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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

BRIEF OF LUIS G. CABRERA, JR. AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST

Mr. Cabrera was convicted in February 2001 of two counts of First Degree Murder, and was sentenced to death. *See State v. Cabrera*, 2002 WL 484641 (Del. Super. Ct. Mar. 14, 2002). On January 27, 2004, Mr. Cabrera's conviction and death sentence were affirmed on direct appeal. *See Cabrera v. State*, 840 A.2d 1256 (Del. 2004). In November 2004, Mr. Cabrera filed a Rule 61 petition for post-conviction relief, and he filed amended petitions in March 2007 and October 2012.

In June 2015, the Superior Court granted Mr. Cabrera's Rule 61 petition and vacated his death sentence because trial counsel provided ineffective assistance in failing to properly investigate and present mitigation evidence. *See Cabrera v. State*, 2015 WL 3878287 (Del. Super. Ct. June 22, 2015). The Superior Court denied the remainder of Mr. Cabrera's Rule 61 claims. *Id.*

Mr. Cabrera filed a notice of appeal, and the State cross-appealed. *See Cabrera v. State*, No. 372, 2015. In its Answering Brief and Opening Brief on Cross-Appeal, filed January 11, 2016, the State asked the Court to "reverse the Superior Court's decision vacating [Mr.] Cabrera's capital sentence" (Br. at 75). On February 8, 2016, the Court stayed further proceedings in Mr. Cabrera's appeal pending the Court's decision in *Rauf v. State*, No. 39, 2016. On August 24, 2016,

the Court informed counsel that Mr. Cabrera's appeal would remain stayed pending the decision on Mr. Powell's motion to vacate his death sentence.

Although Mr. Cabrera's death sentence has been vacated by the Superior Court, he continues to have a significant interest in the constitutionality of death penalty statutes in Delaware. Because the State seeks through its cross-appeal to have this Court reverse the decision vacating Mr. Cabrera's death sentence, and will likely seek to have Mr. Cabrera re-sentenced to death, Mr. Cabrera has a significant interest in the constitutionality of the death penalty statutes in Delaware and the legal issues presented in connection with Mr. Powell's motion to vacate his death sentence.

ARGUMENT

Mr. Powell has moved to vacate his death sentence in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Rauf v. State*, __ A.3d __, 2016 WL 4224252 (Del. Aug. 2, 2016). The State has opposed the motion, arguing that *Hurst* and *Rauf* should not be applied retroactively. Mr. Cabrera submits this brief in support of Mr. Powell's motion to vacate his death sentence.

First, Mr. Powell should not be prevented from relying on *Hurst* in support of his motion to vacate his death sentence, because *Hurst* did not announce a "new rule" of constitutional law. *Hurst* was a straightforward application of prior precedent, and should be applied in all cases on collateral review that were not final on direct appeal until after the prior precedent on which *Hurst* relied was decided, including Mr. Powell's case and Mr. Cabrera's case.

Second, to the extent *Rauf* announced a "new rule" of constitutional law related to jury unanimity and the reasonable doubt standard in capital sentencing, that is precisely the sort of watershed rule of criminal procedure that the Supreme Court has ruled should be applied retroactively to cases on collateral review.

I. RETROACTIVITY ANALYSIS UNDER *TEAGUE*

A. *Teague* Applies Only If A Decision Announces A "New Rule" Of Constitutional Law

In *Teague v. Lane*, 489 U.S. 288 (1989), the U.S. Supreme Court addressed when a "new rule" of constitutional law must be applied retroactively in cases on collateral review. The Court made clear that its retroactivity analysis applies only to "new rules" of constitutional law, and does not apply to decisions that were dictated by prior precedent:

> [A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.

Id. at 301 (emphasis in original). As this Court explained in *Flamer v. State*, 585 A.2d 736, 749 (Del. 1990), "[t]he general rule of non-retroactivity applies only to new rules and not to cases announcing rules which are merely an application of the principle that governs a prior case" that was decided before the defendant's conviction was final. *See also Bailey v. State*, 588 A.2d 1121, 1128 (Del. 1991) ("[A] case decided after the defendant's conviction becomes final does not create a new rule when it merely clarifies a previous decision.").

In *Penry v. Lynaugh*, 492 U.S. 302, 315 (1989), the Supreme Court held that the retroactivity analysis under *Teague* was not required because the relief requested by the defendant was dictated by prior precedent decided before his conviction became final: "In our view, the relief Penry seeks does not

'impos[e] a new obligation' on the State of Texas. . . . Rather, Penry simply asks the State to fulfill the assurance upon which *Jurek* was based." As the Court explained, because the decision on which the defendant was relying was dictated by prior precedent and did not announce a "new rule" of constitutional law, the retroactivity analysis under *Teague* was not implicated:

> Thus, at the time Penry's conviction became final, it was clear from *Lockett* and *Eddings* that a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to circumstances of the offense that mitigate against imposing the death penalty. . . . The rule Penry seeks – that when such mitigating evidence is presented, Texas juries, must upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence in determining whether the death penalty should be imposed – is not a "new rule" under *Teague* because it is dictated by *Eddings* and *Lockett*.

Id. at 318-19.

B. New Rules "Without Which The Likelihood Of An Accurate Conviction Is Seriously Diminished" Should Be Applied Retroactively

If a decision does announce a "new rule" of constitutional law, the new rule should be applied retroactively in cases on collateral review if the new rule "requires the observance of those procedures that are implicit in the concept of ordered liberty." *Teague*, 489 U.S. at 307 (quotation marks omitted).

In adopting this exception to the usual rule of non-retroactivity, the Court in *Teague* relied on Justice Harlan's opinion in *Mackey v. United States*, 401 U.S. 667, 693-94 (1971), and explained that this exception was intended to give retroactive application to "watershed" rules of criminal procedure that implicate "bedrock procedural elements." 489 U.S. at 311-12. This exception is meant to include rules of criminal procedure "without which the likelihood of an accurate conviction is seriously diminished." *Id.* at 313; *see also Flamer*, 585 A.2d at 749.

II. *HURST* WAS DICTATED BY PRIOR PRECEDENT AND DID NOT ANNOUNCE A "NEW RULE"

In *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016), the Supreme Court held that Florida's death penalty statute was unconstitutional because "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death," and that "[a] jury's mere recommendation is not enough." That holding was based on the Court's application of its decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002). *See Hurst*, 136 S. Ct. at 621-22.

In *Hurst*, the Court noted that it had held in *Apprendi* that "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 the jury." *Id.* at 621.[1] The Court also noted that it had held in *Ring* that "Arizona's capital sentencing scheme violated *Apprendi*'s rule because the State allowed a judge to find the facts necessary to sentence a defendant to death." *Id.* As the Court explained, "[had] Ring's judge not engaged in any factfinding, Ring would have

[1] *See Apprendi*, 530 U.S. at 490 ("[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.").

received a life sentence. . . . Ring's death sentence therefore violated his right to have a jury find the facts behind his punishment." *Id.*[2]

The Court then applied its holding in *Ring* that the Arizona death penalty statute was unconstitutional to the Florida statute at issue in *Hurst*, and held that the Florida statute was unconstitutional for the same reasons:

> The analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's. Like Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings necessary to impose the death penalty. . . .
>
> 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.

Hurst, 136 S. Ct. at 621-22.

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[2] *See Ring*, 536 U.S. at 602 ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt."); *id.* at 610 (Scalia, J., concurring) ("[T]he 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."); *see also Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) ("[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.") (emphasis in original).

In *Rauf*, this Court held that Delaware's current death penalty statute was unconstitutional for the same reasons that Arizona's statute was unconstitutional in *Ring*, and for the same reasons that Florida's statute was unconstitutional in *Hurst*. *See* 2016 WL 4225252, at *1 (per curiam) ("Delaware's current death penalty statute violates the Sixth Amendment role of the jury as set forth in *Hurst*."); *id.* at *38 (Holland, J., concurring) ("As with the capital sentencing schemes at issue in *Ring* and *Hurst*, a Delaware judge alone can increase a defendant's jury authorized punishment of life to a death sentence, based on her own additional factfinding of non-statutory aggravating circumstances. In light of *Hurst*'s application of *Ring*, this violates the Sixth Amendment.").

Because the decision in *Hurst* was dictated by prior precedent that existed at the time Mr. Powell's conviction became final, the Court should apply the reasoning of *Hurst* and grant Mr. Powell's motion to vacate his death sentence.[3]

Likewise, any death sentences imposed under the 1991 death penalty statute that did not become final until after the Supreme Court's decisions in

[3] The State's argument that *Hurst* should not be applied retroactively because *Ring* was not applied retroactively is misplaced. *See* State's Oct. 10, 2016 Opening Memorandum, at 17-18. *Hurst* was an application (not an extension) of *Ring*, and did not announce a "new rule" of constitutional law that would implicate the retroactivity analysis of *Teague.*

Apprendi and *Ring* (like Mr. Cabrera's now-vacated death sentence) should be vacated for the same reasons. Under the 1991 statute, a jury's guilty verdict for first-degree murder was sufficient only to sentence a defendant to life in prison. *See* 11 *Del. C.* § 4209(d)(2) (1991). A defendant could be sentenced to death under the 1991 statute only if the trial judge made additional factual findings. *See* 11 *Del. C.* § 4209(e) (1991) ("In order for a sentence of death to be imposed, *the judge must find* . . . ."); 11 Del. C. § 4209(d)(1) (1991) ("A sentence of death shall be imposed . . . *if the Court finds* . . . ."); *see also State v. Cohen*, 604 A.2d 846, 849 (Del. 1992) ("[T]he jury now functions only in an advisory capacity. The judge . . . has the ultimate responsibility for determining whether the defendant will be sentenced to life imprisonment or death.").

III. TO THE EXTENT *RAUF* ANNOUNCED A "NEW RULE" OF CONSTITUTIONAL LAW, IT SHOULD BE APPLIED RETROACTIVELY

In *Rauf*, 2016 WL 4224252, at *2, this Court held that the jury in a capital case must make two findings unanimously and beyond a reasonable doubt. First, the jury (not the judge) must find unanimously and beyond a reasonable doubt that an aggravating circumstance exists. *Id.* Second, the jury (not the judge) must find unanimously and beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. *Id.*

To the extent jury unanimity and the reasonable doubt standard are considered "new rules" of constitutional law in the context of capital sentencing, those "new rules" fall squarely within the exception set forth in *Teague* requiring retroactive application of "new rules" of criminal procedure "without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 313.

In *Ivan V. v. City of New York*, 407 U.S. 203 (1972), the Supreme Court addressed whether its decision in *In re Winship*, 397 U.S. 358 (1970), should be applied retroactively. In *Winship*, the Court had held that juveniles must be afforded the benefit of the reasonable doubt standard when charged with an act that would be a crime if committed by an adult. The Court concluded that the new rule articulated in *Winship* must be applied retroactively, because the reasonable doubt

standard is the sort of procedural requirement without which the truth-finding function of a criminal trial is substantially impaired:

> *Winship* expressly held that the reasonable-doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence – that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of criminal law."
>
> [T]he major purpose of the constitutional standard of proof beyond a reasonable doubt announced in *Winship* was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect.

407 U.S. at 204-05.

The Court's decision in *Rauf* that a defendant should not be sentenced to death without a jury making the necessary findings unanimously and beyond a reasonable doubt represents a watershed rule of criminal procedure that should be applied retroactively under *Teague* to all cases on collateral review, including Mr. Powell's case and Mr. Cabrera's case. Without those procedural requirements, the likelihood of an appropriate sentence being imposed is seriously diminished. *See Rauf*, 2016 WL 4224252, at *4 (Strine, C.J., concurring) ("From the inception of our Republic, the unanimity requirement and the beyond a reasonable doubt standard have been integral to the jury's role in ensuring that no defendant should suffer death unless a cross section of the community unanimously determines that

should be the case, under a standard that requires them to have a high degree of confidence that execution is the just result.").

CONCLUSION

The Court should grant Mr. Powell's motion to vacate his death sentence in light of *Hurst* and *Rauf*.

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