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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DERRICK POWELL,	)	
	)	
Petitioner Below,	)	
Appellant,	)	
	)	
v.	)	No. 310, 2016
	)	
STATE OF DELAWARE,	)	
	)	
Respondent Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR SUSSEX COUNTY

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF DELAWARE AND THE AMERICAN CIVIL LIBERTIES UNION CAPITAL PUNISHMENT PROJECT AS AMICI CURIAE, IN SUPPORT OF APPELLANT

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Statement of interest

The American Civil Liberties Union (ACLU) of Delaware (DE) is dedicated to the principles of liberty and equality embodied in the United States Constitution and the Delaware Constitution, and seeks to defend the rights granted to individuals and groups of individuals by the United States Constitution and its Amendments, including the Bill of Rights, the Delaware Constitution and the statutes effectuating those constitutional provisions. The ACLU Capital Punishment Project (CPP) focuses on upholding those rights in the context of death-penalty cases. Both the ACLU-DE and the ACLU-CPP have long been committed to protecting the constitutional rights of persons facing the death penalty.

Introduction

This Court recently held the capital sentencing procedures set out in Del. Code Ann. tit. 11, § 4209 (West 2013) unconstitutional. *Rauf v. State*, No. 39, 2016, 2016 WL 4224252, at *1–2 (Del. Aug. 2, 2016). Specifically, the Court held that the statute improperly permitted a death sentence upon judicial findings the Sixth Amendment reserves for the jury, including the finding of aggravating circumstances and the finding that such aggravating circumstances outweigh the mitigating circumstances. *Rauf*, 2016 WL 4224252, at *1–2. The Court held that each of these findings must be made by a unanimous jury, beyond a reasonable

doubt – invalidating the statute's preponderance of evidence standard. The Court further stated that because it is impossible to "to sever § 4209, the decision whether to reinstate the death penalty—if our ruling ultimately becomes final— . . . should be left to the General Assembly." *Id.* Because the Attorney General will not seek certiorari review in the United States Supreme Court,[1] the Court's invalidation of § 4209 will soon become final.

This case asks whether a prisoner whose direct appeal was complete before *Rauf* may be executed under the unconstitutional scheme.

The question arises in Derrick Powell's appeal of the denial of his post-conviction petition. *See State v. Powell*, No. S0909000858 R-I, 2016 WL 3023740, at *94 (Del. Super. Ct. May 24, 2016). Powell was sentenced to death under the procedure *Rauf* found unconstitutional: the jury split 7-5 on its recommended finding, by a *preponderance of the evidence*, that the aggravating circumstances *it found* outweighed the mitigating circumstances. *Powell v. State*, 49 A.3d 1090, 1096, 1104 (Del. 2012). The judge then independently found additional, non-statutory aggravating circumstances (documented in Powell's merits memorandum, Powell Memo, at 2-3 (citing *State v. Powell*, No. 0909000858, 2011 WL 2041183, at *1 (Del. Super. Ct. May 20, 2011)). Based on those non-statutory aggravating circumstances, the statutory aggravating circumstances the

[1] J. Masulli Reyes and M. Albright, *AG won't appeal Delaware death penalty ruling*, The News Journal, August 15, 2016.

jury found and the judge's own findings regarding mitigation, the judge then made the dispositive weighing determination, sentencing Powell to death. *Powell*, 2011 WL 2041183, at *29. On direct appeal in 2012, Powell's death sentence became final. *Powell*, 49 A.3d at 1108.

The answer is no. Undersigned amici endorse the arguments of Powell and other amici showing that his execution would violate the Delaware and U.S. Constitutions and that the rule against retroactive application of new procedural constitutional rulings does not apply. But this brief raises an additional salient argument: both the Delaware Constitution's and the Eighth Amendment's parallel prohibitions against cruel (Delaware) and cruel and unusual (U.S.) punishment bar the execution of a person under a scheme previously found in its entirety to violate the Constitution. *See* U.S. Const. amends. VIII, XIV; Del. Const. art. I, § 11. That is because of the societal consensus – in Delaware and nationally – against such executions. The societal consensus is proven by the fact that, in the modern death penalty era, no person has ever been executed under a death-penalty statute the U.S. Supreme Court or a state supreme court previously struck as unconstitutional. Indeed, both times this has occurred in Delaware, the entire death row was spared. This is in *addition* to the consensus Powell's memorandum shows against death sentences post-repeal and, as here, based on judge fact-finding and sentencing. Powell Memo. at 21-22, 30-32.

ARGUMENT

I. Both the Eighth Amendment and the Delaware Constitution bar punishments inconsistent with evolving standards of decency.

The Eighth Amendment bars punishments that conflict with the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The "objective indicia of society's standards" or consensus are expressed not only through legislation, but also actual state practice. *Graham v. Florida*, 560 U.S. 48, 61-63 (2010) (citing sentencing data); *Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008) ("Statistics about the number of executions may inform the . . . " analysis.).

This Court, too, has undertaken the consensus analysis. *See*, *e.g.*, *Sanders v. State*, 585 A.2d 117, 141 (Del. 1990) (finding lack of societal consensus against execution of person with serious mental illness; and noting evaluation under Delaware Constitution would consider "our State's popularly enacted legislation and other objective evidence of our State's standards of decency . . . also . . . the reasoning of cases decided in other courts . . . if they provide persuasive answers to the questions before us").

As shown below, based on the consensus in sentencing practices shown in this State after two other invalidations of prior death-penalty statutes, the execution of Powell under a statute now found to be unconstitutional would violate Article I,

section 11 of the Delaware Constitution. It would also violate the Eighth Amendment.

II. Powell's execution would violate the Delaware Constitution.

Before *Rauf*, twice in the last five decades has this Court found extant death penalty statutes unconstitutional and therefore barred their future use. In 1973, this Court applied *Furman v. Georgia*, 408 U.S. 238 (1972), to find the existing death-penalty statute unconstitutional and to bar its use in future capital sentencing proceedings. *See State v. Dickerson*, 298 A.2d 761 (Del. 1973).

The three remaining prisoners on Delaware's death row at the time of *Furman* were resentenced to life imprisonment. *See* James W. Marquart and Jonathan R. Sorensen, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 Loy. L.A. L. Rev. 5, 6, Table 1 (1989) (noting the prisoners "affected by the decision had their death sentences commuted to life imprisonment," and documenting 3 Delaware prisoners on death row at time of *Furman*). *See also State v. Johnson*, 295 A.2d 741, 744 (Del. Super. Ct. 1972) (noting defendant tried under *Furman* scheme, subsequently invalidated, "falls under its doctrine as well as persons who had been [previously] sentenced"); *United States ex rel. Parson v. Anderson*, 354 F. Supp. 1060, 1090 (D. Del. 1972) (same in federal habeas proceeding).

Four years later, this Court struck the mandatory death-sentencing statute the Legislature had enacted after *Furman*. *See State v. Spence*, 367 A.2d 983, 986 (1976) (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976)). *Spence* consolidated the cases of all nine prisoners sentenced under the mandatory scheme. *Id.* at 985. The Court held that all nine should be sentenced to life imprisonment without parole. *Id.* at 989-90.

The Death Penalty Information Center (DPIC) maintains a database of executions in this nation since 1976. Its list of Delaware executions mirrors a list of executions in a comprehensive academic study of Delaware death sentencing.[2] A review of both lists confirms that Delaware has executed no prisoner previously sentenced under the schemes invalidated by *Furman* and *Woodson*.[3]

These facts of Delaware history bear constitutional significance. In *Sanders*, 585 A.2d at 145-46, the Court highlighted the Delaware's protection against cruel punishment in Article I, section 11 of the Constitution. The Court explained that

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[2] DPIC, *Execution Database*, filtered for Delaware, available at http://www.deathpenaltyinfo.org/views-executions?exec_name_1=&sex=All&state%5B%5D=DE&sex_1=All&federal=All&foreigner=All&juvenile=All&volunteer=All (list of 16 men executed by Delaware since 1976) (last visited on October 6, 2016); Johnson, Sheri et al., *The Delaware Death Penalty: An Empirical Study*, Appendix D (2012). Cornell Law Faculty Publications, *Paper 431* (identical list, documenting that the earliest was tried in 1980).

[3] Steven Pennell's execution in 1992 is chronologically the first execution in both of these lists. *See also* Delaware Dep't of Corr., *Death Row History*, http://www.doc.delaware.gov/deathrow/history.shtml (last visited on Oct. 6, 2016). Prior to that, the State's last execution had been in 1946. *Id.*

the U.S. Constitution "must take account of diversity among the States and devise constitutional limits that are appropriate *for all places and situations*." *Id.* at 145 (emphasis added). Its interpretation evolves "slowly, giving rise to national rules only when they have a clear national foundation in evolving attitudes and needs." *Id.* The U.S. Constitution thus "establishes a minimum, the least protection that a State may provide to its citizens without betraying our heritage of democratic yet limited government[,]" but not "a maximum[.]" *Id.* But Delaware is "governed by its own laws and shaped by its own unique heritage[,] an examination of which "may, from time to time, lead to the conclusion that Delaware's citizens enjoy more rights, more constitutional protections, than the Federal Constitution extends to them." *Id. See also Hammond v. State*, 569 A.2d 81, 87 (Del. 1989) (setting out additional due-process protections of Delaware Constitution).

Sanders also teaches that, to construe Article I, Section 11, the Court may look to "many other sources," including legislation, "other objective evidence of our State's standards of decency[]," and the "reasoning of cases decided in other courts, including the United States Supreme Court," and "the evolution of our laws over time," with an eye towards "the patterns that emerge." *Id.* at 146.

Under *Sanders*, to make Derrick Powell the first, or among the first, to be executed in Delaware under a statute this Court has struck would violate Article I, Section 11's bar against cruel punishment. The Court should look to the U.S.

Supreme Court's consensus analysis set forth above, which takes into account actual sentencing practices. *Graham*, 560 U.S. at 61-63. *See also State v. Santiago*, 122 A.3d 1, 79, 100 (Conn. 2014) (finding execution of prisoner after state's *prospective* execution repeal would violate the Connecticut Constitution and noting "significantly, no state or nation that has repealed the death penalty prospectively ever has carried out another execution"); *id.* at 178, 189-95 (Eveleigh, J., concurring) (relying extensively on such history).

The Court should look to the objective evidence of Delaware's own standard of decency. As reviewed above, in sum, Delaware has executed *none* of the twelve men sentenced to death under the two procedures this Court has ruled unconstitutional. Among these twelve is at least one prisoner whose death sentence was final at the time of the decision invalidating the Delaware statute. *Parson*, 354 F. Supp. at 1090 (winning relief under *Furman* six years after his death sentence had become final on direct review to this Court) (citing *Parson v. State*, 222 A.2d 326 (Del. 1966). *Rauf* requires a jury's involvement in capital sentencing, requires the jury to be unanimous, and invalidated the preponderance burden of proof. *Rauf* compares in significance to *Dickerson* and *Spence*, whose protections were extended to all. Denying Powell of *Rauf*'s jury protections would be like the lightning of *Furman* striking all over again, 408 U.S. at 309 (Stewart, J., concurring), an arbitrary execution that would be a miscarriage of justice, causing

multiple violations of the Delaware Constitution. *See also* Del. Const. art. I, §§ 7 (jury right), 9 (law of land), 11 (against cruel punishment).

Finally, as for "the evolution of [Delaware] laws over time," and "the patterns that emerge," *Sanders,* 585 A.2d at 146, the Court should look to the detailed historical analysis set forth in *Rauf,* showing the singular role of capital juries stretched back to our Nation's founding. But, over time, the jury right was variously diminished and obscured to address Eighth Amendment concerns after *Furman*. *Rauf*, 2016 WL 4224252, at 31-33 (Strine, C.J., concurring).

This pattern continued with limited interruptions until *Hurst v. Florida*, __ U.S. __, 136 S. Ct. 616 (2016). "*Hurst* is best read as restoring something basic that had been lost. At no time before *Furman* was it the general practice in the United States for someone to be put to death without a unanimous jury verdict calling for that final punishment." *Rauf*, 2016 WL 4224252, at *32. Before post-*Furman* detours, the jury's singular role was part of "200 years of our nation's customs and traditions." *Id.* Another factor of historical significance is detailed in Powell's memorandum: although *Rauf* is based on the Sixth Amendment, the right to counsel under the Delaware Constitution is if anything only stronger. Memorandum in Support of Appellant's Motion to Vacate a Death Sentence (Powell Memo), at 15-16. Powell was deprived of that important Delaware right, too, by historical accident.

Rauf instructs that the death sentence of Derrick Powell – decided by a *judge* based on a jury's 7-5 recommendation – is an accident of history. It occurred because Delaware (like other jurisdictions) diminished the historic jury role in its capital sentencing scheme, for a relatively short period of decades. For two centuries before that, however, Powell's judge-determined death sentence would never have been permitted.

Given the arbitrariness and cruelty that would accompany the execution of a man who was denied a "fundamental protection of the Sixth Amendment," *id.* at 26, because of a historic accident, and the clear and unbroken tradition in Delaware of sparing the lives of prisoners sentenced to death based on procedures later found to be unconstitutional, this Court should conclude executing Powell would violate Article I, section 11 of the Delaware Constitution. *See also* Del. Const. art. I, §§ 7 (jury right), 9 (law of land).

Although, as shown below, Powell's execution would also violate the Eighth Amendment, this Court has previously observed the difficulty in gauging the national consensus regarding sentencing practices. *Sanders*, 585 A.2d at 138. A decision to bar Powell's execution under the Delaware Constitution would be the narrower of the two Constitutional options. Because the Court is uniquely suited to gauge the meaning of the Delaware Constitution's protection against cruel

punishment, and why Powell's death sentence violates it, this Court should not allow his execution.

III. In the alternative, Powell's execution would violate the Eighth Amendment.

The Supreme Court's 1972 decision in *Furman* invalidated the death sentences of over 600 prisoners across 40 death-penalty states. *See*, *e.g.*, Welsh S. White, *Cruel and Unusual: The Supreme Court and Capital Punishment*, 74 Colum. L. Rev. 319, 319 (1974). Earlier that year, the California Supreme Court held California's death penalty unconstitutional under that state's Constitution, *People v. Anderson*, 493 P.2d 880, 899 & n.45 (Cal. 1972), resulting in the vacatur of all 101 death sentences. *See* Jack Greenberg, *Capital Punishment As A System*, 91 Yale L.J. 908, 915 (1982).[4]

Since 1972, on 18 different occasions either the U.S. Supreme Court or a state supreme court has found a state death-sentencing statute constitutionally infirm. This includes: 1) the 13 different states (including Delaware) that

[4] Before *Furman*, a pair of 1968 Supreme Court rulings led to the vacatur of over 100 death sentences in various jurisdictions. *See* Greenberg, *Capital Punishment As A System*, 91 Yale L.J. at 915 (documenting relief granted). Because all death rows were cleared in 1972, and the last execution before that came in 1967, s*ee* The Espy File, *Executions in the U.S. 1608-2002*, http://www.deathpenaltyinfo.org/documents/ESPYyear.pdf (last visited Oct. 7, 2016), it follows that no prisoners could have been executed under the procedures invalidated in 1968.

invalidated their mandatory death-sentencing schemes in the wake of *Woodson*; 2) the two states that ruled their statutes invalid under *Lockett v. Ohio*, 438 U.S. 586 (1978); and 3) rulings unique to each of three states, each based on state constitutional grounds. No prisoner was ever thereafter executed under the invalidated capital sentencing statutes. Powell's execution would violate the Eighth Amendment because of the demonstrated consensus against executions under invalidated statutes.

A. None of 13 states who mandatorily sentenced prisoners to death executed such prisoners.

In the following 13 states, the state's highest court (or the U.S. Supreme Court) invalidated mandatory execution statutes under *Woodson*, and thereafter all prisoners sentenced were spared: California (66 spared), Delaware (reviewed above, 9), Indiana (6), Kentucky (3), Louisiana (46), Montana (1), Mississippi (22), Nevada (2), New Mexico (9), North Carolina (109), Oklahoma (36), South Carolina (21), and Tennessee (41). *See* Greenberg, *Capital Punishment As A System*, 91 Yale L.J. at 916 & n.53 (documenting state by state number of prisoners spared under *Woodson* and *Gregg v. Georgia*, 428 U.S. 153 (1976); numbers above limited to *Woodson*); *Rockwell v. Superior Court*, 556 P.2d 1101, 1116 (Cal. 1976) (invalidating mandatory statute); *Spence*, 367 A.2d at 986 (same); *French v. State*, 362 N.E.2d 834, 838 (Ind. 1977) (same); *Boyd v. Commonwealth*, 550 S.W.2d 507, 508 (Ky. 1977) (same); *State v. Adams*, 367 So.

2d 8, 8 (La. 1978) (same); *State v. Coleman*, 579 P.2d 732, 742 (Mont. 1978) (same); *Jackson v. State*, 337 So. 2d 1242, 1249-50 (Miss. 1976) (same); *State v. Rondeau*, 553 P.2d 688, 700 (N.M. 1976) (same); *Davis v. Oklahoma*, 428 U.S. 907 (1976) (same); *State v. Rumsey*, 226 S.E.2d 894, 895 (S.C. 1976) (same); *Collins v. State*, 550 S.W.2d 643, 646 (Tenn. 1977) (same).

In 1987, the U.S. Supreme Court vacated the last remaining mandatory death sentence in the nation – that of man convicted under a short-lived, pre-*Woodson* statute requiring a mandatory death sentence for prisoners who murdered. *See Sumner v. Shuman*, 483 U.S. 66, 70 n.2, 72 (1987).

B. No prisoners were executed based on two invalidated statutes prohibiting consideration of mitigation.

In *Lockett*, and an Arizona decision applying it, two different capital sentencing statutes were struck for barring the consideration of mitigation. In both Arizona[5] and Ohio,[6] no prisoner was executed based on the invalidated statute.

C. In three additional state-court decisions invalidating the death penalty on state-law grounds, no prisoner was executed.

[5] *State v. Watson*, 586 P.2d 1253 (Ariz. 1978); Arizona Department of Corrections, *Arizona Death Penalty History*, https://corrections.az.gov/public-resources/death-row/arizona-death-penalty-history ("After the Court's decision in *Watson*, all prisoners on death row were remanded for new sentencing hearings . . .").
[6] Ohio Department of Rehabilitation and Correction, *Capital Punishment in Ohio*, http://www.drc.state.oh.us/public/capital.htm (noting 97 prisoners serving death sentences at time of *Lockett* were commuted to life).

Akin to *Rauf*, in *State v. Quinn*, 623 P.2d. 630 (Or. 1981), the Oregon Supreme Court ruled the state's capital sentencing scheme violated the Oregon Constitution because it denied a capital defendant a jury trial on a fact required for execution. *Id.* at 644. Neither of the two prisoners Oregon has executed were sentenced to death under this statute. *See, e.g.*, Execution Database, *supra*; *State v. Wright*, 913 P.2d 321, 323 (Or. 1996) (affirming death sentence under different statutory scheme for 1991 crime).

In a series of New York cases, the state's highest court found that its 1995 death-sentencing statute violated the state constitution because it required a coercive deadlock instruction. *People v. Taylor*, 878 N.E.2d 969, 971 (N.Y. 2007). The court invalidated the last remaining death sentence under the unconstitutional statute, *id.*, and New York has executed no person in the modern era. *See* Execution Database, *supra*.

Finally, in *Commmonwealth v. Colon-Cruz*, 470 N.E.2d 116, 130 (Mass. 1984), the Massachusetts high court ruled that state's capital sentencing statute violated the state constitutional protections against self-incrimination and to a jury trial. Massachusetts has not executed anyone since well before *Colon-Cruz*. *See* Alan Rogers, *Success At Long Last: The Abolition of the Death Penalty in Massachusetts, 1928-1984*, 22 B.C. Third World L.J. 281, 282 (2002), http://lawdigitalcommons.bc.edu/twlj/vol22/iss2/2/ (last visited Oct. 7, 2016).

D. *Arizona v. Ring* does not disprove the consensus.[7]

Rauf builds on *Hurst*, which in turn cites *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (striking procedure allowing "a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty"). *Ring* need not be applied retroactively to prisoners whose sentences were final on direct appeal at the time of the decision. *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004). Fifteen people have been executed since *Ring*, undoubtedly including some prisoners who would have prevailed under *Ring*'s holding. *See, e.g.*, *State v. Comer*, 799 P.2d 333, 347 (Ariz. 1990) (rejecting *Ring*-type claim). Comer was executed in 2007. Execution Database, *supra*.

But Arizona's post-*Ring* execution practice does not disprove the consensus for two reasons. First, *Ring* was not so sweeping as *Rauf* and the above decisions invalidating entire sentencing schemes. *Ring* did not speak to two important aspects of the *Rauf* ruling: a) the right to a unanimous jury determination of the final outcome-determinative weighing decision, *Ring*, 536 U.S. at 597 n.4; and b)

[7] The Supreme Court has of course found error in the application of other capital-sentencing statutes. *See Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) (finding Texas scheme did not allow for meaningful consideration of mitigating evidence of intellectual disability). But *Penry* did not invalidate the Texas statute and potential *Penry* error is evaluated case by case. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246-60 (2007) (discussing history of evaluating such errors). Similarly, claims under *Hitchock v. Dugger*, 481 U.S. 393 (1987), another ruling protecting the right to present mitigation (in Florida), are also evaluated case by case. *See Alvord v. State*, 694 So. 2d 704, 705 (Fla. 1997) (rejecting claim).

the constitutional need for proof beyond a reasonable doubt. *See Summerlin*, 542 U.S. at 351 n.1 (noting *Apprendi* requirement of proof "beyond a reasonable doubt" was "not at issue"). Unlike the faulty statutory schemes discussed above, *Ring* errors could be deemed harmless. *Compare State v. Ring*, 65 P.3d 915, 926-28 (Ariz. 2003) (setting forth procedure for determining harmlesslness) *with State v. Grace*, 286 A.2d 754, 755 (Del. 1971) (finding error in conviction upon proof by mere preponderance of evidence, instead of beyond a reasonable doubt).

Second, even to the extent *Ring* and *Rauf* and the other invalidation of capital statutes are similar, the outlier of *Ring* does not rebut the consensus of the sentencing practices of the 21 states that spared the lives of hundreds of death-row prisoners when their statutes failed.

This consensus against the execution of prisoners based on invalidated statutes means Powell's execution would violate the Eighth Amendment. As Powell demonstrates in his memorandum, this is not the only relevant consensus against his execution: Delaware is one of only three states with judge sentencing; and post-repeal states have not executed those already on death row (even in the event of prospective-only legislative repeals). These consensuses further show that the execution of Powell would violate the evolving standards of decency that mark the progress of a maturing society. Powell Memo, at 21-22, 30-32.

Respectfully submitted,

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