes, additional burdens are placed upon the state criminal justice system. This Court recognized the burden of repeated review, not just of convictions but also of sentences, in determining the retroactivity of a recent legislative change to permit concurrent sentencing under certain circumstances.[67] The application of new rules

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[64] *See, e.g.*, *Danforth*, 761 N.W.2d at 498-99.

[65] *Flamer*, 585 A.2d at 749.

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

[67] *See Fountain v. State*, 139 A.3d 837, 843 (Del. 2016).

to cases on collateral review "continually forces the states to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards."[68] "The 'costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus…generally far outweigh the benefits of this application.'"[69]

The *Teague* bright line general non-retroactivity rule has served well in the federal habeas corpus realm, and Delaware's adoption of the *Teague* rule in *Flamer* provides an appropriate mechanism for addressing retroactivity claims in the context of postconviction proceedings. There is no reason to depart from *Flamer*'s workable non-retroactivity rule by adopting a different state retroactivity analysis for collateral review cases.

Inmates on direct review receive the retroactive benefit of case decisions announcing new constitutional rules of criminal procedure. But when a criminal conviction becomes final following the completion of direct appellate review, the State's interest in the finality of its criminal convictions must prevail. This is appropriate because the defendants received a fair trial under the then existing constitutional rules.[70] Finality, deterrence, and the utility of a bright line workable

[68] *Teague*, 489 U.S. at 310.

[69] *Id.* (quoting *Solem v. Stumes*, 465 U.S. 638, 654 (1984) (Powell, J. concurring)).

[70] *See Teague*, 489 U.S. at 310.

rule are all valid reasons for this Court to continue to apply the general non-retroactivity rule announced in *Teague*.

Hurst and _Rauf_ are not retroactive under _Teague/Flamer_ analysis

Powell's conviction and sentence became final for purposes of retroactivity analysis on August 9, 2012, when this Court, on direct appeal, affirmed Powell's convictions and death sentence.[71] At the time Powell's conviction and sentence became final, Delaware's capital sentencing scheme had been approved by this Court in *Brice v. State*,[72] and the federal courts had not granted relief in any collateral challenges to the constitutionality of the statute as amended in 2002.[73] Thus, existing precedent certainly did not compel the conclusion that 11 *Del C.* § 4209 was unconstitutional. *Hurst* announced a new rule, and Powell can only receive the benefit of *Hurst* if the "new rule" meets one of the two exceptions to non-retroactivity.

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[71] *See Griffith v. Kentucky*, 479 U.S. 314, 321, n.6 (1987) ("By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.") (citations omitted).

[72] 815 A.2d 314 (Del. 2003).

[73] *See, e.g.*, *Jackson v. Carroll*, 2004 WL 1192650, at *17-24 (D. Del. May 20, 2004).

Hurst struck down Florida's procedure for imposing a death penalty, but did not hold that the death penalty itself is unconstitutional.[74] Accordingly, *Hurst* is a procedural, not substantive, change.[75] *Hurst* merely holds that the procedure Florida utilized to impose a death sentence was procedurally flawed. Florida may still have a death penalty after *Hurst*, but it must first adopt a procedure for imposing such a penalty that complies with existing constitutional requirements.

Hurst is an extension of *Ring v. Arizona*, 536 U.S. 584 (2002).[76] Because the majority of courts to consider retroactive application of claims based on the holdings of *Apprendi v. New Jersey*,[77] *Ring v. Arizona*,[78] and *Alleyne v. United States*[79] have held that these cases announced new rules of criminal procedure,[80] and *Hurst* based

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[74] *See generally Hurst*, 136 S. Ct. 616; *see also State v. Perry*, 192 So. 3d 70, 73 (Fla. Dist. Ct. App. 2016).

[75] *Perry*, 192 So. 3d at 75-76.

[76] *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016) ("In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment."); *see Perry*, 92 So. 3d at 75 (noting that *Hurst* is an extension of *Ring*).

[77] 530 U.S. 466 (2000).

[78] 536 U.S. 584 (2002).

[79] 133 S. Ct. 2151 (2013).

[80] As to *Apprendi: see, e.g., Jones v. Smith*, 231 F.3d 1227, 123 (9th Cir. 2000) (holding that *Apprendi* rule is not retroactive under *Teague*); *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001); *United States v. Sanders*, 247 F.3d 139, 147 (4th Cir. 2001) ("*Apprendi* constitutes a procedural rule because it dictates what fact-finding procedure must be employed to ensure a fair trial."). *See also United States v. Evans*, 42 F. App'x 801, 802 (6th Cir. 2002) (collecting cases finding *Apprendi* not available for retroactive application). As to *Alleyne*: *see, e.g., United States v. Reyes*, 755 F.3d 210, 212-13 (3d Cir.) (holding that "while *Alleyne* set out a new rule

its holding on *Ring*, it is axiomatic that any rule extending *Ring* would also be a new rule of criminal procedure rather than a substantive rule.[81] Two years after *Ring*, the United States Supreme Court stated that *Ring*'s holding "is properly classified as procedural" and it is not retroactive.[82] If *Ring* is procedural rather than substantive and not retroactive, *Hurst*, a decision that expressly addressed a "capital sentencing scheme ... in light of *Ring*," must be treated the same way.[83]

Hurst also does not fall within *Teague*'s second exception because it does not announce a "watershed rule of criminal procedure" such that it implicates the fundamental fairness and accuracy of the criminal proceeding.[84] By its own terms, *Hurst* applied *Ring* to the Florida capital sentencing statutes.[85] The United States Supreme Court found that *Ring* did not meet *Teague*'s second exception (or any

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of law, it is not retroactively applicable to cases on collateral review"), *cert. denied*, 135 S. Ct. 695 (2014); *In re Mazzio*, 756 F.3d 487, 491 (6th Cir. 2014) ("We now hold that *Alleyne* does not apply retroactively to cases on collateral review."). As to *Ring*: *see, e.g., Summerlin*, 542 U.S. at 353.

[81] *See* Gray Proctor, "Old Rule, Partially Retroactive, and No Remedy: Why *Hurst* Won't Help Many on Florida's Death Row," 28 Fed. Sent. R. 316, 318 (2016) ("*Hurst* is really just *Ring* applied to a slightly different set of facts; it is therefore difficult to see how *Hurst* could be retroactive if *Ring* was not.").

[82] *Summerlin*, 542 U.S. at 353.

[83] *Hurst*, 136 S. Ct. at 621.

[84] *Parks*, 494 U.S at 495; *Teague* 489 U.S. at 311.

[85] *Hurst*, 136 S. Ct. at 621.

other exception) to the general rule of non-retroactivity.[86] The same is true for *Hurst*. "[R]ules that regulate only the *manner of determining* the defendant's culpability are procedural."[87] *Summerlin* explained that *Ring* (like *Hurst*):

> rested entirely on the Sixth Amendment's jury-trial guarantee, a provision that has nothing to do with the range of conduct a State may criminalize. Instead, *Ring* altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment. Rules that allocate decision making authority in this fashion are prototypical procedural rules, a conclusion we have reached in numerous other contexts.[88]

A court ruling invalidating the procedure Florida used to impose a death sentence, but not otherwise invalidating the death penalty *per se,* does not require the observance of "those procedures that … are implicit in the concept of ordered liberty."[89] The mechanics of a sentencing scheme certainly does not rise to the level of an indigent defendant's right to counsel - the only watershed rule found under the second *Teague* exception.[90] *Hurst* is not retroactive to Powell's postconviction

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[86] *Summerlin*, 542 U.S. at 357.

[87] *Id.* at 353 (citing *Bousley*, 523 U.S. at 620) (emphasis in original).

[88] *Id.* 353-54 (citing *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 426 (1996) (*Erie* doctrine); *Landgraf v. USI Film Products,* 511 U.S. 244, 280-81 (1994) (antiretroactivity presumption); *Dobbert v. Florida,* 432 U.S. 282, 293-94 (1977) (*Ex Post Facto* Clause)).

[89] *Teague*, 489 U.S. at 307.

[90] *See Whorton*, 549 U.S. at 419; *Richardson*, 3 A.3d at 239; *McGriff v. State*, 2007 WL 1454883, at *1 (Del. May 18, 2007).

proceeding.

Hurst's holding does not fall within either of the two limited exceptions to the *Teague* general non-retroactivity rule. In light of the clear federal and state law regarding retroactivity of new criminal procedural rules, neither *Hurst* nor *Rauf* have any retroactive application here. More broadly, there is no reason to alter the State's long extant retroactivity law to permit a Delaware capital inmate to argue that *Hurst* or *Rauf* ought to have retroactive application in a collateral review of an earlier final conviction.

In answering the five certified questions in *Rauf*, this Court applied the 2016 *Hurst* decision and compared the Florida death penalty procedural statutes to the Delaware death penalty procedure contained in 11 *Del. C.* § 4209.[91] In *Rauf*, this Court concluded that certain procedures in section 4209 violated the Sixth Amendment to the U.S. Constitution. As a result, *Rauf* declared 11 *Del. C.* § 4209 to be unconstitutional under federal law.[92] The majority in *Rauf* concluded "that Delaware's current penalty statute violates the Sixth Amendment role of the jury as set forth in *Hurst*."[93] A certification procedure was utilized in *Rauf* because "*Hurst*

[91] *See generally Rauf*, 2016 WL 4224252, at *1-2 (*per curium*).

[92] *Id.*

[93] *Id.* at *1.

prompted the question of whether our death penalty statute sufficiently respects a defendant's Sixth Amendment right to trial by jury."[94]

Rauf appears to overrule some portions of this Court's prior rulings about the constitutionality of 11 *Del. C.* § 4209.[95] Nonetheless, the five certified questions in *Rauf* do not address the retroactivity of either *Hurst* or *Rauf*. While this Court found that "prior cases on the constitutionality of Delaware's capital sentencing scheme are hereby overruled to the extent they are inconsistent with the answers in this opinion," – it did not make a judicial determination that *Hurst* or *Rauf* are retroactive to other cases on collateral review.[96] A finding that some portions of Delaware's statutory death penalty procedure are no longer valid law does not require retroactive application. Earlier rulings of this Court about portions of 11 *Del. C.* § 4209 may no longer be binding law after *Rauf*, but that is a different matter than the broad question of the retroactivity of a 2016 decision of the United States Supreme Court and this Court's application of that decision to the Delaware sentencing statute. Whether *Hurst* and *Rauf* are broadly retroactive to invalidate the death sentences of

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[94] *Id.*

[95] *Id.* at *2. *See, e.g.*, *Swan v. State*, 28 A.3d 362 (Del. 2011); *Ortiz v. State*, 869 A.2d 285 (Del. 2005); *Reyes v. State*, 816 A.2d 305 (Del. 2003); *Norcross v. State*, 816 A.2d 757 (Del. 2003); *Brice v. State*, 815 A.2d 314 (Del. 2003); and *State v. Cohen*, 604 A.2d 846 (Del. 1992).

[96] 2016 WL 4224252, at *2.

Powell and others is a different question that requires the application of the retroactivity test formulated in *Teague*, and adopted by this Court in *Flamer*.

Conclusion

Following *Apprendi*, *Ring*, and *Alleyne*, there can be little doubt that *Hurst*'s holding, expanding upon those non-retroactively applicable cases, is a new rule of criminal procedure that does not fall within either *Teague* exception to allow retroactive application.[97] Because this Court, in *Flamer*, adopted the *Teague* rule of non-retroactivity, whether *Hurst* and *Rauf* should be applied retroactively should be analyzed under *Teague*. Neither *Hurst* nor *Rauf* can meet an exception to *Teague*'s

[97] *See, e.g., Raglin v. Mitchell*, 2016 WL 4035185, at *3 (S.D. Ohio July 28, 2016) ("Certainly [*Hurst*] is nowhere near the magnitude of *Gideon*. It appears to be somewhat of the same magnitude as *Ring* [], which the Supreme Court itself has held to be not retroactively applicable to cases pending on collateral review."); *Reeves v. State*, __So. 3d __, 2016 WL 3247447, at *37 (Ala. Crim. App. June 10, 2016) ("The United States Supreme Court's opinion in *Hurst* was based solely on its previous opinion in *Ring*, an opinion the United States Supreme Court held did not apply retroactively on collateral review to cases that were already final when the decision was announced. [citation omitted] Because *Ring* does not apply retroactively on collateral review, it follows that *Hurst* also does not apply retroactively on collateral review."); *State v. Perry*, __ So. 3d __, 2016 WL 1573767, at * (Fla. Dist. Ct. App. Mar. 16, 2016) (slip opinion) ("Finally, we note that *Hurst* is an extension of *Ring v. Arizona*, ... and *Ring* was based on *Apprendi v. New Jersey*. *Apprendi* has been held to establish a rule of procedure. Likewise, *Ring* has been classified as a procedural rule rather than a substantive one. Logically, it follows that *Hurst*'s holding is also procedural rather than substantive.") (citations omitted). *See also Brooks v. Alabama*, 136 S. Ct. 708, Sotomayor, J. & Ginsburg, J., concurring) (Jan. 21, 2016) (Mem. Op.) ("I nonetheless vote to deny certiorari in this particular [capital] case [after collateral review completed] because I believe procedural obstacles would have prevented us from granting relief.").

non-retroactivity rule. Consequently, Powell's pending appeal from the trial court's denial of postconviction relief should proceed, but Powell is not entitled to any retroactive application of *Hurst* or *Rauf*.

Justice Harlan explained it best: "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation."[98] "Collateral challenges to the sentence in a capital case, like collateral challenges to the sentence in a noncapital case, delay the enforcement of the judgment at issue and decrease the possibility that 'there will at some point be the certainty that comes with an end to litigation.'"[99]

[98] *Williams v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in judgments in part and dissenting in part).

[99] *Teague*, 489 U.S. at 314, n.2 (quoting *Sanders v. United States*, 373 U.S. 1, 25, (1963) (Harlan, J., dissenting)).

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

Respectfully submitted,

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Date: October 10, 2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

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

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Dated: October 10, 2016

/s/ Elizabeth R. McFarlan
Signature of filing attorney