

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2019**

MICHAEL MANLEY - PETITIONER

VS.

STATE OF DELAWARE - RESPONDENT

**On Petition for Writ of Certiorari
to the Supreme Court of Delaware**

PETITION FOR WRIT OF CERTIORARI

Christopher S. Koyste, Esq.
Supreme Court Bar # 305492
Law Office of Christopher S. Koyste, LLC
709 Brandywine Boulevard
Wilmington, DE 19809
(302) 762-5195
Attorney for Michael Manley, Petitioner

Dated: April 4, 2019

QUESTIONS PRESENTED

Did the Delaware courts violate Mr. Manley's due process and Eighth Amendment rights by judicially creating a mandatory life without parole sentence?

Did the Delaware courts violate Mr. Manley's Eighth and Fourteenth amendment rights by creating a mandatory sentence of life without parole that precludes appellate review?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY CLAUSES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
A. The Delaware Courts Created and Imposed a Mandatory Life Without Parole Sentence in Violation of Mr. Manley’s Due Process Rights.	6
1. The Delaware Supreme Court is vested with authority to interpret laws and apply penalties but not to create penalties.	6
2. After finding the Delaware death penalty statute unconstitutional and not severable, the Delaware courts unilaterally created a sentence in violation of Mr. Manley’s due process rights.....	7
3. Mr. Manley’s sentence violates the Constitution because it lacks a statutory basis.	8
4. The mandatory life without parole sentence created by the Delaware judiciary violates the Eighth and Fourteenth Amendments.	8
B. A Sentence of Life Without Parole that Cannot Undergo Meaningful Review Violates the Eighth Amendment’s Prohibition Against the Imposition of Cruel and Unusual Punishment and the Fourteenth Amendment’s Due Process Guarantee.....	11
1. Life without parole is a grave penalty akin to death.	11
2. The Delaware courts have created a mandatory life without parole sentence that avoids meaningful appellate review, in violation of the Eighth Amendment.....	12
3. The Delaware courts’ creation of a mandatory life sentence denied Mr. Manley appellate review of his sentence as provided by state law, in violation of his due process rights.....	14
CONCLUSION	14
APPENDIX	
<i>Michael Manley v. State of Delaware</i> , No. 165, 2018 (Del. Dec. 6, 2018).....	A1
Order Denying Motion to Vacate Death Sentence and Resentence Pursuant to 11 <i>Del. C. § 4205 in State of Delaware v. Michael Manley</i> , ID No. 9511006992 (Del. Super. Ct. Feb. 28, 2018).....	B1

Modified Sentencing Order in <i>State of Delaware v. Michael Manley</i> , ID No. 9511007022 (Del. Super. Ct. Mar. 28, 2018).....	C1
Text of 11 <i>Del. C.</i> § 4209.....	D1
Text of 11 <i>Del. C.</i> § 4205.....	E1
November 21, 2017 Motion to Vacate Death Sentence and Resentence Pursuant to 11 <i>Del. C.</i> § 4205 in light of <i>Rauf v. State</i> in <i>State of Delaware v. Michael Manley</i> , ID No. 9511007022, (Del. Super. Ct. Nov. 21, 2017)	F1
July 9, 2017 Appellant's Opening Brief.....	G1
August 17, 2018 Appellant's Reply Brief.....	H1
Order of Appointment.....	I1

PROOF OF SERVICE

TABLE OF AUTHORITIES

Cases

<i>Alaska Airlines, Inc. v. Brock</i> , 480 U.S. 678 (1987)	7
<i>Campbell v. Ohio</i> , 138 S. Ct. 1059 (2018)	12
<i>Cooke v. State</i> , 181 A.3d 152, 2018 WL 1020106 (Del. 2018)	13
<i>Evitts v. Lucy</i> , 469 U.S. 387 (1985)	14
<i>Graham v. Florida</i> , 560 U.S. 48, 69 (2010)	11
<i>Gregg v. Georgia</i> , 428 U.S. 153, 187 (1976)	12
<i>Hill v. Wallace</i> , 259 U.S. 44 (1922)	7
<i>Hurst v. Florida</i> , 136 S.Ct. 616 (2016)	4, 6, 7
<i>Lackey v. Texas</i> , 514 U.S. 1045 (1995)	11, 12
<i>Leatherbury v. Greenspun</i> , 939 A.2d 1284 (Del. 2007)	8
<i>Manley v. State</i> , 709 A.2d 643 (Del. 1998)	3
<i>Mayes v. State</i> , 604 A.2d 839 (Del. 1992)	13, 14
<i>Ohio v. Johnson</i> , 467 U.S. 493 (1984)	8
<i>Powell v. State</i> , 153 A.3d 69 (Del. 2016)	4, 5
<i>Rauf v. State</i> , 145 A.3d 430 (Del. 2016)	4, 5, 6, 7, 8
<i>State v. Manley</i> , 2000 Del. Super. LEXIS 118 2000 WL 703812 (Del. Super 2000)	3
<i>Stevenson v. State</i> , 709 A.2d 619 (Del. 1998)	3

<i>Stevenson v. State</i> , 782 A.2d 249 (Del. 2001)	4
<i>Thompson v. McNeil</i> , 556 U.S. 1114 (2009)	12, 13
<i>Trop v. Dulles</i> , 356 U.S. 86, 99 (1958)	10
<i>Wallace v. State</i> , 956 A.2d 630 (Del. 2008)	10
<i>Ward v. State</i> , 567 A.2d 1296 (1989)	13
<i>Zebroski v. State</i> , 179 A.3d 855 (Del. 2018)	13

Statutes

11 Del. C. § 636	10
11 Del. C. § 4205	2, 5
11 Del. C. § 4209	5, 6, 7, 8
28 U.S.C. § 1257	2
720 Ill. Comp. Stat. 5/9-1	9
730 Ill. Comp. Stat. 5/5-4.5-20	9
Ala. Code § 13A-5-6	10
Ala. Code §§ 13A-6-2	10
Alaska Stat. § 11.41.100	9
Alaska Stat. § 12.55.125	9
Ariz. Rev. Stat. Ann. § 13-751	10
Ariz. Rev. Stat. Ann. § 13-1105	10
Cal. Penal Code § 190	10
Colo. Rev. Stat. § 18-1.3-401	10
Colo. Rev. Stat. § 18-3-102	10
Conn. Gen. Stat. § 53a-35a	9
Conn. Gen. Stat. § 53a-54b.....	9
D.C. Code § 22-2101	9
D.C. Code § 22-2104	9
Del Sup. P.J.I Crim. § 11.636 (2016)	10
Ga. Code Ann. § 16-5-1.....	9
Ga. Code Ann. § 17-10-16	9
Haw. Rev. Stat. § 706-656	9
Haw. Rev. Stat. § 707-701	9
Idaho Code Ann. 18-4004	10
Ind. Code § 35-42-1-1	11
Ind. Code § 35-50-2-3	11
Iowa Code Ann. § 70.2	9
Iowa Code Ann. § 902.1	9
Ky. Rev. Stat. § 532.025	9
Mass. Gen. Laws 265 § 1	9
Mass. Gen. Laws 265 § 2	9

Md. Code Ann., Crim. Law § 2-201	9
Md. Code Ann., Crim. Law § 2-203	9
Md. Code Ann., Crim. Law § 2-304	9
Me. Rev. Stat. Ann. Tit. 17-A, § 201	9
Me. Rev. Stat. Ann. Tit. 17-A, § 1251	9
Mich. Comp. Laws § 750.316	9
Minn. Stat. § 609.185	9
Mo. Ann. Stat. 565.020	9
Mont. Code Ann. § 45-5-102	9
N.D. Cent. Code Ann. § 12.1-16-01	9
N.D. Cent. Code Ann. § 12.1-32-01	9
N.J. Stat. Ann. 2C: 11-3	9
N.M. Stat. Ann. § 30-2-1	9
N.M. Stat. Ann. § 31-18-14	9
N.Y. Penal Law § 60.06	9
N.Y. Penal Law § 70.00	9
N.Y. Penal Law § 125.26	9
N.Y. Penal Law § 125.27	9
Nev. Rev. Stat. § 200.030	9
Ohio Rev. Code Ann. § 2953.08	12
Okla. Stat. tit. 21, § 701.7	9
Okla. Stat. tit. 21, § 701.9	9
Or. Rev. Stat. § 163.095	9
Or. Rev. Stat. § 163.105	9
R.I. Gen Laws § 11-23-1	9
R.I. Gen Laws § 11-23-2	9
S.C. Code Ann. § 16-3-20	10
Tenn. Code Ann. § 39-13-202	9
Tenn. Code Ann. § 39-13-204	9
Tex. Penal Code Ann. § 12.31	9
Tex. Penal Code Ann. § 19.03	9
United States Constitution, Amendment VIII	2, 6, 8, 10
United States Constitution, Amendment XIV	2, 6, 8, 10
Utah Code Ann. § 76-3-206	9
Utah Code Ann. § 76-5-202	9
Vt. Stat. Ann. Tit. 13 § 2301	9
Vt. Stat. Ann. Tit. 13 § 2303	9
W. Va. Code § 61-2-1	9
W. Va. Code § 61-2-2	9
W. Va. Code § 62-2-15	9
Wis. Stat. Ann. § 939.50	9
Wis. Stat. Ann. § 940.01	9
Wyo. Stat. Ann. § 6-2-101	9
Wyo. Stat. Ann. § 6-2-102	9

OPINIONS BELOW

(1) The decision of the Supreme Court of Delaware affirming Mr. Manley's sentence of life without parole is *Michael Manley v. State of Delaware*, No. 165, 2018, (December 06, 2018), which is unpublished (Appendix A).

(2) The Delaware Superior Court's Order Denying Motions to Vacate Death Sentence and Resentence Pursuant to 11 Del. C. § 4205 is *State of Delaware v. Michael Manley*, ID No. 9511006992 (February 28, 2018) Wallace, J. (Appendix B).

(3) The Sentencing Decision is *State of Delaware v. Michael Manley*, ID No. 9511007022, Wallace, J., (March 28, 2018), which is unpublished (Appendix C).

JURISDICTION

The Supreme Court of Delaware filed a final judgment on December 6, 2018. This petition is filed in compliance with United States Supreme Court Rule 13. The jurisdiction of this Court is provided under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY CLAUSES INVOLVED

This case concerns the Eighth Amendment to the United States Constitution, which provides in relevant part:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted

U.S. CONST. amend. VIII,

and Section 1 of the Fourteenth Amendment to the United States Constitution, which provides in relevant part:

nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

U.S. CONST. amend. XIV.

Delaware Code, Title 11, Sections 4209 and 4205 are also relevant to this petition and are attached in Appendix D and E.

STATEMENT OF THE CASE

Mr. Manley is serving a mandatory life sentence without possibility of parole as the result of summary opinions issued by the Delaware Supreme Court, rather than a statute enacted through legislative process.

This matter involves a capital prosecution for the shooting death of Christopher Heath, a security guard at a Macy's department store where both he and Mr. Manley's co-defendant David Stevenson were employed. Mr. Heath had been scheduled to testify against Mr. Stevenson for alleged thefts from Macy's, a crime in which Mr. Manley had no involvement.

Following a joint trial with co-defendant, David Stevenson, a death-qualified jury found both Mr. Manley and Mr. Stevenson guilty of First Degree Murder and related offenses. A split jury voted 7 to 5 to recommend the death penalty for Mr. Manley and 8 to 4 to recommend death for Mr. Stevenson.

Under the statute in effect at that time, 11 *Del. C.* § 4209(c)(3)b.2, the jury's recommendation was not binding on the court, but the court was required to give "such consideration as deemed appropriate . . . in light of the particular circumstances or details of the commission of the offense and the character and propensities of the offender as found to exist by the court." 11 *Del.C.* § 4209(d) (Appendix D).

The Superior Court sentenced both Mr. Manley and Mr. Stevenson to death. The Delaware Supreme Court affirmed both convictions and death sentences. *Manley v. State*, 709 A.2d 643, 661 (Del. 1998) (hereinafter "*Manley I*"); *Stevenson v. State*, 709 A.2d 619, 641 (Del. 1998) (hereinafter "*Stevenson I*").

Mr. Manley thereafter filed a post-conviction motion pursuant to Super.Ct.Crim.R. Rule 61 (hereinafter "Rule 61 Motion"). The Superior Court denied the petition, *State v. Manley*,

2000 Del. Super. LEXIS 118; 2000 WL 703812 (Del. Super 2000) (hereinafter “*Manley II*”). On appeal, the Delaware Supreme Court found that an appearance of impropriety tainted the assignment of the Rule 61 judge and vacated Mr. Manley’s and Mr. Stevenson’s death sentences. *See Stevenson v. State*, 782 A.2d 249, 260-261 (Del. 2001) (hereinafter “*Stevenson II*”). The court also remanded the remaining trial-phase claims “for consideration by a new judge *ab initio*.” *Id.*

Following a second joint penalty hearing, in November 2005, Mr. Manley received a second death sentence by non-unanimous verdict.¹ On February 3, 2006, the Superior Court again sentenced both of them to death. The Delaware Supreme Court affirmed on January 3, 2007 (hereinafter “*Manley III*”).

On January 25, 2008, Mr. Manley filed a Rule 61 motion and followed with amendments. After a limited evidentiary hearing, the court denied relief on May 29, 2014. Mr. Manley timely appealed and filed his Opening Brief on February 27, 2015. On May 11, 2015, the Delaware Supreme Court granted Mr. Manley’s motion to stay the proceedings pending this Court’s adjudication of *Hurst v. Florida*, 136 S.Ct. 616 (2016). On January 12, 2016, this Court issued its opinion in *Hurst*, concluding that a capital sentencing scheme in which the jury’s recommendation is only advisory violates the Sixth Amendment. *Hurst*, 136 S.Ct. at 619, 624.

The Delaware Supreme Court once again stayed Mr. Manley’s appellate proceedings pending the outcome of two cases before that Court involving the application of *Hurst* to Delaware’s capital sentencing procedure: *Rauf v. State*, 145 A.3d 430 (Del. 2016), and *Powell v. State*, 153 A.3d 69 (Del. 2016).

¹ After a penalty phase hearing before a new jury that had not weighed all of the guilt phase issues, the recommendation for death was 11 to 1 for Mr. Manley and 10 to 2 for Mr. Stevenson.

On August 2, 2016, the Delaware Supreme Court concluded that 11 *Del. C.* § 4209, Delaware's death penalty statute, was unconstitutional and not severable. *Rauf v. State*, 145 A.3d 4340 (Del. 2016). On December 15, 2016, the Delaware Supreme Court determined that *Rauf* applied retroactively to all prisoners on Delaware's death row. *Powell*, 153 A.3d at 76.

After additional briefing in light of *Rauf* and *Powell*, the State conceded relief regarding Mr. Manley's death sentence. The Delaware Supreme Court held oral argument on October 18, 2017. On October 20, 2017, the Delaware Supreme Court affirmed the denial of relief as to all trial phase issues but remanded for resentencing consistent with *Rauf* and *Powell*.

On November 21, 2017, prior to resentencing, Mr. Manley filed a *Motion to Vacate Death Sentence and Resentence Pursuant to 11 Del. C. § 4205*² in light of *Rauf v. State*. Appx. F.³ The State filed its Response to that Motion on December 8, 2017. On February 28, 2018, the Superior Court denied Mr. Manley's Motion and scheduled a resentencing hearing, and on March 13, 2018, the Superior Court resentedenced Mr. Manley to life without the possibility of parole. Appx. B and Appx. C. Mr. Manley appealed the Superior Court's denial of his motion to vacate,⁴ however the Delaware Supreme Court affirmed on December 06, 2018. Appx. A.

² In this motion, Mr. Manley argued that his death sentence must be vacated and that he be resentedenced at a hearing in which the sentencing judge could have issued a sentence other life without the possibility of parole. Appx. F.

³ 11 *Del. C.* § 4205 mandates sentencing for all other felony offenses other than first degree murder.

⁴ In his Opening Brief, Mr. Manley argued that the automatic imposition of a mandatory life sentence with no possibility of parole, in which the Court did not consider a sentence less than that, violated the Eighth and Fourteenth Amendments to the United States Constitution. Appx. G-15-24. Mr. Manley further argued, in this Reply Brief, that the Delaware Superior Court did not have the statutory authority to resentence Mr. Manley to life without the possibility of parole, in violation of Mr. Manley's constitutional rights. Appx. H-4-5.

REASONS FOR GRANTING THE WRIT

The Third Sentencing in this case, which is the subject of this Petition, occurred after two juries could not unanimously decide on the sentence. And although the state could not persuade all jurors to agree on the sentence, the Delaware courts have now imposed a sentence independent of the juries or the legislature. The Delaware Supreme Court created a mandatory life without parole penalty for all first-degree murder convictions in Delaware, which the Delaware Superior Court imposed on Mr. Manley.

The Delaware Supreme Court first invalidated the Delaware death penalty statute, 11 Del. C. § 4209, by finding it violated the Constitution, was not severable, and therefore, was no longer valid. *See Rauf; Hurst*. By eliminating the option of a death sentence, the court eliminated the substance of the statute.

When facing the question of resentencing persons previously condemned to death, the Delaware Supreme Court imposed a portion of § 4209, previously deemed not severable, and converted an area of discretion into a mandatory penalty not recognized by the legislature.⁵ The action of the Delaware Supreme Court, in creating a mandatory penalty from a discretionary sentencing procedure, violated the Eighth and Fourteenth Amendments.

A. The Delaware Courts Created and Imposed a Mandatory Life Without Parole Sentence in Violation of Mr. Manley's Due Process Rights.

1. The Delaware Supreme Court is vested with authority to interpret laws and apply penalties but not to create penalties.

⁵ Under the Delaware death penalty statute, the jury weighed the aggravating circumstances against the mitigating circumstances and reported its vote to the judge, who then made the final sentencing decision. *See*, 11 Del.C. §4209(c)(3)b.2 (Appendix D). The jury's recommendation was not binding on the court, but "shall be given such consideration as deemed appropriate by the court in light of the particular circumstances or details of the commission of the offense and the character and propensities of the offender as found to exist by the court." 11 Del.C. §4209(d) (Appendix C).

The Delaware Supreme Court struck down 11 Del. C. § 4209 as unconstitutional in light of *Hurst v. Florida* without exception or caveat. *Rauf v. State*, 145 A.3d 430 (Del. 2016). The court held the statute was not severable “[b]ecause the respective roles of the judge and jury are so complicated under § 4209, we are unable to discern a method by which to parse the statute so as to preserve it.” *Rauf*, 145 A.3d at 433. The *per curiam* opinion does not cite any particular subsection of § 4209, nor does it quote any particular language. The court did not acknowledge the portions of § 4209 that assess a life without parole sentence, nor did it create any caveats or exceptions to the holding that § 4209 is not severable. Section 4209 is therefore void and unenforceable. *See generally, Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-85 (1987); *Hill v. Wallace*, 259 U.S. 44, 70 (1922).

2. After finding the Delaware death penalty statute unconstitutional and not severable, the Delaware courts unilaterally created a sentence in violation of Mr. Manley’s due process rights.

The Delaware statute that guided the death penalty decision delineated a procedure that required a choice between a death sentence and life without parole. 11 Del. C § 4209(a) (“ . . . *shall be punished* by death or by imprisonment for the remainder of the person’s natural life without benefit of probation or parole or any other reduction, *said penalty to be determined in accordance with this section.*”) When the Court held the death penalty unconstitutional, not only did it void the statute in its entirety by ruling out severability, it also disrupted the entire sentencing scheme, voiding any choice between life and death. Nonetheless, the Delaware Superior Court, despite objection by Mr. Manley, Appx. B, relied on a void and disrupted 11 Del. C. § 4209 to resentence Mr. Manley to life without parole. Appx. C.

3. Mr. Manley's sentence violates the Constitution because it lacks a statutory basis.

In striking the statute as unseverable, the court recognized that it lacked the authority to recreate a process to determine a death penalty: “the decision whether to reinstate the death penalty – if our ruling ultimately becomes final – and under what procedures, should be left to the General Assembly.” *Rauf* at 434. Nonetheless, the Superior Court reinstated the life without parole portion of the invalid 11 Del. C § 4209 to resentence Mr. Manley to life without parole. Appx. C. The resentencing deprived Mr. Manley of his federal and state constitutional rights because the sentence expressly relied on an invalid statute.

Courts lack authority to divine, then impose sentences. Sentencing parameters must be established by the legislature, as the Delaware Supreme Court recognized. *Ohio v. Johnson*, 467 U.S. 493, 499 (1984). Courts cannot assume legislative prerogative. *Leatherbury v. Greenspun*, 939 A.2d 1284, 1291 (Del. 2007). The Superior Court had no inherent authority to impose a sentence not provided by the legislature, nor did it have the authority to presume that the legislature would have enacted mandatory life without parole for all first-degree murder convictions in the absence of a valid death penalty provision. *See Johnson*. The court, despite the unavailability of the scheme to determine a life sentence, applied such a sentence anyway. The court clearly overreached and violated the Constitution.

4. The mandatory life without parole sentence created by the Delaware judiciary violates the Eighth and Fourteenth Amendments.

Even if § 4209 were severable, (and the Delaware Supreme Court held it was not) such that a life without parole sentence could stand alone as the only alternative to a death sentence, a mandatory life without parole sentence violates the Eighth Amendment.

Delaware would be an outlier among states if it imposed a mandatory sentence of life without parole for the broadly defined offense of intentional killing. The vast majority of states without the death penalty employ penalty schemes that allow for the possibility of parole upon a conviction for first degree or aggravated murder.⁶ In addition, the non-death penalty states that include provisions for a mandatory sentence of life without parole do so only for a narrow set of first-degree murders: those committed with premeditated malice aforethought;⁷ or in the perpetration of another serious felony;⁸ or with some other enumerated aggravating circumstance.⁹

Most states with valid death penalty statutes include sentencing options other than death or life without parole. Ten states contemplate indeterminate life sentences with the possibility of parole if the first-degree conviction was for felony murder.¹⁰ Two more allow for the possibility

⁶ Alaska, Hawaii, Illinois, and Iowa statutes permit governor commutation to a term of years. Alaska Stat. §§ 11.41.100, 12.55.125; Haw. Rev. Stat. §§ 706-656, 707-701; 730 Ill. Comp. Stat. 5/5-4.5-20; 720 Ill. Comp. Stat. 5/9-1; Iowa Code Ann. §§ 70.2, 902.1. Maine, Maryland, Minnesota, New Mexico, North Dakota, Vermont, West Virginia, Wisconsin, and the District of Columbia provide for the possibility of parole. D.C. Code §§ 22-2101, 22-2104; Md. Code Ann., Crim. Law §§ 2-201, 2-203, 2-304; Me. Rev. Stat. Ann. Tit. 17-A, §§ 1251, 201; Minn. Stat. § 609.185; N.D. Cent. Code Ann. §§ 12.1-16-01, 12.1-32-01; N.M. Stat. Ann. §§ 30-2-1, 31-18-14; Vt. Stat. Ann. Tit. 13 §§ 2301, 2303; W. Va. Code §§ 61-2-1, 61-2-2, 62-2-15; Wis. Stat. Ann. §§ 940.01, 939.50; D.C. Code §§ 22-2101, 22-2104.

⁷ Massachusetts, Mass. Gen. Laws 265 §§ 1, 2; Michigan, Mich. Comp. Laws § 750.316.

⁸ Michigan, Mich. Comp. Laws § 750.316.

⁹ Connecticut, Conn. Gen. Stat. §§ 53a-54b, 53a-35a; New Jersey, N.J. Stat. Ann. 2C: 11-3(a), 3(b)(2)-(4); New York, N.Y. Penal Law §§ 60.06, 125.26, 125.27, 70.00(3)(a)(1); Rhode Island, R.I. Gen. Laws §§ 11-23-1, 11-23-2.

¹⁰ Georgia, Indiana, Kentucky, Montana, Nevada, Oklahoma, Oregon, Tennessee, Utah, and Wyoming provide for the possibility of parole. Ga. Code Ann. §§ 16-5-1, 17-10-16; Ind. Code §§ 35-50-2-3, 35-42-1-1; Ky. Rev. Stat. §§ 532.025; 532.030; Mont. Code Ann. § 45-5-102; Nev. Rev. Stat. § 200.030; Okla. Stat. tit. 21, §§ 701.7, 701.9; Or. Rev. Stat. §§ 163.095, 163.105; Tenn. Code Ann. §§ 39-13-202, 39-13-204; Utah Code Ann. §§ 76-5-202, 76-3-206; Wyo. Stat. Ann. §§ 6-2-101, 6-2-102. In addition, Texas allows for the possibility of parole if the State does not seek the death penalty, while Missouri permits an alternative to life without parole via governor action. Tex. Penal Code Ann. §§ 19.03, 12.31; Mo. Ann. Stat. 565.020.

of parole for first-degree felony murder convictions.¹¹ Four states allow for parole if no statutory aggravators are found.¹² The remaining death penalty states (14) do not allow for the possibility of parole, but a strong majority of those statutes specifically and narrowly define capital murder as more than just intentional murder or otherwise include a prerequisite finding of an aggravating circumstance. In contrast, a trier of fact in Delaware could convict a defendant of first-degree murder upon a mere finding that the killing was intentional, and impose a mandatory sentence of life without parole.¹³

Rare usage indicates societal rejection of mandatorily imposing this extreme penalty, rendering it cruel and unusual under the Eighth Amendment. *See Wallace v. State*, 956 A.2d 630, 639 (Del. 2008) (“Proportionality determinations require an examination of ‘evolving standards of decency that mark the progress of a maturing society’ in deciding a punishment’s constitutionality.”) (*quoting Trop v. Dulles*, 356 U.S. 86, 99 (1958)). As discussed above, Delaware is an outlier among states for imposing a mandatory sentence of life without parole for the broadly defined offense of intentional killing. Such outlier status supports the conclusion that society has abandoned a practice of imposing a mandatory life without parole sentence for all first-degree murders and that such a mandatory punishment is cruel and unusual in violation of the Eighth Amendment.

¹¹ Arizona and Colorado allow for parole for felony-murder. Ariz. Rev. Stat. Ann. §§ 13-1105, 13-751; Colo. Rev. Stat. §§ 18-3-102, 18-1.3-401(4).

¹² Alabama, California, Idaho, and South Carolina allow for parole if no statutory aggravators are found. Ala. Code §§ 13A-6-2, 13A-5-6; Cal. Penal Code § 190(a); Idaho Code Ann. 18-4004; S.C. Code Ann. § 16-3-20.

¹³ 11 Del. C. § 636(a)(1) (A killing is intentional in Delaware if it was the defendant’s “conscious objective or purpose to cause the person’s death.”); Del. Sup. P.J.I. Crim. § 11.636(a)(1) (2016).

B. A Sentence of Life Without Parole that Cannot Undergo Meaningful Review Violates the Eighth Amendment’s Prohibition Against the Imposition of Cruel and Unusual Punishment and the Fourteenth Amendment’s Due Process Guarantee.

1. Life without parole is a grave penalty akin to death.

This Court has already acknowledged the gravity of a sentence of life in prison without the possibility of parole, recognizing that, “life without parole sentences share some characteristics with death sentences that are shared by no other sentences.” *Graham v. Florida*, 560 U.S. 48, 69 (2010). After all, “imprisoning an offender until he dies alters the remainder of his life.” *Miller v. Alabama*, 567 U.S. 400, 474–475 (2012). A sentence of life without parole “means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the convict, he will remain in prison for the rest of his days.” *Graham*, 560 U.S. at 60.

Members of this Court have opined that the penological goals for death are effectively met in cases of adults who spend decades awaiting execution on death row, and that life without parole is akin to death. For example, in *Lackey v. Texas*, where the defendant had spent 17 years on death row, Justice Stevens posited in his memorandum respecting the denial of certiorari that “after such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted.” *Lackey v. Texas*, 514 U.S. 1045 (1995). Consequently, “the additional deterrent effect from an actual execution now, on the one hand, compared to 17 years on death row followed by the prisoner’s continued incarceration for life, on the other, seems minimal.” *Id.* at 1046.

Justice Breyer expressed a similar sentiment in a dissent from denial of certiorari in *Knight v. Florida*, stating that “the longer the delay, the weaker the justification for imposing the

death penalty in terms of punishment's basic retributive or deterrent purposes.” *Knight v. Florida*, 528 U.S. 990, 995 (1999) (Breyer, J., dissenting) (citing *Lackey*, 514 U.S. at 1046).

Most recently, in her Statement respecting denial of certiorari, Justice Sotomayor noted a “‘correspondence’ between capital punishment and life sentences” that may require applying the same procedural safeguards to life without parole sentences as are applied to death sentences. *Campbell v. Ohio*, 138 S. Ct. 1059, 1060 (2018).

In short, while “death is different,” it is increasingly recognized that life without parole is the equivalent of death, and deserves the same level of procedural safeguards.

2. The Delaware courts have created a mandatory life without parole sentence that avoids meaningful appellate review, in violation of the Eighth Amendment.

“We are duty, [sic] bound to insure that every safeguard is observed when a defendant’s life is at stake.” *Thompson v. McNeil*, 556 U.S. 1114, 1116 (2009) (statement of Stevens, J.) (quoting *Gregg v. Georgia*, 428 U.S. 153, 187 (1976)). The most basic of such safeguards is appellate review. But, by creating a mandatory life without parole sentence, the Delaware courts have deprived the sentencing court of any discretion over sentence, meaning that the sentence will never be subject to appellate review.

In *Campbell v. Ohio*, 138 S. Ct. 1059, 1060 (2018), this Court denied a petition for writ of certiorari that challenged an Ohio statute that deprived life sentences of appellate review. *Campbell*, 138 S.Ct. 1059. However, Justice Sotomayor, in a concurring opinion, presented her concerns about the constitutionality of the Ohio appellate procedure. *Id.* Under the relevant provision of the Ohio Code, sentences imposed for murder and aggravated murder are “not subject to review.” Ohio Rev. Code Ann. § 2953.08(D)(3). Such deprivation of appellate review, Justice Sotomayor opined, potentially violates the Eighth Amendment. *Id.* The

Delaware courts have similarly deprived Mr. Manley of appellate review of his life without parole sentence.

“Delaware law is well established that appellate review of sentences is extremely limited. ‘Appellate review of a sentence generally ends upon determination that the sentence is within the statutory limits prescribed by the legislature.’” *Mayes v. State*, 604 A.2d 839, 842 (Del. 1992) (citing *Ward v. State*, 567 A.2d 1296, 1297 (Del. Supr. 1989)). “In Delaware, a sentencing court has broad discretion to consider ‘information pertaining to a defendant’s personal history and behavior which is not confined exclusively to conduct for which that defendant was convicted.’” *Id.* Thus, Delaware law limits appellate penalty review to the question of whether they are within the statutory range, and whether the sentencing court abused its discretion in considering the broad evidence that can affect sentences. By leaving sentencing courts with no option but a mandatory life without parole sentence, the Delaware courts have deprived Mr. Manley of even that minor appellate review. Thus, the Delaware courts have created a situation whereby a mandatory life sentence cannot receive any meaningful appellate review.

When the Delaware Supreme Court determined that the life without parole portion of 11 Del. Code §4209 could survive, *Cooke v. State*, 181 A.3d 152, 2018 WL 1020106, at *1 (Del. 2018); see also *Zebroski v. State*, 179 A.3d 855, 863 (Del. 2018), without the death penalty portion even though they share a single determining procedure, the court effectively created an unreviewable mandatory life without parole sentence. With only one sentencing option, the parameters of Delaware’s appellate sentencing review became pointless, proscribing any review. In creating such a mandatory sentencing, the courts – without legislative authority – have denied Mr. Manley “every safeguard” necessary for a sentence akin to death, in violation of the Eighth Amendment. See *Thompson*, 556 U.S. at 1116.

3. The Delaware courts' creation of a mandatory life sentence denied Mr. Manley appellate review of his sentence as provided by state law, in violation of his due process rights.

As detailed above, while there is no constitutional right to appeal, where a state creates such a right, it cannot then interfere with that appeal without violating the appellant's due process rights. *Evitts v. Lucy*, 469 U.S. 387, 393 (1985). (Where state creates a right to direct appeal, denial of the tools to pursue that right violates due process). Delaware law creates a right to appellate review of a sentence. *Mayes, ibid.* By creating a life without parole sentence that is mandatory, however, the Delaware courts have effectively prevented any appellate review of Mr. Manley's sentence. Thus, by creating a mandatory life sentence, the Delaware courts have denied Mr. Manley the meaningful appellate review that Delaware law provides, violating his due process rights. *Evitts*, 469 U.S. at 393.

CONCLUSION

For the reasons and upon the authorities set forth herein, the Court should grant the Petition for Certiorari.

Respectfully submitted,



Christopher S. Koyste, Esq.

Supreme Court Bar # 305492

Law Office of Christopher S. Koyste, LLC

709 Brandywine Boulevard

Wilmington, DE 19809

(302) 762-5195

Attorney for Michael Manley, Petitioner

Dated: April 4, 2019